CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXIII No. 44 May 3, 2022 215 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
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The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

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CONNECTICUT REPORTS

Vol. 343

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

WILLIAM MALDONADO ET AL. *v.* KELLY C. FLANNERY ET AL.
(SC 20522)

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

Syllabus

The plaintiffs, M and H, sought to recover damages for personal injuries they sustained when a vehicle driven by the defendant F and owned by the defendant T rear-ended the vehicle in which the plaintiffs were traveling. The defendants admitted that the accident resulted from F's negligence, and the trial was therefore limited to the issues of causation and damages. The plaintiffs introduced into evidence their medical records and bills, including reports by their chiropractor, P, in which P diagnosed M and H with, inter alia, various injuries to and conditions

associated with their necks and backs that, in his opinion, were permanent in nature and would require future treatment. After the accident, M was treated approximately sixty-two times over the course of two years and H was treated approximately forty-nine times over the course of eight months, primarily at P's practice, and they each received chiropractic manipulation of the spine and neck, application of hot and cold packs, electrical stimulation, and, on one occasion, an epidural steroid injection. M received two magnetic resonance imagining (MRI) scans, H receive one MRI, and they both were referred for physical therapy. The defendants' expert, L, agreed that the plaintiffs sustained injuries to their necks and backs as a result of the accident and that a period of physical therapy and chiropractic treatment was reasonable and necessary, but he disagreed with P that the length of their treatment was reasonable and that future treatment was necessary. The jury returned a verdict in favor of the plaintiffs and awarded them each economic damages but zero noneconomic damages for their pain and suffering. The verdict form indicated that the jury awarded the plaintiffs all of their respective claimed medical expenses for their hospital visits on the day of the accident, as well as their MRIs, X-rays, and physical therapy, but made slight reductions in the expenses claimed for the chiropractic treatment P provided. Thereafter, the trial court granted the plaintiffs' joint motion for additurs and awarded each plaintiff additional money damages for pain and suffering, concluding that the jury verdict awarding economic damages but zero noneconomic damages was inherently inconsistent because the jury necessarily found that the plaintiffs' medical treatment was reasonable and necessary and because the plaintiffs' particular medical treatment inherently involved treatment for pain. Although the plaintiffs accepted the additurs, the defendants filed an appeal in lieu of accepting or rejecting the additurs. The Appellate Court reversed the trial court's judgment, concluding that the trial court had failed to identity the part of the record that supported its conclusion that the jury's failure to award noneconomic damages was unreasonable, and also concluding that the jury's verdict was not inconsistent because the jury reasonably could have concluded that the plaintiffs had incurred reasonable and necessary medical expenses but zero noneconomic damages for pain and suffering in light of the conflicting and inconsistent evidence adduced at trial. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. Contrary to the Appellate Court's conclusion, the trial court properly set forth in its memorandum of decision, in accordance with this court's case law, the evidentiary and logical basis for its decision to grant the plaintiffs' joint motion for additurs, and that explanation was sufficiently specific to allow appellate review for an abuse of discretion: in its memorandum of decision, the trial court observed its obligation to view the evidence in the light most favorable to sustaining the jury's verdict, described the specific nature of the medical expenses incurred by the

plaintiffs, including the treatment each plaintiff received, and noted the agreement of the parties' respective experts that each plaintiff had sustained sprains or strains to his neck and back as a result of the accident; moreover, the trial court concluded that, because the jury explicitly awarded damages based on the plaintiffs' claimed medical costs, it must have credited those records and found the treatments to be necessary and reasonable, and that, because those specific treatments inherently signified a level of physical pain suffered by the plaintiffs, it was illogical and inconsistent not to award noneconomic damages, especially when the jury awarded the exact amount of the vast majority of the plaintiffs' claimed expenses; accordingly, on the basis of that articulation, a reviewing court was able to identify the evidence and jury findings that the trial court believed, in the exercise of its discretion, warranted the relief granted, to assess the court's reasoning for logical or legal flaws, and to determine whether the court had abused its discretion by ordering additurs.

2. The Appellate Court incorrectly concluded that the trial court had abused its discretion by granting the plaintiffs' joint motion for additurs, and, because the defendants effectively declined to accept the additurs, the case was remanded for a new trial with respect to the issues of causation and damages: the jury necessarily credited the plaintiffs' medical bills and/or the testimony of L regarding the injuries sustained by the plaintiffs as a result of the accident and the reasonableness of the treatment they received, and the trial court reasonably concluded that the inherent purpose of the medical treatment credited by the jury, including the chiropractic manipulations, the application of hot and cold packs, and the epidural steroid injections, was to treat pain and suffering and was not merely diagnostic or prophylactic in nature, which may not involve pain; moreover, because the trial court could have reasonably concluded that the jury's verdict was inconsistent insofar as the jury found, on the one hand, that the plaintiffs suffered personal injuries in the accident that necessitated such medical treatment but, on the other hand, that the plaintiffs experienced no pain or suffering as a result of the accident that warranted an award of noneconomic damages, the court's decision to grant the plaintiffs' joint motion for additurs was not an abuse of discretion.

(*One justice dissenting*)

Argued April 26, 2021—officially released May 3, 2022

Procedural History

Action to recover damages for personal injuries sustained as a result of the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Budzik*, *J.*; verdict for the plaintiffs;

thereafter, the court granted the plaintiffs' motion for additurs and rendered judgment for the plaintiffs, from which the defendants appealed to the Appellate Court, *Keller*, *Bright* and *Bear*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to deny the motion for additurs and to render judgment in accordance with the jury's verdict, from which the plaintiffs, on the granting of certification, appealed. *Reversed*; *new trial.*

Philip F. von Kuhn, for the appellants (plaintiffs).

Jack G. Steigelfest, for the appellees (defendants).

Opinion

ECKER, J. This case presents the scenario, not altogether uncommon, in which a jury awards personal injury plaintiffs economic damages for medical expenses but zero noneconomic damages. The trial court granted the joint motion for additurs filed by the plaintiffs, William Maldonado and Geovanni Hernandez, and awarded each plaintiff additional money damages for pain and suffering. The Appellate Court reversed the judgment of the trial court on the grounds that it had failed to articulate the specific facts to justify the additur awards or to construe the conflicting evidence in the light most favorable to sustaining the jury's verdict. See *Maldonado* v. *Flannery*, 200 Conn. App. 1, 9, 13, 238 A.3d 127 (2020). We reverse the judgment of the Appellate Court.

I

FACTS AND PROCEDURAL HISTORY

On June 6, 2016, at approximately 3:20 p.m., the plaintiffs were traveling in a 2004 Ford Econoline van on Route 4 in Farmington when they were rear-ended by the named defendant, Kelly C. Flannery, who was driv-

ing a Ford Taurus owned by her father.[1] The collision caused serious damage to the defendants' vehicle, but the plaintiffs' van sustained only minimal visible damage.

The plaintiffs declined medical attention at the scene of the accident. A few hours later, they both sought medical treatment at the Hospital of Central Connecticut, complaining of body aches and pain in their lower backs and necks. At the hospital, both plaintiffs underwent diagnostic testing. Maldonado was diagnosed with a neck strain, a lower back strain, and a contusion on his sternum. Hernandez was diagnosed with back pain and a neck spasm. The plaintiffs each were prescribed anti-inflammatory and pain medications and were released from the hospital later that evening.

Soon after the accident, the plaintiffs sought additional medical treatment from Brian Pollack, a chiropractor at New Britain Injury & Spine. Pollack treated Maldonado approximately sixty-two times intermittently over the course of the next two years and referred him for two magnetic resonance imaging (MRI) scans. Maldonado's treatment included application of hot and cold packs, electrical stimulation, and mechanical traction. Hernandez underwent similar treatment with Pollack, approximately forty-nine times over the course of eight months, and was referred for one MRI scan. Pollack also referred both plaintiffs for six months of physical therapy, which they received from another provider. Despite this course of treatment, the plaintiffs continued to experience pain. Subsequently, an epidural steroid injection in the lower back was administered to each plaintiff at Jefferson Radiology.

On July 18, 2017, the plaintiffs filed a negligence action against the defendants in the Superior Court. The

[1] Kelly C. Flannery's father, Michael T. Flannery, is also a defendant in this case. We refer to Kelly C. Flannery and Michael T. Flannery collectively as the defendants and to Kelly C. Flannery individually as Flannery.

case was tried before a jury. The issues at trial were limited to causation and damages because the defendants admitted that the collision resulted from Flannery's negligence. At trial, both Maldonado and Hernandez testified that the collision caused the injuries and pain for which they received the medical treatment previously described.[2] Maldonado testified that he remained unable to do heavy lifting at work and faced difficulties carrying out other tasks he previously was able to perform. He claimed medical expenses in the amount of $18,953.38.[3] Hernandez testified that he had difficulty standing up and difficulty sleeping due to pain caused by the accident. He claimed medical expenses in the amount of $13,254.94.

To corroborate their testimony, the plaintiffs introduced medical records and bills from their health care providers. The plaintiffs also presented lengthy reports authored by Pollack, opining, among other things, that their respective injuries were causally related to the accident, requiring the medical treatment and supervision he provided. Pollack's report diagnosed Maldonado, in relevant part, with a disc herniation, radiculitis, nonallopathic segmental dysfunction, muscle spasms in the cervical and lumbar spine, pain in the lumbar and thoracic spine, and a sprain of the left shoulder. Pollack diagnosed Hernandez with nonallopathic seg-

[2] The plaintiffs' claim for economic damages included emergency care at the Hospital of Central Connecticut the day of the accident, as well as the subsequent MRI scans, chiropractic treatment, physical therapy, epidural steroid injections, and Maldonado's X-rays.

[3] Maldonado also testified that he had been involved in a prior motor vehicle accident in 2014, after which he received chiropractic treatment for approximately two months. The medical records from Maldonado's previous treatment were admitted into evidence at trial. Those records indicate that the prior accident occurred on April 6, 2014. Maldonado received chiropractic treatment for lower back pain from Dr. Michael Yoel beginning on April 15, 2014, and ending on June 5, 2014. Yoel's final treatment note provides in relevant part that Maldonado was "feeling better and seems to be doing okay" and that "no further therapy is felt to be necessary."

mental dysfunction, pain and muscle spasms in the cervical, thoracic and lumbar spine, and an "[e]xtrusion type" herniation of the lumbar spine. He also assigned each plaintiff a permanent impairment rating as a result of the accident.[4] Pollack further opined that the plaintiffs' injuries were permanent in nature and rendered each of them highly susceptible to future aggravations and exacerbations, which would require future chiropractic treatment at least twice a month at a cost of $150 per visit, and future medical supervision at a frequency of three times per year and a cost of $250 per evaluation.

The defendants challenged the plaintiffs' claims on multiple fronts. They attacked the credibility of the plaintiffs' testimony[5] and medical evidence by adducing conflicting evidence as to the dates of treatment, the extent to which Maldonado's reported injuries were directly caused by the 2016 accident, as opposed to a prior accident in 2014; see footnote 3 of this opinion; and the duration of the plaintiffs' chiropractic treatment. In addition, the defendants observed that the emergency room records from Maldonado's visit on the day of the accident indicate that Maldonado's last visit to the

[4] Pollack assigned a 7 percent impairment rating to Maldonado and 5 percent impairment rating to Hernandez.

[5] During cross-examination, the defendants' counsel attacked Maldonado's credibility in connection with numerous aspects of his testimony. For example, Maldonado first denied going to the hospital after his prior 2014 accident. On cross-examination, however, the defendants' counsel introduced hospital records showing that Maldonado had visited the hospital after the 2014 accident. Maldonado then altered his testimony and said that he could not remember if he had visited the hospital in 2014. Describing the 2016 accident, Maldonado initially testified that, while he was approaching a red light in his vehicle, he saw the defendants' car approaching quickly from behind and did not have time to move out of the way. However, during cross-examination, Maldonado testified that he looked back and tried to avoid the approaching vehicle. As for Hernandez, the defendants' counsel elicited admissions that he has a history of drug use, several felony convictions, and memory problems. The defendants' counsel argued to the jury that Hernandez' memory problems undermined the accuracy of his testimony.

hospital was on July 16, 2015, "for chronic pain/sciatica . . . ."

The defendants also presented the jury with expert testimony from an orthopedic surgeon, Jonas V. Lieponis, who disputed the etiology and permanency of some of the plaintiffs' injuries, testifying that the plaintiffs' medical records demonstrated that they both suffered from preexisting degenerative disc disease prior to the accident. Nonetheless, Lieponis agreed that both of the plaintiffs sustained injuries to their necks and lumbar regions as a result of the accident and that a certain period of physical therapy and/or chiropractic treatment was reasonable and necessary to treat those injuries. Lieponis disagreed, however, that the length of treatment was reasonable or that future treatment was necessary. Specifically, in Lieponis' expert opinion, the evidence was insufficient to conclude that the plaintiffs had suffered permanent impairments as a result of the accident. Lieponis did not provide any testimony regarding the pain suffered by the plaintiffs as a consequence of their injuries but, in response to a question posed by the plaintiffs' counsel, did state that each plaintiff underwent an epidural steroid injection to treat his injury, which, "like any injection, [entails] an element of pain."

The jury returned a verdict in favor of the plaintiffs and awarded economic damages in the amount of $17,228.38 to Maldonado and $11,864.94 to Hernandez. The award consisted of full payment for all expenses related to the plaintiffs' hospital visits, radiologic/MRI services, physical therapy, and epidural steroid injections. The only reduction made by the jury was for chiropractic care; Maldonado was awarded $7035, which was $1725 less than the total amount billed by Pollack, and Hernandez was awarded $5670, which was $1390 less than the total amount billed by Pollack. The jury also awarded Maldonado $1800 in future economic

damages. It did not award any future economic damages to Hernandez. The jury did not award either plaintiff any noneconomic damages for pain and suffering, past or future.

The plaintiffs timely filed a joint motion to set aside the verdicts and for a new trial. They also filed a contemporaneous joint motion for additurs pursuant to General Statutes §§ 52-216a and 52-228b. The defendants timely objected. The trial court issued a written memorandum of decision granting the plaintiffs' motion for additurs and to set aside the verdicts. The trial court concluded that the jury verdict awarding economic damages to each plaintiff but zero noneconomic damages was inherently inconsistent because "the jury necessarily found that the plaintiffs' medical treatment was reasonable and necessary and because the plaintiffs' particular medical treatment inherently involved treatment for pain . . . ." The trial court recognized that "the jury could have reasonably concluded that [the plaintiffs] were [not] credible witnesses" but pointed out that "the jury must have credited and relied on some evidence" because it "explicitly awarded damages based on the plaintiffs' medical costs . . . ." Indeed, the jury's award of economic damages reflected an "exactitude" demonstrating that it necessarily "concluded that the treatments set forth in [the plaintiffs' medical] bills were necessary and reasonable and that the injuries being treated during those visits were proximately caused by the defendant's negligence." The trial court reasoned that the nature of the medical treatment deemed reasonable and necessary by the jury for injuries caused by the defendant's negligence and the "underlying symptoms" requiring that treatment "bespeak a level of physical pain suffered by [the plaintiffs]." Accordingly, the trial court awarded past noneconomic damages in the amount of $8000 to Maldonado and $6500 to Hernandez. The trial court explained that these amounts were "based

on the amounts of past economic damages awarded by the jury for medical costs inherently involving treatment for pain, more specifically, the medical bills from New Britain Injury & Spine [for chiropractic treatment] and Jefferson Radiology [for epidural steroid injections that] the jury necessarily credited in its verdict."[6] The court's order concluded: "The parties shall have twenty days from the date of this decision to file their written acceptance or rejection of the additur with the clerk's office. If the additur is accepted, judgment will enter for the plaintiffs in the amount of $27,028.38 ($19,028.38 + $8000) for . . . Maldonado and $18,364.94 ($11,864.94 + $6500) for . . . Hernandez. If the additur is not timely accepted by both parties, a new trial is ordered."

The plaintiffs accepted the additurs within the prescribed time period, but the defendants filed an appeal "in lieu of an acceptance or rejection of the [additurs]."[7] See General Statutes § 52-228a ("the party aggrieved by the order of . . . additur may appeal as in any civil action"). The Appellate Court reversed the trial court's judgment, concluding that the trial court had failed "to identify the part of the record that supported its conclusion that the jury's failure to award noneconomic damages was unreasonable . . . ." *Maldonado* v. *Flannery*, supra, 200 Conn. App. 9. The Appellate Court further determined that the verdict was not inconsistent because

[6] The jury awarded Maldonado medical costs in the amount of $7035 for the treatment at New Britain Injury & Spine and $943 for the treatment at Jefferson Radiology, for a total award of $7978 in connection with these two treatment providers. The jury awarded Hernandez $5670 for the treatment at New Britain Injury & Spine and $937 for the treatment at Jefferson Radiology, for a total award of $6607 in connection with these two treatment providers.

[7] The defendants neither accepted nor expressly rejected the additur. We construe the defendants' failure to accept the additur as the equivalent of a rejection. See, e.g., *Snell* v. *Beamon*, 82 Conn. App. 141, 144, 842 A.2d 1167 (2004) (failure to accept additur within time allotted by trial court resulted in new trial limited to issue of damages).

the jury reasonably could have concluded that the plaintiffs incurred reasonable and necessary medical expenses, but zero noneconomic damages for pain and suffering, in light of the conflicting and inconsistent evidence adduced at trial. See id., 10, 13. This certified appeal followed.[8]

II

LEGAL PRINCIPLES GOVERNING MOTIONS TO SET ASIDE JURY VERDICTS AS INADEQUATE OR EXCESSIVE

A

Legal Principles Governing the Trial Court's Review

There is an inherent tension in the legal principles governing our resolution of this case because the operative considerations demand great deference to two different decision makers: the trial judge and the jury. The judge and the jury each serve essential and elemental functions in our civil justice system and must be accorded wide discretion in the discharge of their respective duties. For the most part, judges and juries occupy separate but coordinate spheres and work cooperatively to produce a harmonious outcome integrating the facts found by the jury and the legal rules set forth by the judge. However, these fields of operation are not entirely separate and distinct, and there occasionally is conflict between the two decision makers—as when a trial court sets aside a jury's verdict. Such moments of conflict have always been present in Connecticut and, indeed, in the English common law going back at least to the mid-seventeenth century. See *Bartholomew* v. *Clark*, 1 Conn. 472, 480 (1816) ("To all courts acting on the

[8] We granted the plaintiffs' petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court had abused its discretion in ordering additurs in favor of both of the plaintiffs?" *Maldonado* v. *Flannery*, 335 Conn. 967, 240 A.3d 284 (2020).

principles of the common law, the power is incidental to grant new trials for various causes, among which one is, that the verdict was against evidence. This has ever been done in England, as well as in sundry states in the union. Courts in this state, then, acting according to the common law, have this power unless prohibited by positive law." (Emphasis omitted.)).

A reviewing court confronted with an appeal challenging a trial court's decision on a motion to set aside a jury's verdict therefore must navigate a path between two different cardinal principles. The first is that the right to a jury trial is enshrined in our constitution and counts among the most vital checks against governmental overreach. See Conn. Const., art. I, § 19 ("[t]he right of trial by jury shall remain inviolate"); see also *Seals* v. *Hickey*, 186 Conn. 337, 350, 441 A.2d 604 (1982) ("[l]itigants have a constitutional right to have questions of fact decided by a jury"). The second, firmly embedded in the common law as a constitutive aspect of the jury right, is the essential role that the trial judge plays in dispensing justice and, of particular relevance here, the fact that the trial judge does not become a mere spectator once the jury returns its verdict. To the contrary, the trial court has not only the power but the "duty to set aside the verdict when it finds that it does manifest injustice, and is . . . palpably against the evidence." (Internal quotation marks omitted.) *Fazio* v. *Brown*, 209 Conn. 450, 454, 551 A.2d 1227 (1988); see *Roma* v. *Thames River Specialties Co.*, 90 Conn. 18, 19, 96 A. 169 (1915) ("[i]t was the [trial] court's duty to set aside the verdict if its manifest injustice was so plain and palpable as to justify the suspicion that the jury or some of its members were influenced by prejudice, corruption or partiality"). See generally *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 280, 32 A.3d 318 (2011) ("[o]ur review of the trial court's grant of remittitur [or additur] is dictated by, on the one hand,

the high bar that must be met before a trial judge may set aside a jury verdict, and, on the other hand, the necessarily broad authority that the trial judge has to oversee the trial process"); *Turner* v. *Pascarelli*, 88 Conn. App. 720, 722–23, 871 A.2d 1044 (2005) ("[There are] two competing jurisprudential principles that additurs bring into play. On the one hand, deference to the ruling of the trial court is warranted because that court, having observed the trial proceedings in their entirety, is in a better position than an appellate court to assess the credibility of the witnesses and the appropriate weight to be accorded their testimony. . . . On the other hand, deference is problematic because the trial court's exercise of its discretion impairs the litigants' constitutional right to designate a jury, rather than a court, to be the fact finder in their case." (Citation omitted.)).

This doctrinal tension does not signal an underlying weakness in the applicable legal framework or a fatal flaw in the principles that, at times, seem to vie for preeminence in the analysis. Rather, it is a sign of health and vigor reflecting a properly functioning arrangement of checks and balances within our civil justice system. Former Chief Justice Zephaniah Swift described the arrangement and extolled its virtues in the seminal case of *Bartholomew* v. *Clark*, supra, 1 Conn. 472: "I think a discreet and prudent exercise of th[e] power [to set aside a verdict] can be attended with no inconvenience or danger; that it is necessary to adopt it to complete the fabric of jurisprudence, and to give to courts all the powers essential to a due execution of the law. It should be exercised only in clear cases, which will rarely occur. It will leave to juries an important and valuable power in the trial of civil causes; and when it is understood that an erroneous verdict can be corrected, the public confidence in the trial by jury will be increased, instead of being impaired." Id., 482; see *Howe* v. *Raymond*, 74

Conn. 68, 71–72, 49 A. 854 (1901) ("[The] power of supervision and correction [that] the judge has over the verdict is an essential part of the jury system. . . . Trial by jury, in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if in his opinion it is against the law or the evidence." (Internal quotation marks omitted.)).

Of the great many cases over the past two hundred years involving appeals from trial court decisions granting or denying a motion to set aside a jury's verdict, a large number involve claims of excessive or inadequate damage awards, and, within that category, many involve challenges directed at the jury's failure to award noneconomic damages, as in the present case.[9] At the most

[9] In addition to our case law on the subject, the legislature has enacted various statutes over the years, beginning during the colonial era, regarding the judicial power to set aside a jury verdict in a civil case. See *Bissell* v. *Dickerson*, 64 Conn. 61, 64–69, 29 A. 226 (1894) (providing detailed discussion of various statutes enacted between 1644 and 1893 that conferred statutory authority to certain courts—including, for brief period of time, to Supreme Court—to rule on motions to set aside jury verdicts as against weight of evidence). More recently, the legislature has enacted a number of statutes specifically relating to the procedure (and, in some cases, the standards) for setting aside a jury's award of damages as excessive or inadequate. See General Statutes §§ 52-216a, 52-228, 52-228a, 52-228b and 52-228c.

Section 52-228b, which is directly applicable to the present case, provides that "[n]o verdict in any civil action involving a claim for money damages may be set aside except on written motion by a party to the action, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of the court. No such verdict may be set aside solely on the ground that the damages are excessive unless the prevailing party has been given an opportunity to have the amount of the

general level, the fundamental question for a trial court deciding whether to set aside a jury verdict on the basis of an excessive or inadequate damages award is very simple: In light of the evidence presented at trial, is the jury's verdict unreasonable? See, e.g., *Munn* v. *Hotchkiss School*, 326 Conn. 540, 575, 165 A.3d 1167 (2017) (repeating oft cited principle that one immovable limitation on power of trial court to set aside jury's verdict is parties' constitutional right to have jury determine amount of damages "when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded" (internal quotation marks omitted)); *Burns* v. *Metropolitan Distributors*, 130 Conn. 226, 229, 33 A.2d 131 (1943) (concluding that trial court improperly set aside jury's verdict because "[t]he jury might reasonably have arrived at the verdict [it] did"). Reasonableness is the lodestar: if the jury's verdict and award of damages are reasonable, then they "should stand; if [they are] not, [they] should be set aside." *Steinert* v. *Whitcomb*, 84 Conn. 262, 264, 79 A. 675 (1911).

Our cases have articulated the following principles to guide the trial court's reasonableness inquiry and to assist it in deciding a motion to set aside a damages award as excessive or inadequate. It is axiomatic that the trial court must conduct its own independent assessment of the full evidentiary record to determine whether the jury reasonably could have reached its verdict on

judgment decreased by so much thereof as the court deems excessive. No such verdict may be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court deems reasonable." Because this statute merely codifies the common law, it provides no useful substantive guidance regarding the proper legal standard for determining when a jury's award of damages is inadequate or an additur is appropriate. Cf. *Wichers* v. *Hatch*, 252 Conn. 174, 187, 745 A.2d 789 (2000) (noting that § 52-216a is codification of common-law standard governing motions to set aside verdict as excessive or inadequate).

the basis of the facts and reasonable inferences drawn therefrom. As we have explained, "[i]n passing [on] a motion to set aside a verdict, the trial judge must do just what every juror ought to do in arriving at a verdict. The juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives [that] influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly. . . . The trial judge in considering the verdict must do the same . . . and if, in the exercise of all his knowledge from this source, he finds the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law to the facts in evidence in the case, or [was] governed by ignorance, prejudice, corruption or partiality, then it is his duty to set aside that verdict and to grant a new trial." (Internal quotation marks omitted.) *Birgel* v. *Heintz*, 163 Conn. 23, 27, 301 A.2d 249 (1972); accord *Schroeder* v. *Triangulum Associates*, 259 Conn. 325, 329–30, 789 A.2d 459 (2002); *Wichers* v. *Hatch*, 252 Conn. 174, 186–87, 745 A.2d 789 (2000).

In independently reviewing the evidence adduced at trial, the trial court must view the evidence through the same lens and against the same background of human experience as would a juror, but the trial court is not a juror and may not substitute its own judgment for that of the jury. See *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 283 ("[t]he fact that the jury returns a verdict in excess of what the trial judge would have awarded does not alone establish that the verdict was excessive" (internal quotation marks omitted)); id., 284 (appellate review is necessary to ensure that trial court "did not merely substitute its own judgment for that of the jury"); *Mulcahy* v. *Larson*, 130 Conn. 112, 114–15, 32 A.2d 161 (1943) ("[t]o justify setting aside a verdict

as inadequate, something more than a doubt of its adequacy must exist"). Thus, in arriving at its reasonableness determination, the trial court must view the evidence "in the light most favorable to the prevailing party . . . ." (Internal quotation marks omitted.) *Childs* v. *Bainer*, 235 Conn. 107, 113, 663 A.2d 398 (1995); see *Saleh* v. *Ribeiro Trucking, LLC*, supra, 290 ("[w]e emphasize that, in reviewing the evidence in the light most favorable to sustaining the verdict, the trial court, and the reviewing court, are bound by the jury's credibility determinations and all *reasonable* inferences the jury could have drawn from the evidence" (emphasis in original)).

The question for the trial court is not whether the jury exercised poor judgment but, instead, whether the jury's damages award lies outside the range of reasonableness; mere disagreement is not enough to warrant judicial intervention. For this reason, "[t]he ultimate test [that] must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, supra, 326 Conn. 576; see *Earlington* v. *Anastasi*, 293 Conn. 194, 207, 976 A.2d 689 (2009) (asking whether verdict "so shocks the conscience as to compel the conclusion that it was due to partiality, prejudice or mistake" (internal quotation marks omitted)).[10] This inquiry is not intended to detect the kind

[10] Many Connecticut cases, especially those of an earlier vintage, speak in terms of the " 'manifest injustice of the verdict' " that would " 'justify the suspicion' " that the jury was influenced (or swayed) by improper considerations. *Steinert* v. *Whitcomb*, supra, 84 Conn. 263. These cases characterize the inquiry as follows: "Our rule governing the action of the trial court over verdicts is perfectly clear. 'It should not set aside a verdict whe[n] it is apparent that there was some evidence [on] which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside [when] the

of shock that arises from a moral outrage but, instead, refers to the distress that may be felt when the requirement of reasonableness has been abandoned in a setting in which reason is a necessary element of any legitimate outcome. If the verdict cannot be explained rationally, then the trial court may presume that it is tainted by improper considerations.

Finally, if the trial court concludes that the jury's verdict and award of damages are excessive or inadequate and that the motion to set aside should be granted, the trial court must provide an explanation setting forth the reasons for its decision in sufficient detail to facilitate appellate review. As we have explained, "[i]n order for us to determine whether the trial court properly reviewed the evidence in the light most favorable to sustaining the verdict, and did not merely substitute its own judgment for that of the jury, a trial court ordering a remittitur [or additur] must set forth the evidence, viewed in that light, and explain the specific reasons that led the court to conclude that the award shocked the conscience of the court. We set forth this requirement, not to discourage the trial court from granting remittitur [or additur] in those cases [in which] it is warranted, but rather to aid the reviewing court in its determination of whether the trial court properly exercised its discretion." *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 284. This requirement is not intended to impose an onerous burden on the trial court, and it does not require an excruciatingly detailed explication of the evidence supporting the trial court's ruling. It requires only that the trial court explain its reasoning with reference to the evidence and with sufficient specificity to

manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that [either the jury] or some of [the jurors] were influenced by prejudice, corruption, or partiality.' " Id., quoting *Burr* v. *Harty*, 75 Conn. 127, 129, 52 A. 724 (1902). We perceive no significance between these slightly different formulations of the same inquiry.

allow an appellate court to review the decision for an abuse of discretion.

B

Legal Principles Governing Appellate Review

We review a decision of the trial court to set aside the jury's verdict and to order an additur for an abuse of discretion. See, e.g., *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 781–82, 208 A.3d 256 (2019); *Wichers* v. *Hatch*, supra, 252 Conn. 181. A trial court's decision to set aside a verdict and to order an additur "is entitled to great weight and every reasonable presumption should be given in favor of its correctness." (Internal quotation marks omitted.) *Mansfield* v. *New Haven*, 174 Conn. 373, 375, 387 A.2d 699 (1978); accord *Ashmore* v. *Hartford Hospital*, supra, 783. The trial court, having observed the trial and evaluated the testimony first-hand, is better positioned than a reviewing court to assess both the aptness of the award and whether the jury may have been motivated by improper sympathy, mistake, partiality, or prejudice. See, e.g., *Childs* v. *Bainer*, supra, 235 Conn. 113; *Palomba* v. *Gray*, 208 Conn. 21, 24–25, 543 A.2d 1331 (1988); *Birgel* v. *Heintz*, supra, 163 Conn. 26–27.

Equally well settled is the principle that the same level of deference is owed whether the trial court grants or denies the motion to set aside the verdict. "The action of a trial judge is no less entitled to weight when he sets aside a verdict, than when he refuses to set it aside; and for the same reasons. He has seen the witnesses, heard their testimony, observed their demeanor on the witness stand, their manner and bearing, their intelligence, character and means of knowledge. And if while all this is fresh in his mind he sets aside a verdict, great weight would naturally be given to his action." *Loomis* v. *Perkins*, 70 Conn. 444, 447, 39 A. 797 (1898); see *Ashmore* v. *Hartford Hospital*, supra, 331 Conn. 781–82

(agreeing with plaintiff "that binding precedent establishes, and our recent cases reaffirm, that a trial court's decision to grant or deny remittitur is reviewed according to a deferential abuse of discretion standard"); *Gladu* v. *Sousa*, 252 Conn. 190, 191, 193, 745 A.2d 798 (2000) (trial court properly exercised its discretion to grant plaintiff's motion for additur and, "after the defendant refused the additur, ordered a new trial on the issue of damages").

A reviewing court, like the trial court, must remain cognizant of the constitutional function of the jury in our system of justice. See part II A of this opinion. At the same time, our case law involving trial court rulings on motions to set aside a jury's verdict and award of damages as excessive or inadequate, which has been codified by the legislature; see footnote 9 of this opinion; reflects a firm commitment to the belief that we should give great weight to the trial court's exercise of discretion regarding the reasonableness of the jury's verdict. That discretion is not unlimited, and a reviewing court will occasionally find it has been exceeded, but our precedent requires that we accord substantial deference to the decision of a trial court once we are satisfied that the trial court has rendered its decision in accordance with the applicable legal principles, as articulated in part II A of this opinion.

III

JURY AWARDS OF ECONOMIC DAMAGES AND ZERO NONECOMONIC DAMAGES (SPLIT VERDICTS)

The present case requires us to consider how the foregoing principles apply in one specific context that has become the subject of increasingly frequent litigation over the past twenty-five years. Juries in personal injury cases sometimes award a plaintiff economic damages for medical expenses caused by the defendant's negligence but no damages for pain and suffering, loss

of life's enjoyment, or any other type of noneconomic damages.[11] These verdicts, which we will refer to as "split verdicts" in this opinion, occur in a variety of personal injury cases but most often in automobile accident cases in which a plaintiff sustains soft tissue injuries requiring chiropractic treatment and physical therapy but no surgical or orthopedic care. As we discuss herein, the fundamental principles governing trial and appellate review of split verdicts are no different from those discussed in part II of this opinion, but there is one

[11] There are scores of unpublished or unofficially reported Connecticut trial court decisions over the past twenty years adjudicating postverdict motions to set aside a jury's verdict as inadequate in split verdict cases. It is reasonable to believe that more such verdicts, perhaps many more, have occurred without being recorded in a published opinion. Whatever the exact number, the situation arises frequently enough that the Superior Court judges have promulgated a specific jury instruction that a trial court may use when a jury returns such a verdict, which provides: "Ladies and [g]entlemen, I have reviewed your verdict and see that you have found in favor of the plaintiff and awarded economic damages, but have awarded zero [noneconomic] damages. [Although] that is a possible verdict, some might argue that it is inconsistent to say that a person was injured enough to incur (medical expenses/lost wages), but experienced no pain and suffering or other [noneconomic] damages. On the other hand, you may have concluded that [although] the plaintiff proved (his/her) economic damages, (he/she) failed to prove the claimed [noneconomic] damages.

"To help eliminate any concerns either party might have, I am going to ask you to go back and review your verdict. In addition to my instructions regarding the plaintiff's burden of proving damages you should also remember my instruction that even momentary pain and suffering [are] compensable.

"Now, in sending you back for further deliberations, I am in no way suggesting that you should change your verdict. I am simply asking you to review your thought processes once more to make sure you have considered all relevant factors. I am giving you a new verdict form, which you should use if you decide to change your verdict." Connecticut Civil Jury Instructions 3-4.9, available at https://www.jud.ct.gov/ji/civil/Civil.pdf (last visited April 26, 2022).

The Committee Notes advise that "[j]udges are not required to give this charge, but they have the discretion to do so pursuant to General Statutes § 52-223." Id. Section § 52-223 provides: "The court may, if it judges the jury has mistaken the evidence in the action and has brought in a verdict contrary to the evidence, or has brought in a verdict contrary to the direction of the court in a matter of law, return them to a second consideration, and for the same reason may return them to a third consideration. The jury shall not be returned for further consideration after a third consideration."

distinguishing characteristic of these cases that warrants attention because it is typically not seen in other claims of inadequacy or excessiveness.

The essential thrust of a plaintiff's argument in a split verdict case is not primarily that the verdict is contrary to the evidence, but that the verdict is internally inconsistent. A plaintiff claims that the two components of the damages verdict are self-contradictory; the jury's award of substantial economic damages arising from physical injuries, but its failure to award any corresponding noneconomic damages for the pain and suffering associated with those same injuries, cannot logically coexist and, thus, reflect an inherent flaw in the jury's verdict. See *Wichers* v. *Hatch*, supra, 252 Conn. 179 (noting that plaintiff's sole argument in support of additur "was that the verdict was inconsistent in that 'if the jury believed [he] was injured so as to require treatment and incur medical bills, it is inconsistent to find that these same injuries did not cause pain and suffering' "); see also *Brooks* v. *Brattleboro Memorial Hospital*, 958 F.2d 525, 530 (2d Cir. 1992) (finding inherent inconsistency in jury's split verdict in medical malpractice case and citing cases); cf. *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 577, 479 A.2d 781 (1984) ("in civil cases [in which] a verdict rests [on] a factual finding contradictory to another finding of the same issue by the trier the judgment cannot stand").

In fact, until relatively recently, the rule in Connecticut was that a jury's verdict was inconsistent as a matter of law if the jury awarded a plaintiff damages for the reasonable and necessary cost of medical care for physical injuries proximately caused by the defendant's negligence but zero damages for any pain, suffering, or noneconomic impairment arising from those same injuries. In *Johnson* v. *Franklin*, 112 Conn. 228, 152 A. 64 (1930), overruled by *Wichers* v. *Hatch*, 252 Conn. 174, 745 A.2d 780 (2000), we held that a jury award of

the economic damages incurred by the plaintiffs in a motor vehicle accident "with no allowance for the pain or the physical injuries suffered" was "manifestly inadequate" and must be set aside. Id., 229, 232. The *Johnson* per se rule prevailed for more than fifty years, but doctrinal cracks became evident in the 1990s,[12] and, in 2000, its holding was expressly overruled in *Wichers* v. *Hatch*, supra, 176, in which we held that an award of economic damages and zero noneconomic damages is not per se inadequate as a matter of law.

In *Wichers*, the plaintiff brought an action to recover for personal injuries sustained in an automobile collision caused by the defendant driver's negligence. Id. The plaintiff claimed that he suffered a neck injury requiring chiropractic treatment as a result of the accident, but his allegation was complicated by the fact that he was in treatment for preexisting neck injuries at the time of the accident. See id., 177. Indeed, by that time, the plaintiff had been receiving ongoing chiropractic treatment for seven years "as part of a monthly maintenance program" for his neck condition. Id. The plaintiff had a documented history of arthritis in his neck, spondylosis, and neck injuries incurred in two prior motor vehicle accidents in the four years before the collision. Id. The jury awarded the plaintiff the full amount of his requested economic damages of $3377 but zero noneconomic damages. Id., 177, 179. The plaintiff filed a motion to set aside the jury's verdict as inadequate and for additur pursuant to *Johnson*, which the trial court granted. Id., 179. The trial court explained

[12] See *Childs* v. *Bainer*, supra, 235 Conn. 116 (upholding trial court's refusal to order additur or new trial when jury awarded plaintiff approximately one fifth of claimed economic damages and zero noneconomic damages because "the cause, nature, and extent of the plaintiff's injuries were 'hotly contested' "); *Ginsberg* v. *Fusaro*, 225 Conn. 420, 430, 432, 623 A.2d 1014 (1993) (upholding trial court's refusal to order additur or new trial after jury awarded only small portion of plaintiff's claimed economic damages and zero noneconomic damages because issue of causation "was hotly contested").

that, because the jury had awarded the plaintiff the exact amount of his claimed economic damages, it necessarily had found that he was injured in the collision with the defendant and that the " 'verdict was inconsistent and inadequate as a matter of law.' " Id., 180.

On appeal, this court, overruling *Johnson*, held that the jury's failure to award noneconomic damages was not per se inconsistent as a matter of law. After reviewing the foregoing facts, we ordered the trial court to reinstate the jury's verdict because the evidence reasonably supported the jury's "conclusion that the plaintiff had not proven that he had suffered any *additional* pain as a result of the defendant's conduct." (Emphasis in original.) Id., 186; see id., 189–90 ("the jury could have accepted the evidence that it was advisable for the plaintiff to see his chiropractor more frequently than usual following the accident, but that the accident did not cause him actually to suffer greater pain than he already had experienced as a result of his preexisting condition"). *Wichers* thus eliminated the per se rule requiring the trial court to grant a motion for a new trial or additur in personal injury cases in which the jury awards economic damages and zero noneconomic damages, holding that "an award of economic damages that is not accompanied by an award of noneconomic damages is . . . not *always* inadequate as a matter of law." (Emphasis in original.) Id., 186.

This holding, although marking an important change in our law, must not be read too broadly because *Wichers* does not substitute the *Johnson* per se rule with an opposite one shielding split verdicts from judicial review altogether. Nor does it eliminate the discretionary standard by which appellate courts review a trial court's ruling on a motion to set aside a verdict and for additur. To the contrary, *Wichers* overruled *Johnson* precisely because its per se rule had *eliminated* the trial court's discretionary authority to assess the jury's

award on the basis of the particular facts and circumstances before it. Pursuant to *Wichers*, there is no automatic rule either requiring or prohibiting the trial court's exercise of discretion within the traditional legal framework described in part II of this opinion. The trial court must conduct its own independent assessment of the evidence, as "every juror ought to do in arriving at a verdict," and set aside the verdict only if it "finds the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law to the facts in evidence . . . or [was] governed by ignorance, prejudice, corruption or partiality . . . ." (Internal quotation marks omitted.) Id., 186–87. "The trial [court] has a broad legal discretion and [its] action will not be disturbed unless there is a clear abuse." (Internal quotation marks omitted.) Id., 187. But, in exercising its discretion, the trial court must demonstrate respect for the jury's fact-finding function, and a "mere doubt of the adequacy of the verdict is an insufficient basis [to set it aside]. . . . A conclusion that the jury exercised merely poor judgment is likewise insufficient." (Internal quotation marks omitted.) Id. The trial court's task, ultimately, is to "examine the evidence to decide whether the jury reasonably could have found that the plaintiff had failed in his proof of [noneconomic damages]." Id., 188–89. *Wichers* holds that the "[*Johnson*] per se rule" is unnecessary because the foregoing traditional standard establishes "a system that allows inadequate awards to be remedied without sacrificing the discretion of either the jury or that of the trial court . . . ." Id., 187–88.

Since *Wichers*, we have had the opportunity to address a trial court's ruling on a motion to set aside a jury's verdict as inadequate in a split verdict case on two occasions. In *Gladu* v. *Sousa*, supra, 252 Conn. 190, which was decided on the same day as *Wichers*, we determined that certification had been improvidently granted and

dismissed the defendant's appeal from the Appellate Court's judgment affirming the trial court's judgment granting an additur after the jury had returned a split verdict. Id., 191–93. We reasoned that the trial court had "evaluated the evidence and the jury's award in a manner consistent with its statutory authority and our jurisprudence sanctioning the exercise of its discretion [to award an additur] in appropriate circumstances" and, therefore, that "the Appellate Court properly affirmed the trial court's judgment." (Footnote omitted.) Id., 193. *Gladu*, a companion to *Wichers*, likewise reaffirms the important role that a trial court's discretionary authority plays in scrutinizing the jury's award of damages in this context.

In *Schroeder* v. *Triangulum Associates*, supra, 259 Conn. 325, we confronted a substantially different set of facts than that presented in *Wichers*. The plaintiff in *Schroeder* was injured while making a delivery at the defendant's restaurant. Id., 328. The jury found the defendant liable for the plaintiff's injuries and the costs of his intrusive spinal fusion surgery but awarded nothing for the pain and permanent disability necessarily resulting from the surgical procedure. See id., 329, 333–34. The trial court denied the plaintiff's motion for additur, and we reversed. Id., 327. Applying the fact specific standard set forth in *Wichers*, we concluded that the incongruous award could not rationally be explained in light of the evidence necessarily credited by the jury in awarding the plaintiff's requested economic damages. We explained that "[t]he jury reasonably could not have initially found the defendant liable for the expense of the surgery but not responsible for any pain or disability attendant to such surgery." Id., 333. We observed that the spinal surgery was in stark contrast with the treatment in *Wichers*, in which the plaintiff "merely underwent additional chiropractic treatment for an aggravation of a preexisting injury, leaving the

jury free to determine whether the plaintiff had incurred any *additional* pain and suffering as a result of the defendant's negligence." (Emphasis added.) Id.[13]

Wichers and *Schroeder* illustrate the outer boundaries of the trial court's discretion to set aside a jury verdict when it is internally inconsistent or inadequate as a matter of law. At one end of the spectrum, *Wichers* holds that a jury that awards a plaintiff economic damages for personal injuries is not required, as a matter of law, to award noneconomic damages when the evidence supports the conclusion that the pain suffered by the plaintiff "was the same as what he had experienced

[13] In the wake of *Wichers*, the Appellate Court has had many opportunities to review trial court rulings on motions to set aside split verdicts. See *Micalizzi* v. *Stewart*, 181 Conn. App. 671, 682–94, 188 A.3d 159 (2018) (upholding trial court's denial of motion for additur); *Cusano* v. *Lajoie*, 178 Conn. App. 605, 613–14, 176 A.3d 1228 (2017) (reversing trial court's grant of motion for additur); *DeEsso* v. *Litzie*, 172 Conn. App. 787, 794–804, 163 A.3d 55 (upholding trial court's denial of motion for additur), cert. denied, 326 Conn. 913, 173 A.3d 389 (2017); *Melendez* v. *Deleo*, 159 Conn. App. 414, 424, 123 A.3d 80 (2015) (upholding denial of motion for additur and/or to set aside verdict); *Sigular* v. *Gilson*, 141 Conn. App. 581, 592–94, 62 A.3d 564 (upholding trial court's denial of motion to set aside verdict), cert. granted, 308 Conn. 948, 67 A.3d 291 (2013) (appeal withdrawn August 1, 2013); *Silva* v. *Walgreen Co.*, 120 Conn. App. 544, 560, 992 A.2d 1190 (2010) (reversing trial court's grant of motion for additur); *Benedetto* v. *Zaku*, 112 Conn. App. 467, 473–74, 963 A.2d 94 (2009) (upholding trial court's grant of motion for additur); *Lombardi* v. *Cobb*, 99 Conn. App. 705, 709–10, 915 A.2d 911 (2007) (upholding trial court's grant of motion for additur); *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, 92 Conn. App. 481, 485–91, 886 A.2d 461 (2005) (reversing trial court's denial of motion for additur), cert. denied, 277 Conn. 907, 894 A.2d 987 (2006); *Smith* v. *LeFebre*, 92 Conn. App. 417, 427, 885 A.2d 1232 (2005) (reversing trial court's grant of motion for additur); *Turner* v. *Pascarelli*, supra, 88 Conn. App. 730–31 (reversing trial court's grant of motion for additur); *Schettino* v. *Labarba*, 82 Conn. App. 445, 449–50, 844 A.2d 923 (2004) (reversing trial court's grant of motion for additur); *Snell* v. *Beamon*, 82 Conn. App. 141, 147, 842 A.2d 1167 (2004) (upholding trial court's grant of motion for additur); *Elliott* v. *Larson*, 81 Conn. App. 468, 476–78, 840 A.2d 59 (2004) (upholding trial court's grant of motion for additur); *Santa Maria* v. *Klevecz*, 70 Conn. App. 10, 12–16, 800 A.2d 1186 (2002) (upholding trial court's denial of motion to set aside verdict). Given the fact specific nature of the Appellate Court's analyses, and the divergent conclusions reached, a comprehensive review and reconciliation of these cases are outside the scope of this opinion.

before his accident with the defendant." *Wichers* v. *Hatch*, supra, 252 Conn. 190. *Schroeder*, at the other extreme, holds that a verdict must be considered legally inconsistent if the jury awards zero noneconomic damages but full economic damages for an injury requiring the plaintiff to undergo spinal fusion surgery as a result of the defendant's negligence. See *Schroeder* v. *Triangulum Associates*, supra, 259 Conn. 333–34. Although these extreme cases do not provide a formula for deciding the cases falling in between; see footnote 13 of this opinion; they are instructive nonetheless because they demonstrate the fact intensive nature of the requisite analysis.

To summarize, *Wichers* marked the end of the idea that split verdicts in Connecticut automatically must be set aside because they necessarily are inconsistent as a matter of law, but its holding should not be read expansively to sanction all split verdicts. A split verdict is examined using the same analysis applied generally to determine whether a verdict should be set aside as inadequate "in light of the circumstances of the particular case before it." *Wichers* v. *Hatch*, supra, 252 Conn. 188. Those circumstances include the possible incongruence between the economic and noneconomic components of a jury's damages award, which can signal a legal inconsistency, at least in the absence of a reasonable (i.e., evidence based) explanation. Noneconomic damages are not an optional element of the damages award if the physical injuries that serve as the basis for the jury's award of economic damages cause the plaintiff to experience any pain and suffering.[14] In the

[14] The jury was instructed in accordance with the standard jury instruction regarding damages in a negligence case, which provides in relevant part: "The rule of damages is as follows. Insofar as money can do it, the plaintiff is to receive fair, just and reasonable compensation for *all injuries and losses*, past and future, which are proximately caused by the defendant's proven negligence.

* * *

"A plaintiff who is injured by the negligence of another is entitled to be compensated for *all physical pain and suffering, mental and emotional*

case of a split verdict, the underlying concern is not simply the potential illogic in a jury's failure to award noneconomic damages for the pain and suffering that one would normally associate with the physical injuries that the jury, by awarding economic damages, necessarily

suffering, loss of the ability to enjoy life's pleasures, and permanent impairment or loss of function that (he/she) proves by a fair preponderance of the evidence to have been proximately caused by the defendant's negligence. . . .

"A plaintiff who is injured by the negligence of another is entitled to be compensated for mental suffering caused by the defendant's negligence for the results which proximately flow from it in the same manner as (he/she) is for physical suffering. . . ." (Emphasis added.) Connecticut Civil Jury Instructions 3.4-1, available at https://jud.ct.gov/JI/Civil/Civil.pdf (last visited April 26, 2022). The defendants do not claim that this jury instruction was erroneous. Nor do they claim that the plaintiffs were not entitled to compensation for all of the pain and suffering proximately caused by Flannery's negligence.

We agree with the dissent that the *amount* of noneconomic damages is a matter " 'peculiarly within the province of the [trier] . . . .' " See, e.g., *Manning* v. *Michael*, 188 Conn. 607, 616, 452 A.2d 1157 (1982). This is particularly true in personal injury and wrongful death actions because of the difficulties inherent in placing a monetary value on noneconomic losses. See, e.g., *Vajda* v. *Tusla*, 214 Conn. 523, 533, 572 A.2d 998 (1990) (recognizing that "[a]n award of damages for pain and suffering is peculiarly within the province of the trier of fact" and "that it is difficult to measure pain and suffering in terms of money"); *McKirdy* v. *Cascio*, 142 Conn. 80, 84–85, 111 A.2d 555 (1955) ("[T]he problem of estimating damages for the loss of . . . life with any exactness is . . . one beset with insurmountable difficulties. . . . For this reason we have frequently said that the amount of damages recoverable in actions for death is peculiarly within the province of the jury." (Citation omitted; internal quotation marks omitted.)). But, when, as here, the evidence necessarily credited by the jury establishes the *existence* of such harm, our law is clear that the plaintiff is legally entitled to be compensated. The fact that noneconomic damages "cannot be computed by a mathematical formula . . . [and] there is no [ironclad] rule for the assessment of damages" does not relieve the jury from quantifying, to the best of its ability, the amount of damages to which the plaintiff is entitled. (Internal quotation marks omitted.) *Vajda* v. *Tusla*, supra, 533. So long as the amount awarded "falls somewhere within the necessarily uncertain limits of just damages," the jury's award is reasonable. *McKirdy* v. *Cascio*, supra, 86. Stated another way, it is up to the jury to determine the *amount* of noneconomic damages to award a plaintiff for pain and suffering, but, once the existence of pain and suffering is established, the jury is not free to award zero damages as compensation.

determined were proximately caused by the defendant's negligence. The deeper concern is that the inconsistency may indicate that the verdict reflects an impermissible compromise or otherwise is the product of improper influence, whether it be ignorance, mistake, prejudice, or emotion.[15] Indeed, these concerns are sufficiently prominent that a standard jury instruction was promulgated for use when a jury returns a split verdict, pursuant to which the trial court sends the case back to the jury for reconsideration. See footnote 11 of this opinion.

These additional considerations will not be implicated in every case in which a jury returns a split verdict. We mention them because the possibility of an inconsistent verdict in this particular context should not be overlooked by the trial court.

IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE PLAINTIFFS' JOINT MOTION FOR ADDITURS

With these principles in mind, we address whether the Appellate Court properly reversed the judgment of

[15] In certain circumstances, for example, the split verdict may reflect a jury compromise in which "some of the jurors . . . conceded liability against their judgment, and some . . . reduced their estimate of the damages in order to secure an agreement of liability with their fellow jurors." (Internal quotation marks omitted.) *George* v. *Ericson*, 250 Conn. 312, 333, 736 A.2d 889 (1999). Or, it may reflect a form of jury nullification in which the jury refused, for whatever reason, to award the plaintiff the damages to which he or she legally is entitled on the basis of the jury's findings on issues of liability, causation, and medical expenses. See, e.g., *Todd* v. *Bercini*, 371 Pa. 605, 607–608, 92 A.2d 538 (1952) ("If [the plaintiff] was entitled to a verdict from the defendant because of the injuries he inflicted [on] her as the result of his negligence, she was entitled to *all* that the law provides in such a case. And the items of pain, suffering and inconvenience, as well as loss of wages and impairment of earning power, are inevitable concomitants with grave injuries when suffered by a [wage earner]. A jury may not eliminate pain from wounds when all human experience proves the existence of pain, and it may not withhold lost wages when the evidence in the case uncontradictedly establishes the loss of wages as the result

the trial court setting aside the jury's verdict and granting the plaintiffs' joint motion for additurs. The Appellate Court relied on two grounds in reaching its decision. First, the Appellate Court determined that the trial court's memorandum of decision "fail[ed] to identify the part of the record that supported its conclusion that the jury's failure to award noneconomic damages was unreasonable under the facts of this case . . . ." *Maldonado* v. *Flannery*, supra, 200 Conn. App. 9.[16] Second, even if the trial court's memorandum of decision was sufficiently detailed, the Appellate Court, upon conducting its own "fact intensive analysis" of the "evidential underpinnings" of the jury's verdict and

of the negligence [that] they, the jur[ors], have adjudicated against the responsible defendant. When it is apparent that a jury by its verdict holds the defendant responsible for a whole loaf of bread, it may not then neglectfully, indifferently, or capriciously cut off a portion of that loaf as it hands it to the plaintiff." (Emphasis in original.)).

[16] It is not entirely clear whether the Appellate Court concluded that the trial court had failed to articulate the evidentiary basis for its threshold conclusion that the jury's award was unreasonable or, rather, whether the deficiency lay in the trial court's failure to articulate the evidentiary basis for the specific amount of the additur awarded to the plaintiffs (i.e., $8000 to Maldonado and $6500 to Hernandez). The passage quoted in the text accompanying this footnote indicates that the problem existed in the trial court's threshold determination of unreasonableness. See *Maldonado* v. *Flannery*, supra, 200 Conn. App. 8 (observing that trial court failed to "delineate the specific facts that led to its decision to grant the plaintiffs' joint motion for additurs"). At another point, however, the Appellate Court states that "the [trial] court's memorandum of decision granting the plaintiffs' joint motion for additurs lacks the necessary identification of the specific facts that would justify an additur of $8000 to Maldonado and $6500 to Hernandez." Id. We focus on the adequacy of the trial court's explanation for its threshold determination that the jury's verdict was unreasonable because the articulation requirement exists to facilitate appellate review of that particular determination. See *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 284 (trial court is required to "explain the specific reasons that led the court to conclude that the award shocked the conscience of the court"); cf. *Wichers* v. *Hatch*, supra, 252 Conn. 189 (requiring trial court to examine "[t]he evidential underpinnings" to determine whether there is reasonable basis in evidence to support jury's verdict (internal quotation marks omitted)). Nonetheless, we address the defendant's challenge regarding the amount of the additurs in footnote 17 of this opinion.

the full evidentiary record; (internal quotation marks omitted) id.; concluded that "the jury reasonably could have found that the plaintiffs failed to prove noneconomic damages for pain and suffering caused by the 2016 accident." Id., 13. We review each conclusion in turn.

A

Trial Court's Explanation of the Basis for the Additur Award Was Sufficient

As we previously discussed, our case law requires a trial court ordering an additur to explain the basis for its ruling in sufficient detail "to aid the reviewing court in its determination of whether the trial court properly exercised its discretion." *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 284. As we explained in *Saleh*, "[m]erely stating that an award shocks the conscience or the sense of justice of the court or that the award does not fall within the necessarily uncertain limits of fair and reasonable compensation will not be sufficient." Id., 283–84. Instead, the trial court is required to state the evidentiary basis for its ruling and the corresponding reasons supporting its conclusion that the jury's verdict is manifestly unjust. Id., 284. This requirement is "not [imposed] to discourage the trial court from granting remittitur [or additur] in those cases [in which] it is warranted, but rather to aid the reviewing court in its determination of whether the trial court properly exercised its discretion." Id.

We conclude that the trial court's memorandum of decision in the present case provided sufficient detail to explain the evidentiary and logical basis for the court's decision to grant the plaintiffs' joint motion for additurs. The trial court stated that it was "[c]onscious of its obligation to view the evidence in the light most favorable to sustaining the jury's verdict and the jury's right to make determinations of witness credibility," and noted

that "the jury could have reasonably concluded that [the plaintiffs] were [not] credible witnesses." Nevertheless, in reaching its decision to award the plaintiffs most of their claimed economic damages, "the jury must have credited and relied on some evidence. Because the jury explicitly awarded damages based on the plaintiffs' medical costs, the court conclude[d] that the jury must have, at a minimum, credited those records." As a corollary to this conclusion, the trial court determined that, "by necessary implication, [the jury must have] concluded that the treatments set forth in those bills were necessary and reasonable, and that the injuries being treated during those visits were proximately caused by the defendant's negligence."

The trial court's memorandum of decision demonstrates that it thoroughly reviewed the plaintiffs' medical records. The trial court described the specific nature of the medical expenses incurred by the plaintiffs and noted that each plaintiff had undergone months of chiropractic care, which included manipulation of the spine and neck, application of hot and cold packs, electrical stimulation, and an epidural steroid injection in the lumbar region. The trial court observed, among other things, that, although there was a disagreement between the expert witnesses regarding the nature and severity of the plaintiffs' injuries, they agreed that the plaintiffs had sustained "sprains and/or strains to their neck and lumbar regions" as a result of the motor vehicle collision. The trial court determined that "the inherent, underlying symptoms necessary to make these treatments 'reasonable and necessary' in the eyes of the jury, as well as the treatments themselves, all bespeak a level of physical pain suffered by [the plaintiffs]. Even though the jury did not award the plaintiffs all of their claimed medical expenses, the jury did award the plaintiffs the vast majority of those expenses and did so with such exactitude that the court can reach no other

conclusion than that the jury concluded [that] those treatments were reasonable and necessary. It would be illogical and inconsistent to conclude that the treatments credited by the jury were reasonable and necessary but that they were not made so because of any neck or back pain suffered by the plaintiffs."

We conclude that the foregoing articulation of the trial court's grounds for granting the plaintiffs' joint motion for additurs was sufficient to permit appellate review. On the basis of the trial court's explanation, a reviewing court is able to identify the evidence and jury findings that the trial court believed, in the exercise of its discretion, warranted the relief granted. Because a reviewing court can assess the trial court's reasoning for logical or legal flaws and determine whether the trial court abused its discretion by ordering the additurs, we disagree with the Appellate Court that the trial court failed to identify "the specific facts that would justify an additur" award for each plaintiff.[17] *Maldonado* v. *Flannery*, supra, 200 Conn. App. 8.

[17] The defendants contend that the trial court's memorandum of decision "provide[s] no basis whatsoever justifying or explaining" the amount of noneconomic damages awarded to the plaintiffs: $8000 to Maldonado and $6500 to Hernandez. We disagree. The trial court explained that these amounts were calculated on the basis of "the medical bills from New Britain Injury & Spine and Jefferson Radiology [that] the jury necessarily credited in its verdict." This explanation certainly is sufficient to permit appellate review. See footnote 6 of this opinion.

Alternatively, the defendants contend, without citation to legal authority, that an additur award in the amount of one dollar of noneconomic damages for every one dollar of medical expenses awarded by the jury is excessive because "[a]n award of less than one dollar for pain and suffering for every dollar of . . . treatment for pain would have been constitutionally permissible." This claim is inadequately briefed, and, therefore, we decline to address it. See, e.g., *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008) ("[When] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . [M]ere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Citation omitted; internal quotation marks omitted.)).

B

Trial Court Did Not Abuse Its Discretion by Granting the Plaintiffs' Joint Motion for Additurs

We next address whether the trial court abused its discretion by granting the plaintiffs' joint motion for additurs. At trial, the defendants admitted that Flannery negligently rear-ended the plaintiffs' motor vehicle because she "fail[ed] to keep a proper lookout . . . ." Thus, the sole issues to be decided by the jury were causation and damages, i.e., whether the plaintiffs sustained damages in the accident that were proximately caused by Flannery's negligence. With respect to causation and damages, the expert witnesses for both the defendants and the plaintiffs agreed that Flannery's negligence caused the plaintiffs to incur personal injuries that necessitated medical treatment. As the trial court pointed out, the defendants' own expert witness, Lieponis, testified "that both plaintiffs sustained sprains and/or strains to their neck and lumbar regions" and disputed only "the extent [and permanency] of the plaintiffs' injuries . . . ."

With respect to Maldonado, Lieponis testified: "[He] sustained musculoskeletal injuries to the cervical, thoracic, and, to a lesser degree, the thoracic spine. It is reasonable and appropriate to treat these [injuries] with either physical therapy or chiropractic care, which he received. It is reasonable and appropriate, based on persistent symptoms, to obtain an MRI, which [Maldonado] did, and I would attribute the need for that MRI to the motor vehicle accident. I think, in this particular case, the continued use of chiropractic care without significant improvement was to a degree beyond what I would have recommended or what I believe is the standard of care for the management of this type of problem." In Lieponis' expert medical opinion, Maldonado had not suffered a permanent medical impairment and would not need "any

future treatment directly attributable to the motor vehicle accident."

Similarly, Lieponis testified that Hernandez had "sustained a strain of the spine that included the cervical, thoracic, and lumbar areas." Lieponis believed that the "[d]iagnostic tests that . . . Hernandez had, including the MRI, [were] reasonable and attributable to the motor vehicle accident" and that it was reasonable and appropriate to treat his injuries "with either physical therapy or chiropractic modalities" for "a six to nine month period of time . . . ." However, in Lieponis' expert medical opinion, the "close to fifty chiropractic treatments" Hernandez underwent were "outside what [he] would typically expect in terms of continuing treatment without significant improvement, without referring to another physician . . . to determine why the patient was not responding to the treatment that was being rendered." Lieponis did not believe that Hernandez suffered a permanent medical impairment as a result of the accident or that future medical treatment was necessary.

In addition to the expert medical testimony, the jury was presented with exhibits documenting the plaintiffs' medical treatment. As the trial court observed in its memorandum of decision, these exhibits show that Maldonado was "treated at New Britain Injury & Spine approximately sixty-two times" between the date of the accident and August, 2018. These treatments "involved chiropractic manipulation of . . . Maldonado's spine and neck, application of hot and cold packs, electrical stimulation, and, on occasion, mechanical traction." Similarly, Hernandez was "treated at New Britain Injury & Spine approximately forty-nine times" after the accident. "These treatments involved chiropractic manipulation of . . . Hernandez' spine and neck, application of hot and cold packs, and electrical stimulation." Furthermore, "on one occasion, both . . . Maldonado and . . . Hernan-

dez received epidural steroid injections in their lumbar regions . . . ."

On the basis of the foregoing evidence, the jury found in favor of the plaintiffs and awarded Maldonado $17,228.38 of $18,953.38 of his claimed medical expenses and $1800 in future economic damages. The jury awarded Hernandez $11,864.94 of $13,254.94 of his claimed medical expenses. According to the verdict form, the jury awarded the plaintiffs all of their claimed medical expenses for their visits to the Hospital of Central Connecticut on the day of the accident, as well as their subsequent MRIs, X-rays, and physical therapy. With respect to the plaintiffs' chiropractic treatment, the jury awarded Maldonado $7035 of his $8760 in claimed medical expenses and Hernandez $5670 of his $7060 in claimed medical expenses. The trial court determined that these "slight reductions" to the plaintiffs' claimed chiropractic costs demonstrated that "the jury was not making these reductions in a generalized way. Instead, the jury was choosing not to credit individual [chiropractic] treatments, [and], by the same token, was specifically choosing to credit others." The trial court therefore concluded "that the jury, at a minimum, credited the plaintiffs' medical bills and, by necessary implication, concluded that the treatments set forth in those bills were necessary and reasonable and that the injuries being treated during those visits were proximately caused by [Flannery's] negligence." Because these medical treatments, which were reasonable and necessary "in the eyes of the jury," inherently "bespeak a level of physical pain suffered by [the plaintiffs]," the trial court held that "[i]t would be illogical and inconsistent to conclude that the treatments credited by the jury were reasonable and necessary but that they were not made so because of any neck or back pain suffered by the plaintiffs." Accordingly, the trial court granted the plaintiffs' joint motion for additurs.

We conclude that the trial court did not abuse its discretion by granting the plaintiffs' joint motion for additur. As the foregoing recitation of facts reflects, the jury necessarily credited the plaintiffs' medical bills and/or the testimony of the defendants' expert witness, both of which support the jury's finding that the plaintiffs suffered back injuries as a result of the accident that necessitated medical treatment. The trial court reasonably concluded that the inherent purpose of this medical treatment, which included chiropractic manipulations and epidural steroid injections, was to treat pain and suffering. Stated another way, the plaintiffs' medical treatments were not merely "diagnostic or prophylactic measure[s]" from which the jury reasonably could have found that the plaintiffs experienced no pain. *Micalizzi* v. *Stewart*, 181 Conn. App. 671, 686, 188 A.3d 159 (2018); see id., 687 (jury reasonably concluded that plaintiff did not experience any compensable pain related to accident because medical expenses were for diagnostic and prophylactic treatment). Instead, on the present factual record, the jury awarded the plaintiffs economic expenses for medical treatment, "the purpose of which was to alleviate pain and to improve functioning . . . ." *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, 92 Conn. App. 481, 489, 886 A.2d 461 (2005), cert. denied, 277 Conn. 907, 894 A.2d 987 (2006); see id. (jury verdict "finding that the plaintiff, by virtue of the accident, had suffered an injury requiring treatments and medication, the purpose of which was to alleviate pain and to improve functioning," was inconsistent with award of zero noneconomic damages). It is inconsistent for the jury to conclude, on the one hand, that the plaintiffs suffered personal injuries in the accident that necessitated this type of medical treatment but, on the other hand, that the plaintiffs experienced no pain or suffering as a result of the accident that warranted an award of noneconomic dam-

ages. Because the trial court could have reasonably concluded that the jury's verdict was inconsistent on this particular factual record, its decision to grant the plaintiffs' joint motion for additurs was not an abuse of discretion.

The dissent posits that a jury is not required to find that "*any* instance of pain and suffering" is compensable and that the jury can choose to award zero damages for pain and suffering proximately caused by a tortfeasor's negligence. (Emphasis in original.) Footnote 1 of the dissenting opinion. Relatedly, the dissent suggests that the jury rationally may have found that the plaintiffs sustained injuries resulting from Flannery's negligence but nonetheless experienced no "compensable" pain and suffering on the theory that their pain and suffering was so "brief or innocuous" that no compensation was required. Id. These claims are flawed in four respects.

First, the very notion of noncompensable pain and suffering is inconsistent with the manner in which the parties litigated the case and the trial court instructed the jury. Consistent with our civil jury instructions, the trial court instructed the jury that the plaintiffs were entitled "to receive fair, just and reasonable compensation for *all injuries and losses* that are proximately caused by the defendant's negligence.

* * *

"A plaintiff who is injured by the negligence of another is entitled to be compensated for *all* physical pain and suffering, and mental and emotional suffering, and the loss of the ability to enjoy life's pleasures that are legally caused by the defendant's negligence. . . .

"A plaintiff who is injured by the negligence of another is entitled to be compensated for mental suffering caused by the defendant's negligence for the results that proximately flow from it in the same manner as the

plaintiffs are for physical suffering." (Emphasis added.) See footnote 14 of this opinion. The jury was not free to disregard the trial court's instructions on the law.

Second, the dissent cites no authority from this court that would allow a jury to refuse to award *any* damages upon determining that a defendant's negligence caused a plaintiff pain, or only minor or brief pain. We have located no precedent of this court to support that novel proposition. To the contrary, the purpose of an award of compensatory damages "is to restore an injured party to the position he or she would have been in if the wrong had not been committed." (Internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 248, 905 A.2d 1165 (2006). To accomplish this purpose, a plaintiff must recover *all* of the damages suffered as a result of a tortfeasor's negligence, regardless of whether those damages are economic or noneconomic in nature. See, e.g., *First Federal Savings & Loan Assn. of Rochester* v. *Charter Appraisal Co.*, 247 Conn. 597, 604, 724 A.2d 497 (1999) (it is "[a] well established proposition that a tortfeasor is liable for all damages proximately caused by its negligence"). To conclude otherwise risks condoning jury compromise or nullification and undermining the principles animating tort law, namely, "compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . ." (Internal quotation marks omitted.) *Doe* v. *Cochran*, 332 Conn. 325, 363, 210 A.3d 469 (2019); see footnote 15 of this opinion.

Third, putting aside the dubious legal validity of the dissent's theory, the evidence in the present case does not support a reasonable inference that the plaintiffs' injuries were either brief or innocuous. The plaintiffs' treatment was lengthy in duration, lasting approximately two years for Maldonado and eight months for Hernandez. The nature of the plaintiffs' injuries, which

the jury reasonably and necessarily found required such invasive treatment as electrical stimulation, mechanical traction, and epidural steroid injections, cannot accurately be characterized as innocuous. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2004) p. 645 (defining "innocuous" as "producing no injury" or "harmless").

Fourth, to the extent that the dissent suggests that the jury reasonably could have found that the plaintiffs suffered *no* pain or suffering, we also disagree. The very medical records on which the jury must have relied to award the plaintiffs their medical expenses demonstrate unequivocally that *pain* was the precipitating and ongoing reason for the treatment that the jury found to be compensable.[18] Indeed, although the dissent reminds us that " 'we must examine the evidential basis of the verdict itself to determine whether the trial court abused its discretion,' " it then provides a theoretical explanation for the jury's split verdict without reference to the particular evidentiary record in this case. Our own examination of the evidentiary record leads us to conclude that the trial court acted within its discretion when it determined that the jury could not consistently have found, on the one hand, that the aforementioned medical treatments were reasonable and necessary and, on the other hand, that the plaintiffs suffered no pain and suffering.

[18] The epidural steroid injections are the most salient example of pain treatment credited by the jury. The referring provider determined that an epidural steroid injection was appropriate in light of ongoing lumbar pain, and we are not aware of any evidence suggesting an alternative explanation for that treatment. More broadly, the medical records are replete with references to the plaintiffs' pain symptoms that prompted the rendering of medical care, beginning with the initial visit to the hospital emergency room. The hospital records also reflect that the plaintiffs both were prescribed anti-inflammatory medication and muscle relaxants, all of which were ordered to treat pain. Likewise, the medical records demonstrate that the chiropractic treatment found to be necessary by the jury was rendered for the purpose of alleviating the plaintiffs' back and neck pain.

We also reject the defendants' argument that the Appellate Court properly reversed the judgment of the trial court on the basis of the plaintiffs' "conflicting and inconsistent" testimony; *Maldonado* v. *Flannery*, supra, 200 Conn. App. 10; which the jury reasonably could have found "lacked credibility." Id., 13. The trial court explicitly acknowledged that "the jury could have reasonably concluded that [the plaintiffs] were [not] credible witnesses." The trial court was "[c]onscious of its obligation to view the evidence in the light most favorable to sustaining the jury's verdict and the jury's right to make determinations of witness credibility," and, therefore, did not rely on the plaintiffs' conflicting or inconsistent testimony in ruling on the plaintiffs' joint motion for additurs. Instead, the trial court relied on the findings of harm and causation necessarily inherent in the jury's verdict awarding the plaintiffs' claimed damages for the treatment reflected in their respective medical bills, which the court reasonably determined the jury must have credited to arrive at its verdict and award in favor of the plaintiffs.

The defendants also contend that the trial court's additur award was improper under *Wichers* because the plaintiffs both had preexisting back and neck conditions, which the jury reasonably could have found were the cause of their pain and suffering following the 2016 collision. We reject this claim. As we previously explained, *Wichers* did not establish a per se rule automatically requiring or prohibiting a trial court from awarding an additur of noneconomic damages. Instead, *Wichers* rejected the *Johnson* per se rule declaring all split verdicts inconsistent as a matter of law and replaced it with a more flexible, fact sensitive approach. See *Wichers* v. *Hatch*, supra, 252 Conn. 181 (stating that "a case-specific standard should apply to the instance in which a party seeks to have a verdict set aside on the basis that it is legally inadequate").

Wichers is factually distinguishable from the present case because the plaintiff in that case was receiving medical treatment "as part of a monthly maintenance program" for a preexisting neck impairment at the time of the accident. Id., 177. The plaintiff's antecedent neck impairment, which was both traumatic and organic in origin, caused the plaintiff to suffer ongoing pain and "a reduced range of motion" at the time of the accident. Id. In light of the plaintiff's preexisting medical condition and ongoing medical treatment, we reasoned that "the jury could have accepted the evidence that it was advisable for the plaintiff to see his chiropractor more frequently than usual following the accident, but that the accident did not cause him actually to suffer greater pain than he already had experienced as a result of his preexisting condition. Certainly, the jury reasonably could have found that the accident had not aggravated the plaintiff's condition, and that his pain was the same as what he had experienced before his accident with the defendant. Thus, there was a sufficient evidentiary basis for the jury's verdict." Id., 189–90.[19]

Unlike the plaintiff in *Wichers*, neither Maldonado nor Hernandez was undergoing medical treatment for a preexisting medical condition at or near the time the defendant negligently rear-ended their motor vehicle.

[19] The dissent expresses concern that our holding today represents a "retreat" from *Wichers*. The concern is groundless—*Wichers* remains good law, the principles articulated therein remain valid, and its holding applies to cases involving comparable factual circumstances. To be clear, however, nothing in *Wichers* or any other case decided by this court suggests that a trial court must deny a motion for additur, even though it discerns an inconsistency in a split verdict that cannot be explained under any reasonable view of the evidentiary record. *Wichers* acknowledges this limitation on a court's deference to the jury's verdict in the very language quoted by the dissent: " '[T]he conclusion of a jury, if one at which honest [jurors] acting fairly and intelligently might arrive *reasonably*, must stand . . . .' " (Emphasis added.), quoting *Wichers* v. *Hatch*, supra, 252 Conn. 189. We have emphasized throughout this opinion that the watchword in this context is *reasonableness*.

Although there was evidence that both plaintiffs had degenerative disc changes of nontraumatic etiology, and that Maldonado had received treatment for a back and neck injury sustained in a motor vehicle accident in 2014 and "chronic pain/sciatica" in 2015, the parties presented no evidence from which the jury reasonably could have found that the pain associated with the injuries for which the plaintiffs were treated following the 2016 collision was the same in nature or degree as that related to any preexisting conditions.[20] On the basis of the evidence admitted at the trial, the jury could not have found that it was reasonable and necessary for the plaintiffs to undergo months of chiropractic manipulations and a steroid injection as a result of the injuries sustained in 2016 and, at the same time, that the plaintiffs suffered no compensable pain as a result of these injuries. Because the factual record in the present case contains no "reasonable basis in the evidence for the jury's [split] verdict"; (internal quotation marks omitted) *Wichers* v. *Hatch*, supra, 252 Conn. 189; the trial court did not abuse its discretion by granting the plaintiffs' joint motion for additurs.

V

CONCLUSION

After a careful review of the record, we conclude that the trial court did not abuse its discretion by granting the plaintiffs' joint motion for additurs. Because the defendants declined to accept the trial court's additur award; see footnote 7 of this opinion; a new trial is required.[21]

[20] Indeed, there is no evidence in the record indicating that Hernandez ever experienced any back or neck pain prior to the 2016 collision. Nor is there any evidence that he ever was treated for any back or neck condition prior to the collision.

[21] "Ordinarily the reversal of a jury verdict requires a new trial of all the issues in the case," unless there is "error as to one issue . . . [that] is separable from the general issues . . . ." (Internal quotation marks omitted.) *Schroeder* v. *Triangulum Associates*, supra, 259 Conn. 334. As we explained in *Schroeder*, "issues of liability and damages are not separable

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

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

ROBINSON, C. J., dissenting. I respectfully disagree with the majority's conclusion that the trial court did not abuse its discretion in granting the joint motion for additurs filed by the plaintiffs, William Maldonado and Geovanni Hernandez, on the ground that the jury in their negligence action against the defendants, Kelly C. Flannery and Michael T. Flannery, could not reasonably have found that they incurred economic damages for medical expenses for their injuries but no noneconomic damages from those injuries. Instead, I agree with the Appellate Court's conclusion that the jury could have reasonably found that the plaintiffs failed to prove noneconomic damages for pain and suffering. *Maldonado* v. *Flannery*, 200 Conn. App. 1, 13, 238 A.3d 127 (2020). Because I would affirm the judgment of the Appellate Court directing the trial court to deny the plaintiffs' motion and to render judgment in accordance with the jury's verdict; see id.; I respectfully dissent.

At the outset, I note my agreements with the facts and procedural history set forth by the majority. See part I of the majority opinion. I also agree with the standard of review stated by the majority pursuant to *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 781–82, 208 A.3d 256 (2019), and *Wichers* v. *Hatch*, 252 Conn. 174, 181, 745 A.2d 789 (2000), requiring that we review

but instead are inextricably interwoven . . . thus requiring a new trial as to both liability and damages unless the court can clearly see that this is the way of doing justice in [a] case." (Citation omitted; internal quotation marks omitted.) Id. In this case, because the defendants have admitted negligence, a new trial is required as to causation and damages only.

a decision of the trial court to order an additur for an abuse of discretion. See part II B of the majority opinion.

I begin by emphasizing my agreement with the legal principles set forth by the majority's comprehensive review of the law limiting a trial court's authority to set aside a jury verdict. See part II A of the majority opinion. The majority accurately cites our precedents stating that the only cases in which the jury's verdict should be set aside are those in which the verdict is " '*so clearly against the weight of the evidence* in the case as to indicate that the jury did not correctly apply the law to the facts in evidence in the case, or [was] governed by ignorance, prejudice, corruption or partiality . . . .' " (Emphasis added.) Id., quoting *Birgel* v. *Heintz*, 163 Conn. 23, 27, 301 A.2d 249 (1972). Further, in *Wichers*, this court described the limit on a trial court's discretion to set aside a verdict: "[I]f there is a reasonable basis in the evidence for the jury's verdict, unless there is a mistake in law or some other valid basis for upsetting the result other than a difference of opinion regarding the conclusions to be drawn from the evidence, *the trial court should let the jury work* [*its*] *will*." (Emphasis added; internal quotation marks omitted.) *Wichers* v. *Hatch*, supra, 252 Conn. 189; see *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 280, 32 A.3d 318 (2011) ("we consistently have held that a court should exercise its authority to order a remittitur rarely—only in the most exceptional of circumstances"). I add to these principles that it "is axiomatic that [t]he amount of damages awarded is a matter peculiarly within the province of the jury . . . . Moreover, there is no obligation for the jury to find that every injury causes pain, or the amount of pain alleged. . . . Put another way, [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. . . . The

[jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609, 176 A.3d 1228 (2017); see *Munn* v. *Hotchkiss School*, 326 Conn. 540, 579, 165 A.3d 1167 (2017) ("[j]uries may differ widely in the conclusions [that] they reach in what may be apparently similar cases, and, in fact, in any given case one jury may arrive at a result substantially different from that of another jury" (internal quotation marks omitted)).

With these principles in mind, I address the majority's conclusion that the trial court did not abuse its discretion by granting the plaintiffs' joint motion for additurs in the present case. The main argument advanced by both the trial court and the majority is that, because the jury's verdict as to economic damages indicates that it credited the plaintiffs' medical bills for a significant number of treatments, with only "slight reductions" to individual chiropractic treatments, and because those procedures were specifically to treat pain rather than for diagnostic or prophylactic purposes, it was, therefore, not reasonable for the jury to determine that the plaintiffs' pain and suffering were not worth more than zero noneconomic damages. See part IV B of the majority opinion. Although this contention might have merit in other cases presenting more severe injuries, it does not in the present case. Specifically, I do not agree that it was unreasonable for the jury not to have come to the same conclusion as the trial court that "[b]oth the inherent underlying symptoms . . . as well as the treatments themselves, all bespeak a level of physical pain suffered" by the plaintiffs. Put differently, the trial court's conclusion, which is embraced by the majority, incorrectly suggests that the jury had no choice but to conclude that the plaintiffs experienced compensable pain and suffering, given the injuries and the treatments that formed the basis for its award of economic damages.

In my view, the majority's conclusion to uphold the additur ordered by the trial court departs from the "assumption" that underlies our analysis, namely, "that . . . the jury did exactly what it intended to do." *Wichers* v. *Hatch*, supra, 252 Conn. 189. Thus, on review, we must determine whether it was reasonable for the jury to find that the plaintiffs did not experience compensable pain and suffering as a result of the injuries and the treatments that the jury found the plaintiffs had experienced. The trial court's decision to set aside the jury's verdict means it determined that it was unreasonable for the jury to make that finding. See id., 188–89 ("the trial court should examine the evidence *to decide whether the jury reasonably could have found* that the plaintiff had failed in his proof of the issue" (emphasis added)). I fail to see, and the trial court failed to articulate, why it was unreasonable for the jury not to have determined that the symptoms and the treatments at issue in the present case "all bespeak a level of physical pain suffered," for which the plaintiffs must be compensated. Because " 'there is no obligation for the jury to find that every injury causes pain' "; *Cusano* v. *Lajoie*, supra, 178 Conn. App. 609; the jury could have accepted the evidence as to the plaintiffs' injuries, and the evidence that the procedures administered were reasonable and necessary to treat those injuries, yet declined to accept the evidence presented as to the plaintiffs' pain and suffering. I see there to be "room for a reasonable difference of opinion among fair-minded [jurors]" as to whether compensable pain and suffering are inherent in the sprains sustained by the plaintiffs; *Howard* v. *MacDonald*, 270 Conn. 111, 128, 851 A.2d 1142 (2004); and, thus, I respectfully disagree with the trial court's conclusion that the jury's verdict was illogical and inconsistent. Although we do not disturb the trial court's action in the absence of an abuse of its discretion, that discretion to set aside a verdict is limited to the situation

in which there is no room for a reasonable difference of opinion; thus, when there is room for a reasonable difference in opinion, the trial court abuses its discretion in setting aside a jury's verdict. See id. ("[t]he right to a jury trial is fundamental in our judicial system, and this court has said that the right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fair-minded [jurors] passed [on] by the jury and not by the court"); see also *Seals* v. *Hickey*, 186 Conn. 337, 349, 441 A.2d 604 (1982) ("[t]he defendant has a constitutional right [to] trial by jury under article first, § 19, of the Connecticut constitution, adopted in 1965, which declares '[t]he right of trial by jury shall remain inviolate' " (footnote omitted)); see, e.g., *Munn* v. *Hotchkiss School*, supra, 326 Conn. 575 ("Litigants have a constitutional right to have factual issues resolved by the jury. . . . This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded." (Internal quotation marks omitted.)); *Howard* v. *MacDonald*, supra, 128 ("[because], *in setting aside the verdict, the trial court has deprived the party in whose favor the verdict was rendered of his constitutional right to have factual issues resolved by the jury*, we must examine the evidential basis of the verdict itself to determine whether the trial court abused its discretion" (emphasis added; internal quotation marks omitted)).

A point of comparison discussed by the majority opinion is instructive here. In *Schroeder* v. *Triangulum Associates*, 259 Conn. 325, 332, 789 A.2d 459 (2002), this court determined that "[i]t is not reasonable for the jury to have found the defendant liable for the expense of the spinal fusion surgery, but not liable for

the pain and permanent disability necessarily attendant to such intrusive surgery." Thus, it was unreasonable not to infer from the spinal fusion surgery at issue in *Schroeder* that the plaintiff in that case experienced pain and suffering. The majority opinion frames *Schroeder* as an extreme that does not provide a formula for determining what other cases warrant the same conclusion. See part III of the majority opinion. I disagree. In my view, an injury requiring spinal fusion surgery is not an extreme case but, instead, is an illustrative example of severe injuries requiring intensive treatments for which it is simply unreasonable for a jury not to assume that compensable pain was attendant. Although I certainly do not suggest that injuries that are treated with chiropractic care, the application of hot and cold packs, electrical muscle stimulation, and a single epidural steroid injection, may never be serious enough to cause compensable pain and suffering, they nevertheless are a far cry from those injuries for which the existence of compensable pain and suffering *must* be presumed.[1] If

[1] The trial court's articulation also presumes that all pain associated with a compensable injury is compensable pain, that all pain, as a matter of law, can be equated to damages for which plaintiffs must be compensated. The only authority cited in the majority opinion that could support this contention is a pattern jury instruction that provides in relevant part: " 'A plaintiff who is injured by the negligence of another is entitled to be compensated for *all physical pain and suffering*, mental and emotional suffering, loss of the ability to enjoy life's pleasures, and permanent impairment or loss of function that (he/she) proves by a fair preponderance of the evidence to have been proximately caused by the defendant's negligence. . . . .' " (Emphasis added.) Footnote 14 of the majority opinion, quoting Connecticut Civil Jury Instructions 3.4-1, available at https://jud.ct.gov/JI/Civil/Civil.pdf (last visited April 26, 2022). I do not view this model jury instruction as a conclusive statement of Connecticut law on this point. Although there is an absence of guidance as to what renders pain and suffering compensable as a matter of law, there is no authority in our jurisprudence for the proposition that a jury is required to find that *any* instance of pain and suffering, no matter how brief or innocuous, is a damage suffered for which the plaintiff must be compensated. Indeed, case law from our Appellate Court stands for the contrary. See *Micalizzi* v. *Stewart*, 181 Conn. App. 671, 684–85, 188 A.3d 159 (2018) ("[T]he fact that the jury awarded economic damages for medical treatment, *including treatment for pain*, does not necessarily

the existence of compensable pain and suffering must be presumed, as a matter of law, from the treatments in this case, I do not see many injuries or treatments remaining for which compensable pain and suffering would not have to be presumed as a matter of law.

The majority's determination that the trial court was reasonable in concluding that the inherent purpose of the medical procedures credited by the jury was to treat pain and, thus, that compensable pain and suffering must be assumed, is a marked retreat from *Wichers* and its statement of our law that "the conclusion of a jury, if one at which honest [jurors] acting fairly and intelligently might arrive reasonably, must stand, even though the opinion of the trial court and this court be that a different result should have been reached." (Internal quotation marks omitted.) *Wichers* v. *Hatch*, supra, 252 Conn. 189. We could be entirely convinced, as the trial court was, that pain and suffering were inherent in the plaintiffs' injuries, and we would still be required to hold that it was improper to set aside the jury's verdict because the court's duty is not to "merely substitute its own judgment for that of the jury . . . ." *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 284. The trial court's duty to set aside a jury verdict is prompted by a "verdict [that] so shocks the sense of justice as to compel the conclusion that the jury [was] influenced

mean that it must award damages for pain itself. . . . [I]t may be reasonable for a jury to conclude that although a plaintiff suffered an injury caused by a defendant and incurred reasonable and necessary medical expenses in treating that injury, that plaintiff nevertheless did not suffer compensable pain and suffering." (Emphasis altered.)); *Cusano* v. *Lajoie*, supra, 178 Conn. App. 611 ("the court seems to assume that because the plaintiff sought *medical treatment for pain* in his upper back and neck, and was awarded the full amount of the cost of that treatment, the plaintiff inevitably experienced *compensable pain and suffering*" (emphasis added)); see also *Boggavarapu* v. *Ponist*, 518 Pa. 162, 167, 542 A.2d 516 (1988) ("*A jury is not compelled to believe that a dog bite or puncture by a needle causes compensable pain.* They may believe that it is a transient rub of life and living, a momentary stab of fear and pain, or neither." (Emphasis added.)).

by partiality, prejudice, mistake or corruption . . . a very clear and striking case of indubitable wrong, so clear and striking as to indicate the influence of undue sympathy, prejudice or corruption on the verdict." (Citation omitted; internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, supra, 326 Conn. 576. A jury determining that the injuries and treatments at issue in this case do not "bespeak a level of physical pain suffered" cannot be the striking, indubitable wrong this court contemplated in *Munn*. Accordingly, I would conclude that the trial court abused its discretion in setting aside the jury's verdict.

Based on the trial court's obligation to view the evidence in the light most favorable to sustaining the jury's verdict, and my hesitation to conclude that compensable pain and suffering must be assumed as a matter of law from the plaintiffs' sprains and the procedures used to treat those injuries, I disagree with the majority's conclusion that "the factual record in the present case contains no reasonable basis in the evidence for the jury's [split] verdict . . . ." (Citation omitted; internal quotation marks omitted.) Part IV B of the majority opinion. Instead, I agree with the Appellate Court's conclusion that the trial court abused its discretion in granting the plaintiffs' joint motion for additurs.

Because I would affirm the judgment of the Appellate Court, I respectfully dissent.

KATIE N. CONROY *v.* AMMAR A. IDLIBI
(SC 20598)

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

Syllabus

Following the dissolution of the parties' marriage, the defendant filed a motion to open the dissolution judgment, claiming that the plaintiff had committed fraud during the dissolution proceedings by submitting a

false response to an interrogatory in which she denied the existence of a sexual relationship with another man during the parties' marriage and by falsely testifying at trial that the defendant had physically assaulted her. The trial court denied the motion, concluding that the defendant's allegations of fraud, even if proven to be true, would not have altered the disposition of the parties' divorce. The defendant appealed to the Appellate Court, which upheld the trial court's denial of the defendant's motion to open. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court correctly concluded that the trial court had not abused its discretion in denying the defendant's motion to open: even if there were merit to the defendant's contention that the dissolution court was factually mistaken about the true nature of the plaintiff's extramarital affair, such a mistake could not have been caused by the allegedly fraudulent response to the interrogatory, as the defendant acknowledged, in his prior, direct appeal from the dissolution judgment, that the plaintiff had confessed to the dissolution court that her response to the interrogatory in which she denied the existence of a sexual relationship with another man during the marriage was a lie, and, therefore, it was reasonable to infer that this falsehood did not impact the dissolution court's judgment; moreover, the defendant's claim of fraud with respect to the plaintiff's allegation of assault was unavailing, as the dissolution court found that the plaintiff's account of the alleged assault lacked credibility, and, accordingly, it was reasonable for the trial court to conclude that additional evidence about the alleged assault would not likely have altered the result of the parties' divorce.

Submitted on briefs February 25—officially released May 3, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Carbonneau*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to the Appellate Court, *Alvord*, *Keller* and *Bishop*, *Js.*, which affirmed the judgment of the trial court; thereafter, the court, *Connors*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to the Appellate Court, *Lavine* and *Alexander*, *Js.*, with *Flynn*, *J.*, dissenting, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Ammar A. Idlibi, self-represented, the appellant (defendant).

Opinion

PER CURIAM. The defendant, Ammar A. Idlibi, appeals from the judgment of the Appellate Court affirming the trial court's denial of his motion to open the judgment in this marital dissolution case on the basis of fraud. Specifically, the defendant claims that the trial court improperly denied his motion to open without first affording him an opportunity to present certain evidence that the plaintiff, Katie N. Conroy, had lied under oath about certain topics during the underlying proceedings. For the reasons that follow, we agree with the Appellate Court's assessment that the trial court did not abuse its discretion by concluding that the defendant's particular allegations, even if proven to be true, were unlikely to have altered the ultimate resolution of the parties' divorce. As a result, we conclude that the Appellate Court properly affirmed the trial court's denial of the defendant's motion to open.

The following undisputed facts and procedural history are relevant to our consideration of the defendant's claims. The plaintiff commenced this marital dissolution action on May 19, 2015. Following a trial, the dissolution court, *Carbonneau, J.*, issued a memorandum of decision dissolving the parties' marriage and issuing certain financial orders. The defendant then appealed to the Appellate Court, which dismissed in part the defendant's appeal and affirmed the dissolution court's judgment. *Conroy* v. *Idlibi*, 183 Conn. App. 460, 461, 471, 193 A.3d 663, cert. denied, 330 Conn. 921, 194 A.3d 289 (2018).

On October 29, 2018, the defendant filed the motion to open at issue in this appeal. In that motion, the defendant claimed that the plaintiff had committed fraud by (1) submitting a false response to an interroga-

tory denying the existence of a sexual relationship with another man during the course of the marriage, and (2) falsely testifying at trial that the defendant had physically assaulted her on July 29, 2015. After hearing oral arguments from the parties, the trial court, *Connors*, *J.*, concluded that the defendant's allegations of fraud, even if proven to be true, would not have altered the disposition of the parties' divorce and, accordingly, denied the defendant's motion to open. The defendant then appealed once again to the Appellate Court, which agreed with the trial court's assessment and affirmed the trial court's judgment. *Conroy* v. *Idlibi*, 204 Conn. App. 265, 266, 288, 254 A.3d 300 (2021). This certified appeal followed. See *Conroy* v. *Idlibi*, 337 Conn. 905, 252 A.3d 366 (2021).

"Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed [as] long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 440, 93 A.3d 1076 (2014); see also *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005); *Gaary* v. *Gillis*, 162 Conn. App. 251, 255–56, 131 A.3d 765 (2016).

"Pursuant to General Statutes § 52-212a, 'a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which [the notice of judgment or decree was sent].

. . .' An exception to the four month limitation applies, however, if a party can show, inter alia, that the judgment was obtained by fraud." *Reville* v. *Reville*, supra, 312 Conn. 441; see also *Weiss* v. *Weiss*, 297 Conn. 446, 455, 998 A.2d 766 (2010); *Jucker* v. *Jucker*, 190 Conn. 674, 677, 461 A.2d 1384 (1983).

"There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud;[1] and (3) there [must be] a [reasonable probability] that the result of the new trial [would] be different." (Footnote added; footnote omitted; internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 442; see also *Duart* v. *Dept. of Correction*, 303 Conn. 479, 491, 34 A.3d 343 (2012) (requiring movant to demonstrate reasonable probability, rather than substantial likelihood, that result of new trial would have been different); *Billington* v. *Billington*, 220 Conn. 212, 214, 595 A.2d 1377 (1991) (abandoning diligence requirement for motions to open dissolution judgments secured by fraud).[2]

[1] "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 441. Although a trial court's factual findings with respect to these elements are entitled to deference; see *Weinstein* v. *Weinstein*, supra, 275 Conn. 685; the trial court in the present case took no evidence and made no factual findings in order to decide whether the requisite clear proof of these four elements existed.

[2] We observe that the Appellate Court's May 4, 2021 decision recited the fourth prong of the applicable test using a "substantial likelihood" standard, rather than the "reasonable probability" standard adopted by this court in *Duart*. See *Conroy* v. *Idlibi*, supra, 204 Conn. App. 283. Because the defendant's motion to open fails under either standard, however, that distinction has no bearing on the disposition of this appeal.

Even if we were to accept the defendant's contention that the dissolution court was somehow factually mistaken about the true nature of the plaintiff's extramarital affair,[3] such a mistake could not have been caused by the allegedly fraudulent response to the interrogatory, as the defendant claimed in his motion to open. In his brief to the Appellate Court in his initial appeal, the defendant acknowledged that the plaintiff had candidly confessed to the dissolution court that her response to the interrogatory denying the existence of a sexual relationship with another man during the marriage had been a lie. Specifically, the defendant argued before the Appellate Court that, "[o]n May 17, 2016, the plaintiff testified on direct examination by her counsel . . . that she had an affair with a man . . . prior to her filing of the divorce. The plaintiff further testified that she provided a false answer about her affair in her sworn answers to the defendant's interrogatories and request[s] for production." Because the plaintiff openly admitted that the interrogatory response in question was false, it is reasonable to infer that this lie did not impact the dissolution court's judgment. See *Reville* v. *Reville*, supra, 312 Conn. 441 (movant must show that judgment was obtained by fraud).[4]

[3] We disagree with the defendant's assertion that the dissolution court's observation that the record contained "no direct evidence of [the plaintiff] and this other man ever having [had] sex," in and of itself, constitutes a factual finding that the plaintiff's extramarital relationship was platonic in nature. The dissolution court, as the finder of fact, could well have inferred the existence of a sexual relationship from the extensive circumstantial evidence presented at trial with respect to that issue. Most notably, the dissolution court specifically observed that the police had discovered "a number of cell phone messages of a sexual nature between [the] plaintiff and [the man with whom she was having an extramarital relationship]," and remarked that "[a]t least some [suggestive photographs were] in evidence before [the] court."

[4] Judge Flynn dissented from the Appellate Court's opinion and concluded, inter alia, that the trial court had improperly denied the defendant "an opportunity to present his after discovered new evidence of the plaintiff's admission to adulterous conduct . . . ." *Conroy* v. *Idlibi*, supra, 204 Conn. App. 289 (*Flynn*, *J.*, dissenting). We do not disagree that motions to open

The defendant's claim of fraud with respect to the plaintiff's allegation of domestic assault is, likewise, unavailing. The dissolution court specifically found that the plaintiff's account of the alleged assault on July 29, 2015, lacked credibility, noting that she had "declined to answer . . . questions [by Detective Damien Bilotto of the Plymouth Police Department] not once, but twice, about the sequence of events . . . ." The dissolution court also explicitly observed the fact that Bilotto, "[d]espite [a] thorough investigation" of the incident, had been unable to rule out the possibility that the plaintiff's injuries were "self-inflicted . . . ."[5] In light of the doubts expressed by the dissolution court on this point, it was reasonable

in this particular context often require such hearings, both to substantiate allegations of fraud and to determine whether additional discovery is necessary. See, e.g., *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988). Because the specific instance of fraud claimed by the defendant with respect to the alleged adultery—namely, the false interrogatory response—was plainly admitted to by the plaintiff before the dissolution court, we decline to conclude that the trial court's decision to forgo such a hearing in the present case amounted to an abuse of discretion.

[5] The dissolution court's decision contains the following specific factual findings with respect to the alleged assault: "The plaintiff called 911 at 6:26 p.m. on Wednesday, July 29, 2015, to report that the defendant had 'forced his way' into her presence and assaulted her. Detective Bilotto determined that the defendant sent the plaintiff three text messages prior to her 911 call at 6:19, 6:20, and 6:22 p.m. From these messages and the transcript of the 911 call, the detective concluded that the defendant was not in the same location as the plaintiff. He did not hear the defendant's voice on the 911 call. He heard a 'commotion' but no screaming. . . . Detective Bilotto interviewed the plaintiff at the marital residence on July 29, 2015. He found discrepancies between her verbal accounts of the incident to him and her 911 call. The plaintiff twice declined to answer his questions about the sequence of events on the night in question; once that night and later with her attorney present. . . . Detective Bilotto noted an injury to the right temple of the plaintiff's face above her eye. She claimed that, during an argument, the defendant struck her with a blunt object, causing bleeding and swelling. The detective studied photo[graphs] of the blood spatter on the floor where the injury was alleged to have occurred. He determined that the pattern was from a person in a stationary position and that this was inconsistent with the description of the incident given by the plaintiff." The dissolution court expressly found Detective Billotto's testimony in this regard to be highly credible.

for the trial court to conclude that additional evidence about the alleged assault was unlikely to have altered the result of the parties' divorce.

The trial court, having considered the allegations of fraud contained in the defendant's motion to open in the context of the dissolution proceeding as a whole, expressly found that, "even if the [allegations] were true, [we] would have likely had the exact same result, nothing would have changed . . . ." Making every reasonable presumption in favor of the trial court's ruling; see *Reville* v. *Reville*, supra, 312 Conn. 440; we perceive of no error in that assessment. As a result, we agree with the Appellate Court's conclusion that the trial court did not abuse its discretion in denying the defendant's motion to open.

The judgment of the Appellate Court is affirmed.

ORDERS

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HOUSING AUTHORITY OF THE CITY OF NEW LONDON *v.* BRUCE STEVENS

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 569 (AC 43471), is denied.

John L. Giulietti, in support of the petition.

Lloyd L. Langhammer, in opposition.

Decided April 19, 2022

CASMIER ZUBROWKSI *v.* COMMISSIONER OF CORRECTION

The petitioner Casmier Zubrowski's petition for certification to appeal from the Appellate Court, 209 Conn. App. 828 (AC 43981), is denied.

Alice Osedach Powers, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided April 19, 2022

MARGUERITE PURNELL ET AL. *v.* INLAND WETLANDS AND WATERCOURSES COMMISSION OF THE TOWN OF WASHINGTON ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 209 Conn. App. 688 (AC 44083), is denied.

Gail E. McTaggart, in support of the petition.

David F. Sherwood and *Kari L. Olson*, in opposition.

Decided April 19, 2022

ROBERT PARKER ET AL. *v.* ZONING COMMISSION OF THE TOWN OF WASHINGTON ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 209 Conn. App. 631 (AC 44130), is denied.

Gail E. McTaggart, in support of the petition.

Michael A. Zizka and *Peter V. Gelderman*, in opposition.

Decided April 19, 2022

CHARLES ILL *v.* ELLEN MANZO-ILL

The defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 364 (AC 42735), is denied.

James H. Lee, in support of the petition.

Anthony L. Cenatiempo and *Norman A. Roberts II*, in opposition.

Decided April 19, 2022

THE BANK OF NEW YORK MELLON, SUCCESSOR TRUSTEE *v.* WADE H. HORSEY II ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 904 (AC 42925), is denied.

Wade H. Horsey II, self-represented, in support of the petition.

Marissa I. Delinks, in opposition.

Decided April 19, 2022

ANGELO REYES *v.* STATE OF CONNECTICUT

The petitioner Angelo Reyes' petition petition for certification to appeal from the Appellate Court, 210 Conn. App. 714 (AC 43571), is denied.

Norman A. Pattis, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided April 19, 2022

RICHARD T. O'DONNELL *v.* AXA EQUITABLE LIFE INSURANCE COMPANY

The defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 662 (AC 44215), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the plaintiff had satisfied the 'new pleading' requirement of Practice Book § 10-44 when the amended complaint added allegations that were 'apart from' and 'independent of' the specific pleading deficiency identified by the trial court?

"2. If the answer to the first question is 'yes,' did the Appellate Court correctly conclude that the trial court had erred in striking the plaintiff's claim for failure to plead causation?"

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

John W. Cerreta, *Thomas D. Goldberg*, *Jay B. Kasner*, pro hac vice, and *Kurt Wm. Hemr*, pro hac vice, in support of the petition.

David A. Slossberg, *Sara A. Sharp* and *Daniella Quitt*, pro hac vice, in opposition.

Decided April 19, 2022

ARTURO ICELO-HERNANDEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Arturo Icelo-Hernandez' petition for certification to appeal from the Appellate Court, 210 Conn. App. 905 (AC 44590), is denied.

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

Meryl R. Gersz, deputy assistant state's attorney, in opposition.

Decided April 19, 2022

AURORA LOAN SERVICES, LLC *v.* ROBERT P. GABRIEL ET AL.

The petition of the defendants Robert P. Gabriel and Pamela P. Gabriel for certification to appeal from the Appellate Court (45112) is denied.

Anthony J. Febles and *Alex R. Hess*, pro hac vice, in support of the petition.

Victoria L. Forcella, in opposition.

Decided April 19, 2022

CHARLES J. MOZZOCHI *v.* GEORGE M. PURTILL

The plaintiff's petition for certification to appeal from the Appellate Court (AC 45181) is denied.

Charles J. Mozzochi, self-represented, in support of the petition.

Patrick J. Day and *Gabriel G. D'Antonio*, in opposition.

Decided April 19, 2022

BANK OF AMERICA, NATIONAL ASSOCIATION *v.* KATHI SORRENTINO ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 45184) is denied.

Kathi Sorrentino, self-represented, in support of the petition.

Scott M. Harrington, in opposition.

Decided April 19, 2022

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CONNECTICUT APPELLATE REPORTS

Vol. 212

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE TEAGAN K.-O.*
(AC 44918)
(AC 44923)

Alexander, Suarez and Sheldon, Js.

Syllabus

The respondent parents filed separate appeals to this court from the judgment of the trial court terminating their parental rights with respect to their minor child, T. T was born in Florida, and the Florida Department

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

of Children and Families took emergency custody of T. While the respondent mother was pregnant with T, the respondents moved to Florida in order to avoid further involvement with the Connecticut Department of Children and Families. The petitioner, the Commissioner of Children and Families, filed a motion in Connecticut seeking temporary custody of T and a petition seeking to adjudicate T neglected, which the trial court denied on the ground that T was not in Connecticut. After a Florida court ratified and adopted a magistrate's recommendation to transfer jurisdiction to Connecticut, the trial court granted the petitioner's renewed request for an ex parte order of temporary custody of T. The court denied the respondent father's motion to dismiss the neglect petition on the ground of lack of subject matter jurisdiction, and the father appealed. The petitioner subsequently filed a petition to terminate the respondents' parental rights. Our Supreme Court in *In re Teagan K.-O.* (335 Conn. 745) reversed the judgment of the trial court and remanded the case with direction to grant the father's motion to dismiss the neglect petition, concluding that the court lacked jurisdiction over that petition because, when that petition was filed, T was not present in Connecticut. Thereafter, the trial court dismissed the neglect petition. Subsequently, the petitioner filed a motion for order in which she asked the court to find that it had jurisdiction over T's case, including the pending termination of parental rights petition, which the court granted. After concluding that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the court consolidated for trial the termination of parental rights petition with the father's motion seeking to vacate the order of temporary custody. Following a trial, the court rendered judgment terminating the respondent parents' parental rights and denying the father's motion to vacate the order of temporary custody. *Held*:

1. This court declined to review the respondent mother's claim that the trial court lacked the statutory authority to terminate her parental rights because T was not in the custody of the petitioner, which was based on her claim that the fact that our Supreme Court ordered that the neglect petition be dismissed vitiated the predicate for the order of temporary custody that had been granted to the petitioner pursuant to statute (§ 46b-129): the mother's claim constituted an impermissible collateral attack on the order of temporary custody as the mother did not appeal from the order of temporary custody, which was a final judgment for purposes of appeal, and the mother had a chance to litigate any issue with respect to the order of temporary custody when it was issued and when the neglect petition was dismissed, but failed to do so.
2. The respondent father's claim that the trial court lacked jurisdiction to adjudicate the petition for termination of parental rights because the order of temporary custody was not a final custody determination for purposes of establishing jurisdiction under the UCCJEA, and because there was no mechanism by which the order of temporary custody could

become a final custody determination, was unavailing: in adjudicating the petitioner's motion for order, the court found that the order of temporary custody was a final custody determination for the purposes of jurisdiction under the UCCJEA, and determined that Connecticut would retain jurisdiction over the case and would move forward in adjudicating the termination of parental rights petition as the three conditions required by statute (§ 46b-115n (b)) to make that determination were satisfied, namely, the father did not dispute that Connecticut had become T's home state and that proceedings had not been instituted in any other state, and the court explicitly determined that the order of temporary custody was a final child custody determination for the purposes of jurisdiction under the UCCJEA.

Argued February 15—officially released April 27, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hoffman, J.*; judgment terminating the respondents' parental rights, from which the respondents filed separate appeals to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant in Docket No. 44918 (respondent mother).

Matthew C. Eagan, assigned counsel, for the appellant in Docket No. AC 44923 (respondent father).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee in both appeals (petitioner).

Opinion

SUAREZ, J. In these two appeals, the respondent parents appeal from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of

** April 27, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Children and Families, terminating their parental rights with respect to their minor child, Teagan K.-O. (Teagan). In Docket No. AC 44918, the respondent mother claims that the trial court lacked the statutory authority to terminate her parental rights under General Statutes § 17a-112 because Teagan was not in the custody of the petitioner pursuant to General Statutes § 46b-129. Specifically, she argues that the fact that our Supreme Court ordered that the neglect petition filed with respect to Teagan be dismissed vitiated the statutory predicate for the order of temporary custody over Teagan that had been granted to the petitioner under § 46b-129. In Docket No. AC 44923, the respondent father claims that the trial court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), General Statutes § 46b-115 et seq., to adjudicate the petition for termination of parental rights because (1) the order of temporary custody was not a final custody determination for purposes of establishing jurisdiction under the UCCJEA, and (2) there is no mechanism by which the order of temporary custody could become a final custody determination. We affirm the judgment of the trial court.

The following facts and procedural history, which our Supreme Court recited in a prior appeal in this action, are relevant to our review of the present appeal. "The respondents, both raised in Connecticut, have a lengthy history of involvement with the Connecticut Department of Children and Families [(department)]. Each had been placed in the department's custody as a teenager due to various mental health issues. The respondents' involvement with the department continued after they had children.

"The respondent mother's first child, A, born in Connecticut in 2012, was conceived with someone other than the respondent father. In 2013, the department became involved with A due to concerns about the

mother's mental health, her parenting ability, and domestic violence, as well as concerns about possible physical abuse of A. A was adjudicated neglected, and, thereafter, sole custody was awarded to A's father.

"The respondents subsequently had three children together; the first two children were born in Connecticut. Their first child, G, was removed from the respondents' custody within one month of his birth in 2015, in light of the mother's history and an incident of domestic violence in G's presence. Subsequently, G was adjudicated neglected and placed in the [petitioner's] custody. The respondents' second child, J, was removed from the respondents' custody immediately after his birth in 2016, on the ground that the respondents had not addressed mental health and parenting issues. In March, 2017, J was adjudicated neglected and committed to the [petitioner's] custody. At that same time, the respondents' parental rights with respect to G were terminated.

"In April, 2018, the [petitioner] filed a petition seeking to terminate the respondents' parental rights with respect to J. The mother was then near full-term in her pregnancy with Teagan. The respondents paid a relative to drive them to Gainesville, Florida, where they signed a one year lease for an apartment.

"In May, 2018, Teagan was born in a Gainesville hospital. The hospital contacted the Florida Department of Children and Families after information came to light that the respondents' other children had been removed from their care. Two days after Teagan's birth, when she was ready to be discharged from the hospital, the Florida department took emergency custody of her. The Florida department contacted the Connecticut department to report that the mother had given birth.

"One day after the Florida department took emergency custody of Teagan, the [petitioner] filed a motion in the Connecticut Superior Court for Juvenile Matters at Water-

ford(trial court) seeking temporary custody of Teagan and a petition seeking to adjudicate Teagan neglected on the grounds that she would be subject to conditions injurious to her well-being if she remained in the respondents' care or that she was denied proper care and attention. The motion for temporary custody was denied on the ground that the child was not in Connecticut.

"Shortly thereafter, the Florida department filed in the Circuit Court of the Eighth Judicial Circuit of Florida, Juvenile Division (Florida court), a motion to transfer jurisdiction to the Connecticut trial court on the basis of the family's history with service providers and child protective services in this state. The respondents opposed the motion. A Florida general magistrate held a contested hearing on the motion, at which the respondents were represented by separate counsel. Following the hearing, the magistrate issued a report and a recommendation to grant the motion.

"The recommendation rested on the following factual findings. An open dependency case in Connecticut was then pending on a petition for termination of the respondents' parental rights with respect to Teagan's sibling, J. The [petitioner] wanted to add Teagan to the open dependency case. The respondents had admitted to the Florida department that they traveled to Florida before Teagan's birth to avoid further involvement with the Connecticut department. Witnesses and persons with knowledge of the issues pertaining to Teagan's possible neglect and to the possible termination of the respondents' parental rights as to J reside in Connecticut. The respondents previously had been involved with the Connecticut department as children, and their parental rights with respect to another child had been terminated. Teagan's guardian ad litem and the Connecticut department both supported the transfer of jurisdiction. The Florida court had verified with the Connecticut trial

court, *Driscoll*, *J.*, that the Connecticut court wanted to, and would, accept jurisdiction.

"The magistrate acknowledged that the respondents opposed the transfer of jurisdiction and that, in support of their opposition, they had presented a copy of their Florida lease and represented that the father was employed in Gainesville. The magistrate also acknowledged that the respondents had offered to consent to Teagan's dependency if the Florida court retained jurisdiction, to eliminate the need for witnesses and to allow the court to rely solely on documentation from the Connecticut department to establish a reunification plan. The magistrate noted, however, that the Florida department and Teagan's guardian ad litem represented that they had no intention of offering or supporting reunification should the Florida court retain jurisdiction and, instead, would seek to terminate the respondents' parental rights with respect to Teagan on the basis of the respondents' prior history.

"The magistrate's report concluded: Connecticut is a more convenient forum state, and the court finds that it is in the best interests of the child . . . and will promote the efficient administration of justice to transfer jurisdiction to Connecticut. The following day, after the parties waived the period for filing exceptions to the magistrate's report, the Florida court ratified and adopted the magistrate's recommendation to transfer jurisdiction to the Connecticut court.

"The [petitioner] then renewed her request for an ex parte order for temporary custody of Teagan in the trial court, which the court, *Driscoll*, *J.*, granted. Teagan was brought to Connecticut and placed with the same foster family caring for her sibling, J.

"The father filed a motion to dismiss the pending neglect petition on the ground of lack of subject matter jurisdiction. Appended to the motion were copies of the

respondents' Florida lease, a pay stub from the father's Florida employment, and the father's Florida voter registration card, which was issued after the Florida court proceeding. The [petitioner] opposed the motion, contending that the Florida court's inconvenient forum determination established a basis for the Connecticut trial court's subject matter jurisdiction under the UCCJEA. After a contested hearing on the motion, the trial court, *Hon. Michael A. Mack*, judge trial referee, opened the evidence twice—once to take evidence that the father had appealed from the Florida court's decision granting the motion to transfer, and again to take evidence that the First District Court of Appeal of Florida had issued a per curiam, summary affirmance.

"The Connecticut trial court denied the father's motion to dismiss. The court cited two reasons. First, the trial court reasoned that a Florida District Court of Appeal had affirmed that jurisdiction rests with Connecticut courts, after the respondents had had an opportunity to present evidence in that forum on the matter and had failed to present such evidence. Second, the trial court determined that the respondents could not seek equitable redress because they did not come to the court with clean hands, given their admission to the Florida department that they had traveled to Florida to avoid involvement with the Connecticut department. Ultimately, the trial court concluded that it has subject matter jurisdiction over Teagan's case following the dictates of the [UCCJEA] in that a court of Florida has declined to exercise jurisdiction on the ground that Connecticut is the more appropriate forum, [a Florida District Court of Appeal] has affirmed that, and Connecticut has accepted that conclusion.

"The father appealed from the trial court's decision denying his motion to dismiss to the Appellate Court. [The appeal was transferred to our Supreme Court]

pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. After the father filed his brief with [our Supreme Court], but before the [petitioner] filed her appellate brief, the [petitioner] filed a petition in the trial court seeking to terminate the respondents' parental rights with respect to Teagan." (Footnotes omitted; internal quotation marks omitted.) *In re Teagan K.-O.*, 335 Conn. 745, 748–54, 242 A.3d 59 (2020).

On June 24, 2020, our Supreme Court reversed the judgment of the trial court and remanded the case with direction to grant the respondent father's motion to dismiss. Id., 747, 786. The court concluded that the trial court lacked jurisdiction over the neglect petition that the petitioner had filed in Teagan's interest on May 25, 2018, because, as of that day, Teagan was not present in the state, as required under General Statutes § 46b-121 (a) (1). Id., 765–67. The court further concluded that the failure to satisfy the territorial limitation set forth in § 46b-121 prevented Connecticut courts from exercising jurisdiction over the neglect petition, "irrespective of whether the conditions for exercising jurisdiction under the UCCJEA would be met." Id., 767. Accordingly, the court reversed the judgment of the trial court and remanded the case with direction to dismiss the neglect petition. Id., 786.

Relevant to our resolution of the present appeal, the court clarified the following in a footnote: "Our conclusion that the trial court lacks jurisdiction over the [petitioner's] neglect petition has no effect on the order granting the [petitioner] temporary custody of Teagan. The father did not challenge that order, and Teagan's presence in this state is sufficient to establish a basis for temporary emergency custody. Teagan has resided with her sibling's foster family since the Connecticut trial court issued the order placing her in the [petitioner's] temporary custody. It is significant to note that

our decision is limited to the question of whether Connecticut has jurisdiction to make a final custody decision at the time the custody proceeding was commenced. We have no occasion, in this appeal, to consider whether the UCCJEA would provide another mechanism by which such a temporary order could become a final custody determination under the facts of this case . . . or whether Teagan could remain in the care of her sibling's foster family even if the issue of a final custody determination is made by a Florida court. . . . Should either of those issues, or any other, arise hereafter, they will be addressed in the first instance by a Connecticut court." (Citations omitted.) Id., 786–87 n.33.

The following additional undisputed procedural history is relevant to this appeal. After our Supreme Court's decision was released, counsel for the respondent parents and counsel for the petitioner participated in a conference call with representatives and attorneys from the Florida department. During the call, Attorney Stefanie Camfield, assistant general counsel for the Florida department, indicated that the Florida department required more information about the status of Teagan's case in order to decide how to proceed following our Supreme Court's decision. The petitioner then filed a motion asking the trial court to release its records regarding Teagan to Camfield and to the Florida department.

The petitioner also filed a motion for in-court review so that the trial court could dismiss the neglect petition in accordance with our Supreme Court's decision and so that the parties could address how that decision impacted the pending termination of parental rights petition. Two days later, the respondent father filed a motion in which he asked the court to vacate its order vesting temporary custody of Teagan in the petitioner and to immediately turn over physical custody of Tea-

gan to her parents. In support of his motion, the respondent father cited only our Supreme Court's decision. The petitioner objected to the motion, representing that the respondent parents had not had any contact with Teagan in nearly one year and that their circumstances had not changed such that they could safely care for Teagan. Counsel for Teagan also objected to the motion. Following our Supreme Court's ruling, the respondent mother did not file a motion for reconsideration or otherwise raise an issue about the effect of the dismissal of the neglect petition on the order of temporary custody.

The court, *Driscoll*, *J.*, held an in-court review in which it heard arguments with respect to these motions and objections on August 4, 2020. The court, by agreement of all of the parties, granted the petitioner's motion to release the court's records to Camfield, who participated in the hearing virtually from Tallahassee, Florida. The court also dismissed the neglect petition pursuant to the order of our Supreme Court and indicated that it would not grant the respondent father's motion to vacate the order of temporary custody without holding a hearing. The respondent parents did not request an evidentiary hearing, nor did they argue that the order of temporary custody should be vacated as a matter of law.

During the in-court review, Camfield reported that the Florida department had reviewed our Supreme Court's decision and that Teagan would have to "physically reenter Florida in order for [the Florida department] to effectuate a new shelter on that child." Camfield further asserted that the Florida department "cannot shelter a child that's in another state." When asked if the Florida department was declining jurisdiction, Camfield responded: "I don't know if it's declining jurisdiction so much as stating that we do not have jurisdiction over that child by virtue of her being [in

Connecticut] for so long." The court then scheduled a case status conference[1] so that the parties could discuss how to proceed. The case status conference was held on August 20, 2020, during which Camfield again expressed the Florida department's reservations about reinstituting proceedings in Florida, given that Teagan was residing in Connecticut.

On August 26, 2020, the petitioner filed a motion for order regarding jurisdiction, in which she asked the court to find that it had jurisdiction over Teagan's case, including the pending petition for termination of parental rights pursuant to General Statutes § 46b-115n. The petitioner argued in her motion that § 46b-115n, a provision of the UCCJEA that has been adopted by both Connecticut and Florida, is the provision that our Supreme Court determined to empower the Superior Court to exercise temporary emergency jurisdiction over Teagan, although it had originally lacked jurisdiction over the neglect petition filed with respect to Teagan. The petitioner further argued that under § 46b-115n (b) temporary emergency jurisdiction can become permanent if three conditions are satisfied: "(1) A child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under a provision substantially similar to section 46b-115k, 46b-115*l* or

[1] A case status conference is a procedure in juvenile matters, including termination of parental rights proceedings, used to discuss a pending case and encourage settlement. See Practice Book §§ 35a-2 and 35a-18. "When the allegations of the petition are denied, necessitating testimony in support of the petitioner's allegations, the case shall be continued for a case status conference . . . ." Practice Book § 35a-2 (a). "Parties with decision-making authority to settle must be present or immediately accessible during a case status conference . . . ." Practice Book § 35a-2 (b). "At the case status conference . . . all attorneys and self-represented parties will be prepared to discuss the following matters: (1) Settlement; (2) Simplification and narrowing of the issues; (3) Amendments to the pleadings; (4) The setting of firm trial dates; (5) Preliminary witness lists; (6) Identification of necessary arrangements for trial . . . (7) Such other actions as may aid in the disposition of the case." Practice Book § 35a-2 (c).

46b-115m; (2) this state has become the home state of the child; and (3) the child custody determination provides that it is a final determination." General Statutes § 46b-115n (b). The petitioner asserted that the first two of these conditions had already been satisfied by the facts that Florida had declined jurisdiction and that the child had been living in Connecticut for more than six months. The petitioner further asserted that the court should satisfy the third condition by making "clear that the order of temporary custody that [the court] issued on June 25, 2018, is a final custody determination for purposes of jurisdiction under the UCCJEA."

The trial court, *Hoffman*, *J.*, held a hearing on the motion on September 24, 2020. At the hearing, both parents stipulated to the fact that the first two conditions of § 46b-115n (b) were satisfied, acknowledging that Connecticut had become Teagan's home state and that no proceedings regarding Teagan had been instituted in another state.[2] The respondent father's counsel objected to the petitioner's motion because "[the respondent father believed] that jurisdiction was improperly exercised over the child from the outset. And as a consequence, could not be turned into proper jurisdiction just because the child was kept [in Connecticut]." At the hearing, the respondent mother did not argue, as she does now, that the court lacked the statutory authority to terminate her parental rights because the neglect petition, on which the order of temporary custody was based, had been dismissed.

[2] A child's "[h]ome state," as defined by the UCCJEA, "means the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. . . ." General Statutes § 46b-115a (7). In the present case, Teagan had resided continuously in Connecticut since June, 2018, more than six months before the petitioner filed the termination petition. With respect to the second condition, Camfield confirmed that the Florida department had not instituted any proceedings in Florida regarding Teagan.

Following the argument, the court granted the petitioner's motion. The court explicitly found "that the order of temporary custody that was issued on June 25, 2018, is a final child custody determination for the purposes of jurisdiction under the UCCJEA. There is no other state in which [a] custody proceeding has been commenced. That Connecticut is Teagan's home state under the UCCJEA and the order of temporary custody that Judge Driscoll issued on June [25, 2018] constitutes a final child custody determination. And the court rules that as a matter of law, it has proper jurisdiction over Teagan's case under the statutes."

After concluding that it had jurisdiction under the UCCJEA, the court, *Hoffman*, *J.*, consolidated for trial the termination of parental rights petition with the respondent father's motion seeking to vacate the order of temporary custody. The consolidated trial began on March 18, 2021. The court conducted the trial via Microsoft Teams at the request of the respondent parents, who continued to reside in Florida. Following the trial, on July 1, 2021, the court issued a memorandum of decision in which it terminated the parental rights of the respondent parents as to Teagan.

At the outset of its decision, the court noted that it had "found as a matter of law and fact that it may properly exercise jurisdiction over Teagan's case under § 46b-115n (b), including adjudicating the underlying termination of parental rights petition." The Superior Court may grant a petition for termination of parental rights if it finds by clear and convincing evidence that (1) the department has made reasonable efforts to locate the parent and reunify the child with the parent, (2) termination is in the best interest of the child, and (3) there exists one or more of the stated adjudicatory grounds for termination of parental rights. See General Statutes § 17a-112. The court found that the petitioner had proven by clear and convincing evidence the three

elements necessary to grant the termination petition: (1) the department had made reasonable efforts to reunify Teagan with her parents and that they were unable or unwilling to benefit from reunification efforts; (2) it was in the best interest of Teagan to terminate the respondent parents' rights; and (3) there existed an adjudicatory ground for terminating the respondent parents' rights. From this judgment, both parents appealed.

In its memorandum of decision, the court also denied the respondent father's motion to vacate the order of temporary custody and immediately reunify Teagan with him. With respect to the respondent father's motion, the court found that, "in light of [its] findings [of fact] on the termination of parental rights [petition] there is no factual basis to vacate the order of temporary custody in that father's circumstances have not changed such that he can now safely care for Teagan." Additional facts and procedural history will be set forth as necessary.

I

AC 44918

On appeal, the respondent mother does not challenge the court's factual findings. Rather, she claims that the judgment terminating her parental rights should be reversed because the court lacked the statutory authority to adjudicate the termination petition. Specifically, she claims that "[w]hen the neglect petition in this case was dismissed on August 4, 2020, it vitiated the statutory predicate for the issuance of the temporary custody order under § 46b-129 (b)." The respondent mother argues, on the basis of the alleged defect in the order of temporary custody, that "the trial court was without statutory authority to adjudicate the parental rights termination petition filed pursuant to . . . § 17a-112" because Teagan was not in the petitioner's custody in accordance with § 46b-129 (b), as required under § 17a-

112.[3] Because we determine that the respondent mother's claim is an impermissible collateral attack on the order of temporary custody, we decline to review the merits of this claim. We therefore affirm the judgment of the trial court.

We begin by setting forth the legal principles relevant to the respondent mother's appeal. "The right of appeal is purely statutory [and stems from General Statutes § 52-263]. It is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met. . . . Not only must the appellant be aggrieved by the decision of the court, but the appeal must be taken from a final judgment of the court. Because our jurisdiction over appeals, both criminal and civil, is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . General Statutes § 46b-142 (b), regarding juvenile matters, provides in relevant part: The Department of Children and Families, or any party at interest aggrieved by any final judgment or order of the court, may appeal to the Appellate Court in accordance with the provisions of section 52-263. . . . Thus, it is important for us to determine initially whether the determinations made regarding neglect and temporary custody were final for purposes of appeal.

"In general, we recognize the statutory principle that appellate jurisdiction is limited to appeals from final judgments. We also recognize, however, that there is a

[3] General Statutes § 17a-112 (a) provides in relevant part: "*In respect to any child in the custody of the Commissioner of Children and Families in accordance with section 46b-129*, either the commissioner, or the attorney who represented such child in a pending or prior proceeding, or an attorney appointed by the Superior Court on its own motion, or an attorney retained by such child after attaining the age of fourteen, may petition the court for the termination of parental rights with reference to such child. . . ." (Emphasis added.)

gray area between those judgments which are undoubtedly final and others that are clearly interlocutory and not appealable. . . . The *Curcio* rule provides that [a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them. *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 556 (1983)]. Thus, there have been occasions [i]n both criminal and civil cases, [in which] we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. . . . We note the existence of a narrow category of cases in which certain temporary orders have been held to be appealable final judgments because they so conclude the rights of a party that further proceedings could not affect them. . . .

"In *Madigan* v. *Madigan*, [224 Conn. 749, 753–54, 620 A.2d 1276 (1993)], we applied the *Curcio* standard to determine whether, in the context of a dissolution case, an order of temporary custody was a final judgment for purposes of appeal. In that case, temporary custody orders were entered in favor of the defendant wife during the pendency of a dissolution proceeding in the Superior Court. . . . The plaintiff husband appealed from the temporary custody orders on the grounds that they would interfere with his right to spend significant time with his child, and that such an opportunity cannot be replaced by a subsequent order of custody as part of an ultimate dissolution judgment. . . . The Appellate Court dismissed his appeal for lack of a final judgment. . . . We granted certification to appeal regarding the issue of the finality of the temporary custody order and reversed the Appellate Court's judgment. . . .

"Relying on the second prong of the *Curcio* test, we concluded in *Madigan* that denying immediate relief to

an aggrieved parent [would interfere] with the parent's custodial right over a significant period [of time] in a manner that [could not] be redressed by a later appeal. . . . Even a temporary custody order may have a significant impact on a subsequent permanent custody decision . . . [by] establish[ing] a foundation for a stable long-term relationship that becomes an important factor in determining what final custodial arrangements are in the best interests of the child. . . . We concluded that temporary custody orders did so [conclude] the rights of the parties that further proceedings [could not] affect them . . . and, therefore, they were final for purposes of appeal. . . .

"[C]ourts and state agencies must keep in mind the constitutional limitations imposed [upon them when they undertake] any form of coercive intervention in family affairs . . . [which includes] the right of the family to remain together without the . . . interference of the awesome power of the state. . . . Thus, we consider orders of temporary custody in light of these constitutional considerations and reaffirm our conclusion that an immediate appeal of [a court order of temporary custody] is the only reasonable method of ensuring that the important rights surrounding the parent-child relationship are adequately protected. . . . Accordingly, we conclude that, in order to protect the parent's interest in retaining custody of the child, an order of temporary custody is a final judgment for purposes of appeal. That reasoning means, moreover, that any party with standing to challenge that order by appeal must do so at that time." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *In re Shamika F.*, 256 Conn. 383, 400–405, 773 A.2d 347 (2001).

Moreover, "temporary custody orders are immediately appealable not only to protect a parent's interest

in their children, but also to protect the individual interests of the children. . . .

"[S]uch appeals are obligatory so that parents may act in the best interest of their children. A grave injustice would be committed against children if a parent were permitted to appeal from a judgment of temporary custody long after they had established a stable relationship with foster parents. We therefore protect the best interest of the children by requiring parents immediately to appeal decisions that . . . interfere substantially with their family integrity. Those parents must do so in a timely fashion not only to protect themselves, but also to protect the children. Appealing from a temporary custody order after allowing children to languish in foster care for three years does nothing for family integrity. To the contrary, it would interfere seriously with their ability to experience any kind of family stability with either a biological parent or a foster family, even in situations where parents have demonstrated a total lack of interest in reunifying the family. We, therefore, limit a parent's right to attack collaterally a temporary custody order in order to avoid further disruption of the lives of neglected children. By doing so, not only are we protecting the parent-child relationship, but we are also protecting the important interests of the children.

"The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these

or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. Unless it is entirely invalid and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it. . . . Although public policy in Connecticut favors the protection of the integrity of the family, there is also a strong public policy in favor of protecting the best interest of our children. It is in the best interest of the children, especially those growing up in situations of neglect, that the state provide them with a stable family life to the extent that it is able to do so. The [petitioner] and the department seek to do this through our state foster care system. Allowing a collateral attack [several] years into that effort would undermine the purpose of the collateral attack rule as well as the goal of our state agencies in protecting the neglected children of Connecticut." (Citation omitted; internal quotation marks omitted.) Id., 405–407.

In *In re Shamika F.*, which involved strikingly similar facts to the present case, the respondent parents moved back and forth between New York and Connecticut several times, during which time the department investigated reports of neglect. Id., 386–87. After the family returned to Connecticut, the department received another report that the respondents' minor children had been neglected. Id. The petitioner then filed neglect petitions with respect to the children and sought ex parte orders vesting her with temporary custody of the children. Id., 387. The court issued the orders of temporary custody, and neither parent challenged the court's jurisdiction at that time. Id., 387–88.

More than two years later, after the petitioner had filed petitions for termination of parental rights, the respondent father argued in a motion for in-court review "that the court should consider transferring the case

to the New York state child protection agency and the Interstate Compact on the Placement of Children." Id., 390–93. The court denied the motion. Id., 393. Prior to the termination of parental rights trial, the respondent father again challenged the court's jurisdiction by filing a motion in which he claimed that Connecticut lacked jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA), General Statutes (Rev. to 1999) § 46b-90 et seq., the predecessor to the UCCJEA. Id., 394–95. Specifically, he argued that the court lacked jurisdiction over the termination of parental rights petitions because New York, rather than Connecticut, was the children's home state at the time the neglect petitions were filed. Id., 395. The trial court disagreed, denied the motion, and held a trial on the petitions for termination of parental rights. Id., 397. Following the trial, the court terminated the parental rights of the respondent parents. Id., 398. On appeal, the respondent father challenged the trial court's decision to terminate his parental rights based on the alleged jurisdictional error that the court had committed during the proceedings on the orders of temporary custody. Id., 398. Our Supreme Court declined to consider the father's jurisdictional claim because "[h]e had a fair chance to [litigate the issue of Connecticut's jurisdiction] at the time of the neglect and temporary custody proceedings, and he failed to act." Id., 408. The court further noted that "his failure to act at the time the temporary custody orders were entered does not give him a right at this late date to launch a collateral attack on the neglect and temporary custody proceedings." Id., 407.

In the present case, the respondent mother did not appeal from the June, 2018 order of temporary custody, which was a final judgment for purposes of appeal. She now attempts to attack the judgment terminating her parental rights by challenging the June, 2018 order of temporary custody. On appeal, the respondent mother

argues that the order of temporary custody, "as a matter of law, could not be sustained in accordance with . . . § 46b-129 once the underlying neglect petition was dismissed." She further argues that, "[t]here being no legal basis for the [petitioner] to have custody of Teagan under . . . § 46b-129, the trial court was without statutory authority to adjudicate the parental rights termination petition filed pursuant to . . . § 17a-112." This is the only claim that she advances on appeal.

Just as the respondent father in *In re Shamika F.*, the respondent mother in the present case had a fair chance to litigate any issue with respect to the order of temporary custody at the time that it was issued, and again when the neglect petition was dismissed, but she failed to do so. At the time of the termination of parental rights trial, the order of temporary custody had been in place for nearly three years, and it had remained in effect for more than seven months following the dismissal of the neglect petition. At no point during that period did the respondent mother claim that there was a defect in the order of temporary custody, nor did she move to have the temporary order vacated. As we iterated previously in this opinion, it is well settled that "any party with standing to challenge [an] order [of temporary custody] by appeal *must do so at that time*." (Emphasis added.) Id., 405. The respondent mother's failure to appeal from the order of temporary custody precludes her from launching a collateral attack on the temporary custody proceedings following the termination of her parental rights. We, therefore, decline to reach the merits of this claim on appeal.

II

AC 44923

On appeal, the respondent father claims that the court lacked jurisdiction under the UCCJEA to adjudicate the petition for termination of parental rights. Specifically,

he claims that "the statutes implicated do not allow the trial court to convert a temporary order into a final custody determination" and, therefore, "the trial court never had . . . jurisdiction" to decide the termination of parental rights petition.[4] We disagree.

We begin by setting forth the legal principles relevant to the respondent father's appeal. This appeal requires us to interpret certain provisions of the UCCJEA. The UCCJEA was "adopted by this state in 1999 . . . [and] replaced a largely similar scheme adopted in 1978, known as the [UCCJA]." (Citation omitted.) *In re Teagan K.-O.*, supra, 335 Conn. 760. "The purposes of the UCCJEA are to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; promote cooperation with the courts of other states; discourage continuing controversies over child custody; deter abductions; avoid [relitigation] of custody decisions; and to facilitate the enforcement of custody decrees of other states. . . . The UCCJEA addresses [interjurisdictional] issues related to child custody and visitation. . . . The UCCJEA is the enabling legislation for the court's jurisdiction." (Internal quotation marks omitted.) *Parisi* v. *Niblett*, 199 Conn. App. 761, 770, 238 A.3d 740 (2020). "To effect [these purposes], the UCCJEA provides rules for determining jurisdiction in

[4] We note that, in his brief, the respondent father framed his argument in terms of subject matter jurisdiction. Our Supreme Court, however, in the respondent father's first appeal, explained that "the UCCJEA does not confer subject matter jurisdiction on our courts but instead determines whether our courts may exercise existing jurisdiction or must defer to another state's jurisdiction . . . ." *In re Teagan K.-O.*, supra, 335 Conn. 782. The trial court had subject matter jurisdiction over this child protection case because General Statutes §§ 46b-1 and 46b-121 grant the Superior Court subject matter jurisdiction over juvenile matters, including "all proceedings . . . concerning . . . termination of parental rights of children committed to a state agency . . . ." General Statutes § 46b-121 (a) (1). The issue in the present appeal is whether the UCCJEA required the trial court to defer to another state's jurisdiction.

custody cases involving multiple states." (Internal quotation marks omitted.) *In re Teagan K.-O.*, supra, 775.

The UCCJEA sets out three means by which a state may exercise jurisdiction over a child custody case that involves multiple states. Depending on the circumstances, a state can (1) make an initial child custody determination, (2) modify a child custody determination made by another state, or (3) exercise temporary emergency jurisdiction. See General Statutes § 46b-115k (initial child custody jurisdiction); General Statutes § 46b-115m (modification jurisdiction); General Statutes § 46b-115n (temporary emergency jurisdiction).

When making an initial child custody determination, there are several possible bases for a Connecticut court to exercise jurisdiction. See General Statutes § 46b-115k (a) (1) through (6). "[A Connecticut] court has jurisdiction to make an initial custody determination if: (1) This state is the home state of the child on the date of the commencement of the child custody proceeding; (2) This state was the home state of the child within six months of the commencement of the child custody proceeding, the child is absent from the state, and a parent or a person acting as a parent continues to reside in the state; (3) A court of another state does not have jurisdiction under subdivisions (1) or (2) of this subsection, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships; (4) A court of another state which is the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision substantially similar to section 46b-115q or section 46b-115r, the child and at least one parent or person acting as a parent have a significant

connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships; (5) All courts having jurisdiction under subdivisions (1) to (4), inclusive, of this subsection have declined jurisdiction on the ground that a court of this state is the more appropriate forum to determine custody under a provision substantially similar to section 46b-115q or section 46b-115r; or (6) No court of any other state would have jurisdiction under subdivisions (1) to (5), inclusive, of this subsection. . . ." General Statutes § 46b-115k (a).

Even if a Connecticut court lacks jurisdiction to make an initial child custody determination, it nevertheless may exercise temporary emergency jurisdiction. See General Statutes § 46b-115n (a). Under § 46b-115n (a), "[a] court of this state [may exercise] temporary emergency jurisdiction if the child is present in this state and (1) the child has been abandoned, or (2) it is necessary in an emergency to protect the child . . . ." Section 46b-115n (b) further provides in relevant part: "If there is no previous child custody determination that is enforceable under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction . . . a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction . . . . A child custody determination made under this section shall be a final determination if: (1) A child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under a provision substantially similar to section 46b-115k, 46b-115*l* or 46b-115m; (2) this state has become the home state of the child; and (3) the child custody determination provides that it is a final determination."

The respondent father claims that the court lacked jurisdiction under the UCCJEA to adjudicate the petition for termination of parental rights because the court

did not make a final child custody determination. The respondent father makes two specific arguments with respect to this claim. First, he argues that the June 25, 2018 order vesting temporary custody of Teagan in the petitioner could not be a final child custody determination because it was, by definition, temporary, rather than final. Second, the respondent father argues that § 46b-115n (b) did not allow the trial court to later convert the order of temporary custody into a final child custody determination. The manner in which the respondent father frames his arguments, however, is legally flawed and does not accurately characterize the relevant issue in the present case. The petitioner's motion for order regarding jurisdiction asked the court to make a final determination of *jurisdiction* and to determine which forum would retain jurisdiction over the child custody proceedings. In adjudicating the motion, during the September 24, 2020 hearing, the court found "that the order of temporary custody that was issued on June 25, 2018, is a final custody determination *for the purposes of jurisdiction of the UCCJEA*." (Emphasis added.) What the respondent father misconstrues in framing his arguments is that the order of temporary custody did not become a final custody determination at the September 24, 2020 hearing, but, rather, the court issued a final determination of jurisdiction. Specifically, the court determined that Connecticut would retain jurisdiction over the matter and would move forward in adjudicating the termination of parental rights petition. Despite the flaw in the manner in which the respondent father has couched his arguments, after considering their substance, we believe that they are more accurately framed as whether a court's exercise of temporary emergency jurisdiction can become a final determination of jurisdiction under § 46b-115n (b), and, if so, whether a final determination of jurisdiction was made in the present case.

In order to determine whether a court's exercise of temporary emergency jurisdiction can become a final

determination of jurisdiction under § 46b-115n (b), we must interpret the relevant statutory language of § 46b-115n. "[O]ur fundamental objective [in statutory construction] is to ascertain and give effect to the apparent intent of the legislature . . . ." (Internal quotation marks omitted.) *State* v. *Panek*, 328 Conn. 219, 225, 177 A.3d 1113 (2018). General Statutes § 1-2z provides that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." In *State* v. *Panek*, supra, 225–26, our Supreme Court noted that, "[w]hen a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citation omitted; internal quotation marks omitted.) Further, "[w]e do not read statutory language in isolation, but rather must consider it within the context of the statute as a whole and in harmony with surrounding text." *Norris* v. *Trumbull*, 187 Conn. App. 201, 219, 201 A.3d 1137 (2019). Finally, we note that "[i]ssues of statutory construction . . . are . . . matters of law subject to our plenary review." (Internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 730, 224 A.3d 525 (2020).

On the basis of the plain language of § 46b-115n (b), we determine that a child custody determination made

pursuant to the court's temporary emergency jurisdiction can become a final determination of jurisdiction when the conditions of that statute are satisfied. Section 46b-115n (b) provides in relevant part that "[a] *child custody determination made under this section shall be a final determination if*: (1) A child custody proceeding has not been or is not commenced in a court of a state having jurisdiction . . . (2) this state has become the home state of the child; and (3) the child custody determination provides that it is a final determination." (Emphasis added.) In order to interpret this provision, we turn to the definition of a "child custody determination" under the statute. A " '[c]hild custody determination' means a judgment, decree, or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, *temporary*, initial and modification order. . . ." (Emphasis added.) General Statutes § 46b-115a (3). As we noted previously in this opinion, § 46b-115n (b) provides that "[a] child custody determination made under this section shall be a final determination" if the three stated conditions are satisfied. It follows that a child custody determination, which by definition includes a *temporary* order, can become a "final determination" if the conditions set forth in § 46b-115n (b) are met.

In order to ascertain the meaning of "final determination," which our legislature did not define, we turn to the dictionary definition of "determination." "In interpreting statutes, words and phrases not otherwise defined by the statutory scheme are construed according to their commonly approved usage . . . . In determining the commonly approved usage of the statutory language at issue, we consult dictionary definitions." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Edge Fitness, LLC*, 342 Conn. 25, 32, 268 A.3d 630 (2022). Merriam-

Webster's Collegiate Dictionary defines "determination," inter alia, as "a judicial decision settling and ending a controversy." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 340. It follows that a final "determination" under § 46b-115n (b) means the settling or ending of a controversy with respect to this section. Section 46b-115n (b) governs the court's temporary emergency jurisdiction, establishing when the court may exercise temporary emergency jurisdiction, how long orders made pursuant to the court's temporary emergency jurisdiction will last, and how to settle disputes of jurisdiction that occur when another state claims that it has jurisdiction or has commenced a custody proceeding with respect to the same child. See General Statutes § 46b-115n. A "controversy" under this section, therefore, refers to the issue of which state is going to exercise jurisdiction over a child custody proceeding in cases involving multiple states. Thus, a "final determination" for the purposes of § 46b-115n (b) means a final determination of jurisdiction.

Further, § 46b-115n (b) provides in relevant part that "[a] child custody determination made under this section shall be a final determination if: (1) A child custody proceeding has not been or is not commenced in a court of a state having jurisdiction . . . (2) this state has become the home state of the child; and (3) the child custody determination provides that it is a final determination." As we explained previously in this opinion, the conditions that must be met in order for a child custody determination to become a "final determination" focus on jurisdictional conflicts such as whether another state has attempted to exercise jurisdiction over the proceeding and whether the state that issued an order pursuant to its temporary emergency jurisdiction has become the home state of the child. This indicates that the controversy for which there is a "final determination" under § 46b-115n (b) is the issue of which state will

exercise jurisdiction over the child custody proceeding. Therefore, the language of § 46b-115n (b) is susceptible to only one reasonable interpretation, namely, that a "final determination" refers to a determination of which state will exercise jurisdiction over the proceedings.

Our interpretation is bolstered by other relevant language in § 46b-115n (b). Section 46b-115n (b) provides in relevant part that "[if] there is no previous child custody determination that is enforceable under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction . . . a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction . . . ." Because § 46b-115n governs temporary emergency jurisdiction, the statute's reference to "[a] child custody determination *made under this section*" refers to a child custody determination made pursuant to the court's temporary emergency jurisdiction. (Emphasis added.) General Statutes § 46b-115n (b). A custody determination made under § 46b-115n (b) remains in effect only "until an order is obtained from a court of a state having jurisdiction . . . ." By its plain language, § 46b-115n (b) establishes that a custody determination made by a court pursuant to its temporary emergency jurisdiction is "temporary" in that it lasts only until an order is obtained from a state that has preferred jurisdiction. This language is significant because it establishes that the limitation on a court's temporary emergency jurisdiction is the existence of a state with preferred jurisdiction. If there is no state that has preferred jurisdiction or if an order is never obtained from a court of a state with preferred jurisdiction, it follows that Connecticut's jurisdiction would continue.

The language of § 46b-115n (c) further supports our interpretation. It is well settled that "the legislature is always presumed to have created a harmonious and

consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008). Section 46b-115n (c) provides in relevant part: "If there is a previous child custody determination that is enforceable under this chapter or if a child custody proceeding has been commenced in a court of a state having jurisdiction . . . the court of this state which issues an order pursuant to this section shall specify that such order is effective for a period of time which the court deems adequate to allow the person seeking an order to obtain such an order from the other state which has jurisdiction. *Such order shall be effective for that period of time specified in the order or until an order is obtained from the other state whichever occurs first.*" On the basis of the plain language of § 46b-115n (c), an order pursuant to the court's temporary emergency jurisdiction is effective "for that period of time specified in the order or until an order is obtained from [another] state . . . ." This indicates that the temporary nature of temporary emergency jurisdiction has to do with the expiration of the order itself or the exercise of jurisdiction by another state with preferred jurisdiction. If the court's temporary emergency jurisdiction is not cut short by either of those occurrences, however, § 46b-115n (b) provides that the court's temporary emergency jurisdiction can become a final determination of jurisdiction under certain circumstances.

On reading § 46b-115n (b) and considering it in the context of § 46b-115n as a whole, the only reasonable

interpretation of that statute is that an exercise of the court's temporary emergency jurisdiction can become a final determination of jurisdiction if the three conditions set forth in § 46b-115n (b) are satisfied. In other words, if Connecticut has become the home state of the child, a child custody proceeding has not been commenced by another state having jurisdiction, and the child custody determination provides that it is a final determination, Connecticut's temporary emergency jurisdiction can ripen into a final determination of jurisdiction.[5]

Because we conclude that an exercise of temporary emergency jurisdiction under § 46b-115n (a) can become a final determination of jurisdiction under § 46b-115n (b), we must now address whether the conditions required to do so were satisfied in the present case. As we stated previously in this opinion, the respondent father does not dispute that the first two conditions had been met, namely, that Connecticut had become Teagan's home state and that proceedings had not been instituted in any other state. He stipulated to these facts during the September 24, 2020 hearing. We conclude that the third condition was satisfied because the court explicitly determined during the September 24, 2020 hearing "that the order of temporary custody that was issued on June 25, 2018, is a final child custody determination for the purposes of jurisdiction of the UCCJEA." Thus, the court made the explicit finding that all three conditions of § 46b-115n (b) had been satisfied during the hearing on September 24, 2020. When it did so, the court made a final determination for the purposes of jurisdiction, deciding that it would retain jurisdiction over this matter and later adjudicate the termination of parental rights petition.

[5] Section 46b-115n is based on § 204 of the UCCJEA, a model act that Connecticut has adopted. We note that our interpretation of § 46b-115n (b) is consistent with the official commentary to § 204 of the UCCJEA, upon which § 46b-115n is based. See Unif. Child Custody Jurisdiction Enforcement Act (1997) § 204, comment, 9 U.L.A. (Pt. 1A) 518–19 (2019).

We conclude that there was a final determination for the purposes of jurisdiction under the UCCJEA. Therefore, the court had jurisdiction to adjudicate the petition for termination of the respondent father's parental rights. Because we determine that the court had jurisdiction to adjudicate the petition, and because the jurisdictional claim is the only claim that the respondent father advances on appeal, we affirm the judgment of the court terminating the respondent father's parental rights.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BENNIE GRAY, JR. (AC 43339)

Prescott, Moll and Cradle, Js.

Syllabus

Convicted, after a jury trial, of the crime of possession of narcotics with intent to sell, the defendant appealed to this court. After observing a suspected narcotics transaction between the defendant and D, police officers recovered crack cocaine on D and seized $1268 in cash from the defendant. Prior to trial, the defendant filed a motion for discovery requesting that the state produce the money seized during his arrest. The state responded that it could not produce the exact currency because the police department, in accordance with its policy, had deposited those funds immediately into a secure bank account. The defendant subsequently filed a motion to dismiss the charges against him or, in the alternative, to suppress any evidence relating to the currency, which the trial court denied. Also prior to trial, the state provided the defendant with a copy of a forensic lab report describing the narcotics as being contained within "knotted plastic," which contradicted certain other pretrial statements. The defendant argued that these discrepancies presented a chain of custody issue and requested that his standby counsel subpoena the lab for any photographs taken of the seized narcotics. At trial, a forensic lab employee produced two photographs of the narcotics as initially received by the lab, which were admitted into evidence as a defense exhibit, and testified that the narcotics appeared to be contained within a knotted plastic bag. The defendant presented testimony, during his case-in-chief, that the narcotics were "loose" when recovered by the

police, and not placed into a plastic bag, then moved for a judgment of acquittal based on the chain of custody issue. After the state recalled certain witnesses on rebuttal, the trial court denied the defendant's motion for a judgment of acquittal. When the defendant asked to call additional lab employees as witnesses, the state presented additional testimony from forensic lab employees and introduced an enlarged copy of one of the forensic lab photographs already in evidence. The witnesses testified that what they originally believed to be knotted plastic looked to be a glare or reflection in the enlarged photograph. The trial court subsequently denied the defendant's postverdict motions for a new trial or, in the alternative, a mistrial, based on the state's late disclosure of the forensic lab photographs. *Held*:

1. The trial court did not violate the defendant's right to due process under article first, § 8, of the state constitution by denying his pretrial motion to dismiss the charges against him or, in the alternative, to suppress any evidence relating to the currency seized during his arrest: although this court determined that the police department's improper disposition of the currency violated the requirements of the applicable statute (§ 54-36a (b) (3) (B)) and demonstrated a reckless disregard of the defendant's right to a hearing on the currency's disposition, this court also concluded, applying the factors set forth in *State* v. *Asherman* (193 Conn. 695), that the seized currency was immaterial because it was speculative whether the defendant's examination or testing of the currency would have led to exculpatory evidence that affected the outcome of the proceeding, the currency's absence was unlikely to lead to misinterpretation of the evidence by the jury, and, considering the strength of the state's case, as well as the defendant's opportunity to engage in unfettered cross-examination and to raise doubt about the significance of the seized currency during closing argument, the defendant was not prejudiced by the currency's unavailability.

(*One judge concurring separately*)

2. The defendant could not prevail on his claim that the trial court abused its discretion by denying his postverdict motions for a new trial or, in the alternative, a mistrial, as the defendant failed to demonstrate that the state's late disclosure of the forensic lab photographs violated his right to due process under *Brady* v. *Maryland* (373 U.S. 83): the defendant could not demonstrate that the forensic lab photographs were favorable to his defense because, although there was confusion at trial regarding the presence of a knotted plastic bag with the narcotics, the enlarged photograph clearly demonstrated that the photographs at issue did not depict knotted plastic and, therefore, did not support his challenge to the chain of custody.

3. This court declined to review the defendant's claim that the trial court abused its discretion by permitting the state to present as evidence the enlarged lab photograph of the narcotics and related witness testimony on rebuttal, the defendant having invited any error that may have arisen

from the trial court's decision to permit such evidence: although the defendant initially argued against the state's introduction of witness testimony on rebuttal, he repeatedly asked to call additional lab employees to testify as to the forensic lab photographs and documents related to the narcotics after the court denied his motion for a judgment of acquittal and, only thereafter, did the witnesses examine the enlarged photograph and testify that what originally appeared to be knotted plastic was actually glare or reflected light; moreover, the defendant was given a full and fair opportunity to cross-examine the witnesses regarding the condition in which the lab received the narcotics and to elicit testimony regarding any discrepancies.

Argued October 19, 2021—officially released May 3, 2022

Procedural History

Substitute two part information charging the defendant, in the first part, with one count each of the crimes of possession of narcotics with intent to sell and possession of narcotics, and, in the second part, with having previously been convicted of possession of narcotics with intent to sell, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the first part of the information was tried to the jury before *Kwak*, *J.*; verdict of guilty of possession of narcotics with intent to sell; thereafter, the defendant pleaded guilty to the second part of the information; subsequently, the state entered a nolle prosequi as to the charge of possession of narcotics; thereafter, the court, *Kwak*, *J.*, rendered judgment of guilty in accordance with the verdict and the plea, from which the defendant appealed to this court. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Sarah Bowman*, assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Bennie Gray, Jr., appeals from the judgment of conviction, rendered after a jury

trial, of possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a). On appeal, the defendant claims that the trial court (1) improperly denied his motion to dismiss the charges against him or, in the alternative, to suppress any evidence relating to currency seized during his arrest, thereby violating his right to due process under article first, § 8, of the Connecticut constitution, (2) abused its discretion by denying the defendant's postverdict motion for a new trial or, in the alternative, for a mistrial based on the state's late disclosure of forensic lab photographs, and (3) abused its discretion by permitting the state, on rebuttal, to present an enlarged copy of a lab photograph already in evidence and witness testimony on that photograph. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. During the late afternoon hours of May 9, 2018, four plainclothes officers from the vice and narcotics unit of the New London Police Department[1] (police department) were conducting surveillance near the intersection of Broad Street and Ledyard Street in New London. The officers were monitoring two convenience stores, the Gulf station located at 265 Broad Street and the 7-Eleven situated at the corner of Broad Street and Parker Street, which were locations known for narcotics trafficking. The officers were divided into teams of two, with investigators Todd Lynch and Jeremy Zelinski occupying one unmarked vehicle, and investigators Ryan Griffin and Joseph Pelchat occupying another.

At approximately 4:30 p.m., the officers noticed a man, later identified as Brian Drobnak, standing along-

[1] At the time, each officer held the title of investigator and was assigned to the vice and narcotics unit of the police department. Vice and narcotics investigators are charged with investigating and arresting individuals that use, possess, and sell narcotics. Because anonymity is necessary to conduct undercover investigations and ensure officer safety, vice and narcotics officers frequently wear plain clothes and utilize unmarked vehicles.

side a Volvo sedan parked on the right side of the Gulf station parking lot. The officers observed Drobnak pace back and forth alongside the vehicle and continuously check his cell phone. They did not see Drobnak purchase gasoline, enter the convenience store, or use the air pressure machine near where the Volvo was parked.

Shortly thereafter, a dark blue Toyota Camry, operated by a man later identified as the defendant, drove into the Gulf station and stopped alongside the Volvo. The officers observed Drobnak enter the front passenger seat of the Toyota, remain inside the vehicle for less than one minute, exit the vehicle, and subsequently enter the Volvo through the driver's side door. The officers could not see what transpired between Drobnak and the defendant inside of the Toyota, but the brief nature of the interaction led them to believe that they had just witnessed a narcotics transaction. Accordingly, the officers decided that Lynch and Zelinski would investigate Drobnak, while Griffin and Pelchat would follow the Toyota. Lynch and Zelinski then drove into the Gulf station parking lot at the same moment that the Toyota was exiting the lot, parked their unmarked vehicle behind the Volvo, and exited the vehicle.[2] Lynch walked toward the driver's side door of the Volvo while Zelinski approached the passenger's side.

Through the driver's side window, Lynch observed Drobnak sitting in the driver's seat with a white, rock like substance in his lap. Lynch later testified that Drobnak appeared to be manipulating the rock like substance with the ink cartridge of a ballpoint pen. Lynch identified himself as law enforcement, at which point Drobnak attempted to conceal the ink cartridge and rock like substance in the empty space between the driver's seat and the passenger's seat. Zelinski then opened

[2] Upon entering the Gulf station parking lot, Lynch was able to observe, and later identify, the defendant as the operator of the Toyota.

the passenger side door, placed Drobnak in custody, and took possession of the rock like substance, which had fallen to the floor of the vehicle. Lynch performed a field test on the rock like substance, which returned positive for crack cocaine. Drobnak was arrested and given *Miranda*[3] warnings. At the scene, Drobnak voluntarily agreed to speak with Lynch and Zelinski. He informed the officers that he had purchased $50 worth of crack cocaine from the man in the Toyota and showed them the phone number he had contacted to arrange the transaction.

Meanwhile, Griffin and Pelchat continuously had been monitoring the Toyota operated by the defendant since it had exited the Gulf station. After leaving the parking lot, the defendant traveled down Broad Street and turned into a Sunoco station, where he remained for a few minutes. Griffin and Pelchat observed a woman, later identified as Amanda Barton, emerge from a restaurant next to the Sunoco station and walk toward the Toyota carrying two plastic bags. Once Barton entered the Toyota, the defendant exited the Sunoco parking lot and turned onto Connecticut Avenue.

As Griffin and Pelchat continued to follow the Toyota, they were informed by the other officers that Drobnak was found in possession of narcotics, was placed under arrest, and had told the officers that he had purchased the narcotics from the operator of the Toyota. Believing this information provided probable cause to conduct a motor vehicle stop, Griffin and Pelchat requested that the police department send a marked police cruiser to assist them in apprehending the Toyota.[4] Sergeant Gregory Moreau, the street sergeant assigned to the patrol shift, responded to the officers' request.

[3] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] Griffin testified that it is against the police department's policy to initiate a motor vehicle stop in an unmarked vehicle.

Shortly thereafter, Moreau pulled behind Griffin and Pelchat, who were still following the defendant down Briggs Street. Moreau then maneuvered his police cruiser between the Toyota and the officers' unmarked vehicle, activated his siren and overhead lights, and attempted to initiate a motor vehicle stop. Despite the siren and headlights, the defendant continued to drive forward at a slow speed. Moreau then used his vehicle's public address system to order the defendant to pull the Toyota over to the side of the road. After proceeding an additional two to four hundred feet, the defendant came to a stop. Moreau exited the police cruiser and walked toward the driver's side window of the Toyota, while Griffin, who had exited the unmarked vehicle, began to approach the Toyota on foot.

As Griffin drew closer to the Toyota, he observed Barton and the defendant appear to manipulate their hands near their waists. Concerned that Barton and the defendant could be concealing "weapons" or "narcotics" on their persons, Griffin and Moreau ordered the passengers to raise their hands to where the officers could see them. Barton complied immediately, but the defendant raised his hands only after Griffin issued a second verbal command. The officers removed Barton and the defendant from the Toyota and placed them in investigative detention. Griffin conducted a pat-down search of the defendant for weapons and, after feeling "a bulge in [the defendant's] pocket," uncovered $1268 in cash. Believing the cash to be the proceeds of narcotics transactions, the officers seized the currency. The officers also noticed three cell phones, including an LG cell phone, in the Toyota's center console. Although Barton and the defendant each claimed ownership of one of the phones, neither claimed to own the LG phone.[5]

[5] The defendant would later claim, first on October 4, 2018, during a hearing on the defendant's motion to suppress, and then later at trial, that the LG phone belonged to his son.

Around that time, Pelchat, who had parked the unmarked vehicle a short distance away,[6] approached the defendant's Toyota. Pelchat had been in contact with Lynch, who communicated that Drobnak had provided the officers with the phone number he had used to arrange the narcotics transaction. The officers agreed that Lynch would use his city-issued cell phone to call the number once Pelchat arrived at the motor vehicle stop. When Lynch placed the call, Pelchat observed the unclaimed phone ring in the Toyota's center console and display Lynch's phone number as the incoming caller. The officers seized the phone. The defendant was then placed under arrest and transported to the police department. No narcotics, residue, or paraphernalia were recovered from the scene.

At the station, Lynch asked the defendant why he was involved in selling narcotics, to which the defendant responded, "that's all I know." The defendant was subsequently charged, by way of a substitute information dated March 25, 2019, with one count of possession of narcotics with intent to sell in violation of § 21a-277 (a), and one count of possession of narcotics in violation of General Statutes § 21a-279 (a).[7]

Drobnak was transported to the New London police station, where he provided a written statement indicating that he had purchased $50 worth of "loose crack cocaine" from "G," and had done so on "at least three different occasions." Drobnak was also shown a photographic lineup consisting of eight photographs and was asked to

[6] At trial, Griffin and Pelchat testified that vice and narcotics officers typically do not park their unmarked vehicles near marked police cruisers. This is done to preserve the anonymity of the unmarked vehicle.

[7] The substitute information also included a part B information, which charged the defendant with having previously been convicted of possession of narcotics with intent to sell in violation of § 21a-277 (a). On April 8, 2019, the defendant waived his right to a trial on the charge contained in the part B information and admitted to the prior conviction.

determine whether one of those photographs displayed the individual from whom he had purchased narcotics. He identified an individual other than the defendant. Later, at trial, Drobnak identified the defendant as the individual from whom he had purchased narcotics and testified that he had purchased the narcotics using two $20 bills and one $10 bill. Drobnak explained that he initially misidentified the defendant because his "anxiety was off the wall," he was going through withdrawal, and he "just wanted [the police interview] to be over and to be done with." He then testified that "[t]here is no doubt in my mind that [the defendant] is the man who sold me crack cocaine." Drobnak also testified that he was previously familiar with the defendant and had purchased narcotics from the defendant at least twice before. During cross-examination, Drobnak admitted that "G" was actually the nickname of Greg Williams, a mutual acquaintance of Drobnak and the defendant. Although Drobnak identified "G" in his written statement, he testified that he had intended to refer to the defendant.

A jury trial commenced on April 2, 2019. At trial, the defendant, appearing as a self-represented party, testified in his defense that he had previously met Drobnak a few days prior to May 9, 2018, when Drobnak had given the defendant and Williams a ride to Groton. The defendant stated that he had left his son's cell phone—the same unclaimed LG phone recovered from the defendant's center console—in Drobnak's car. He further testified that he had met with Williams on the morning of May 9, 2018, and that Williams had returned the phone to him. The defendant asserted that Drobnak contacted him later that day in order to speak with him about the missing phone. The defendant agreed, and the two arranged to meet at the Gulf station.

The defendant testified that Drobnak briefly entered the defendant's car in the Gulf station parking lot and requested a financial reward for finding the missing cell

phone. The defendant told Drobnak that the phone already had been returned to him and asked Drobnak to exit his car. The defendant denied selling narcotics and testified that the seized currency was income he had earned working as a groundskeeper at Lake of Isles golf course in North Stonington. He asserted that he planned to use the money to pay for rent.

The jury found the defendant guilty of possession of narcotics with intent to sell.[8] On July 8, 2019, the court, *Kwak*, *J.*, sentenced the defendant to twenty years of incarceration, execution suspended after twelve years, followed by five years of probation. The Sentence Review Division of the Superior Court subsequently reduced the sentence to twelve years of incarceration, execution suspended after seven years, followed by five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court improperly denied his pretrial motion to dismiss the charges against him or, in the alternative, to suppress any evidence relating to the currency seized during his arrest, which the police department improperly deposited prior to trial, thereby violating his right to due process under article first, § 8, of the Connecticut constitution. Specifically, the defendant contends that the police department's improper disposition of the currency denied him an opportunity (1) to test the bills for the absence of Drobnak's fingerprints or DNA and (2) to demonstrate that the denominations on the inventory list were incorrect, that the currency was comprised of large bills, and that the actual denominations could have been used to impeach Drobnak's testimony regarding the transaction. Although we determine that the police department's disposition

[8] The jury did not return a verdict on the lesser included charge of possession of narcotics, and the state entered a nolle prosequi as to that charge.

of the seized currency violated General Statutes § 54-36a (b) (3) (B),[9] we conclude that the defendant has failed to demonstrate a due process violation under article first, § 8, of our state constitution.

The following additional facts and procedural history are relevant to our resolution of this claim. After Griffin and Pelchat delivered the seized currency to the New London police station, Lynch and Pelchat each counted the bills and listed the total amount and denominations on a police department money envelope. The officers recorded that the total amount of money recovered was $1268, which consisted of two $50 bills, forty-eight $20 bills, twenty $10 bills, one $5 bill, and three $1 bills.[10]

On October 11, 2018, the defendant filed a motion for discovery requesting that the state produce, inter alia, "the actual money seized from [the defendant] on May 9, 2018 . . . for review and inspection by . . . [the defendant]." In its written response, the state replied that the "[police department's] policy for seized funds is to deposit such funds immediately in a secure bank account, not in evidence at the [police department]. . . . Accordingly, the state cannot produce the exact bills for the defendant's inspection." On January

[9] General Statutes § 54-36a (b) (3) (B) provides in relevant part that "[i]f the seized property is currency and is not stolen property, the law enforcement agency seizing the currency shall, within ten days of such seizure, notify the defendant . . . if such currency was seized in connection with a criminal arrest . . . that such defendant . . . has the right to a hearing before the Superior Court on the disposition of the currency. Such defendant . . . may, not later than thirty days after receiving such notice, request a hearing before the Superior Court. The court may, after any such hearing, order that the law enforcement agency, after taking reasonable measures to preserve the evidentiary value of the currency, deposit the currency in a deposit account in the name of the law enforcement agency as custodian for evidentiary funds at a financial institution in this state or order, for good cause shown, that the currency be retained for a period to be determined by the court. . . ."

[10] A photograph of the police department's money envelope reflecting these denominations was admitted into evidence at trial.

3, 2018, the defendant moved to dismiss the charges, or, alternatively, to suppress any evidence concerning the seized cash arguing, inter alia, that the police department's failure to preserve potentially exculpatory evidence violated his right to due process under article first, § 8, of the Connecticut constitution as set forth in *State* v. *Morales*, 232 Conn. 707, 720–21, 657 A.2d 585 (1995). The state subsequently filed a response in opposition.

On February 27, 2019, the court heard argument on the defendant's motion. The defendant argued that the police department had violated § 54-36a (b) (3) (B) by failing to provide him with notice of his right to a hearing on the disposition of the seized currency before depositing the currency into a secure bank account. He contended that the police department's failure to preserve the currency prevented him from testing the bills for Drobnak's fingerprints and DNA, and from determining their actual denominations, resulting in a violation of his state constitutional right to due process. The state conceded that the police department improperly had deposited the seized currency without providing the defendant notice, explaining that the police department had been using an outdated inventory form and that it was the department's standard procedure to deposit currency in a secure bank account. The state argued, however, that the currency's exculpatory value was speculative and that the defendant was not prejudiced by its inability to produce missing bills. The state also contended that the police department's failure to inform the defendant of his right to a hearing was not done in bad faith and, therefore, did not rise to the level of a constitutional violation.[11]

[11] We note that the state's argument rested upon an incorrect understanding of the law. Although the United States Supreme Court has held that a criminal defendant cannot demonstrate a federal due process violation, based upon the failure of the police to preserve potentially exculpatory evidence, in the absence of a showing of bad faith on the part of the police; see *Arizona* v. *Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d

After hearing argument, the court orally denied the defendant's motion. In so doing, the court applied the four factor test set forth in *State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), to determine whether the police department's failure to preserve the currency violated the defendant's state constitutional right to due process. Specifically, the court "consider[ed] the following factors . . . [1] the materiality of the potentially exculpatory evidence, [2] the likelihood of mistaken interpretation of the missing evidence by witnesses or the fact finder, [3] the reason for the unavailability of the evidence, and [4] the prejudice to the defendant." Applying each factor, the court held that (1) "the money [was not material because] . . . while it may be exculpatory, it could go both ways . . . . If [forensic testing] found [Drobnak's] fingerprints or DNA on the money that you held, it's going to support . . . Drobnak's potential testimony that he gave you the money for some drugs," (2) "regarding the likelihood of mistaken interpretation of missing evidence . . . I think it could be very well explained by . . . the state that this is per statute, even despite the fact that they didn't notify you," (3) "the reason for the unavailability of the evidence is that it was deposited wrongfully because you didn't get notice, but that wasn't bad faith," and (4) "to ensure that you're not prejudiced by [the missing currency] . . . I'm going to allow you full cross-examination to the police about why you weren't notified pursuant to the statute."

We begin our analysis by setting forth the appropriate standard of review and the relevant principles of law

281 (1988); our Supreme Court unequivocally has rejected that standard. *State* v. *Morales*, supra, 232 Conn. 726–27. Rather, our state constitution requires that trial courts employ the balancing test set forth in *State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), in determining whether the failure of police to preserve potentially exculpatory evidence constitutes a violation of the defendant's right to due process. Id.

that govern the defendant's claim on appeal. "With respect to a due process violation for failure to preserve [potentially exculpatory evidence] under the federal constitution, the United States Supreme Court has held that the due process clause of the fourteenth amendment requires that a criminal defendant . . . show bad faith on the part of the police [for] failure to preserve potentially useful evidence [to] constitute a denial of due process of law. . . .

"In . . . *Morales* . . . our Supreme Court rejected the federal bad faith requirement and instead held that, when a due process claim is advanced under the Connecticut constitution, our courts should employ the balancing test set forth in . . . *Asherman* . . . . In determining whether the reasons for the unavailability of the evidence outweigh the degree of prejudice to the accused, the *Asherman* test reviews the totality of the circumstances surrounding the missing evidence. . . . Specifically, the *Asherman* test considers [1] the materiality of the missing evidence, [2] the likelihood of mistaken interpretation of it by witnesses or the jury, [3] the reason for its unavailability to the defense and [4] the prejudice to the defendant caused by its unavailability . . . . The reason for the missing evidence's nonavailability factor concerns the state's involvement and the remaining three factors scrutinize the impact of the missing evidence on the trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Fox*, 192 Conn. App. 221, 236–37, 217 A.3d 41, cert. denied, 333 Conn. 946, 219 A.3d 375 (2019).

Here, the trial court examined the underlying facts and determined that the unavailability of the seized currency did not violate the defendant's right to due process under our state constitution. "[W]hether those facts constituted a violation of the [defendant's right to due process] is a mixed determination of law and fact that requires the application of legal principles to the historical facts of the case. . . . Whether the histor-

ical facts as found by the [trial] court constituted a violation of the [defendant's right to due process] is subject to plenary review by this court, unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *State* v. *Nunez*, 93 Conn. App. 818, 823, 890 A.2d 636, cert. denied, 278 Conn. 914, 899 A.2d 621, cert. denied, 549 U.S. 906, 127 S. Ct. 236, 166 L. Ed. 2d 186 (2006). Applying the *Asherman* test to the present case, we conclude that the state's failure to preserve the seized currency did not violate the defendant's due process right under the Connecticut constitution.

The first *Asherman* factor involves the materiality of the missing evidence. In *State* v. *Asherman*, supra, 193 Conn. 695, our Supreme Court set forth the standard for materiality in cases where evidence was lost or destroyed prior to forensic testing. Specifically, the court held that "if the state has not tested an item of evidence before its loss or destruction, and no other facts indicate that test results might have proved unfavorable to the defendant, little more is required than a showing that the test could have been performed and results obtained which, in the context of the defendant's version of the facts, would prove exculpatory." (Internal quotation marks omitted.) Id., 725. Our courts subsequently have clarified that standard, explaining that "[missing] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Internal quotation marks omitted.) *State* v. *Fox*, supra, 192 Conn. App. 237; *State* v. *Estrella*, 277 Conn. 458, 485, 893 A.2d 348 (2006) (same).[12]

[12] In *Correia* v. *Rowland*, 263 Conn. 453, 476–77, 820 A.2d 1009 (2003), our Supreme Court rejected the argument that unpreserved, untested evidence is exculpatory per se. The court stated that adopting such a presumption "would stand in violent contradiction of the balancing principles espoused by the *Asherman/Morales* rule; by virtue of the fact that the evidence at issue is unpreserved and untested, the state could never rebut that presumption, despite the strength of its case as a result of other evidence." Id., 476–77. Accordingly, a defendant is not entitled to a presumption that the currency

The defendant contends that, had the currency been available, he could have (1) tested it for the absence of Drobnak's DNA or fingerprints and (2) demonstrated that the currency denominations had been larger than those listed on the police department's envelope containing the seized currency, thereby negating Drobnak's account that he purchased crack cocaine from the defendant with two $20 bills and one $10 bill. We are not persuaded.

As an initial matter, the defendant has not established that forensic testing of the currency for DNA or fingerprints could have been performed and that those results would prove to be exculpatory under the circumstances of this case. Indeed, it is speculative whether forensic testing yielding cognizable fingerprints or DNA profiles could have been performed on the currency. The record indicates that Drobnak was in the Toyota operated by the defendant for less than one minute. The defendant has not presented evidence establishing that Drobnak was in possession of the bills for a substantial period of time before the alleged transaction or that Drobnak handled each bill individually. Therefore, it remains unclear whether a quick exchange of currency would have been sufficient for Drobnak to leave traceable fingerprints or DNA profiles on any or all of the bills. Moreover, given the frequency by which currency changes hands, and the fact that the bills were commingled when recovered during the arrest, the defendant has not demonstrated that the forensic lab would have been able to extract unique and discernable profiles from the bills.

The defendant argues that the speculative nature of such testing is irrelevant because he sought to establish

was exculpatory merely because it was lost prior to forensic testing. Rather, in such instances, the defendant must affirmatively demonstrate that such testing "*could* . . . [*be*] *performed*" and results obtained that "*would prove exculpatory.*" (Emphasis added; internal quotation marks omitted). *State* v. *Asherman*, supra, 193 Conn. 725.

the *absence*, rather than the *presence*, of Drobnak's DNA and fingerprints. Relying on the language set forth in *Asherman*, he claims that tests could have been performed and results obtained, which, whether inconclusive or affirmatively indicating the absence of Drobnak's fingerprints, would have proven exculpatory within his version of the facts. Stated otherwise, the defendant contends that the inability to isolate identifiable fingerprints or DNA on the currency would have supported his theory of defense, namely, that no transaction transpired between him and Drobnak at the Gulf station parking lot. However, even if we were to assume that forensic test results would have been inconclusive, or that such results actually would indicate the absence of Drobnak's fingerprints or DNA, the defendant still cannot demonstrate a reasonable probability that the outcome at trial would have been different. As this court frequently has held, such results would not conclusively establish that Drobnak never handled the seized currency, but only that his DNA and fingerprints were not detectable. See *Jason B.* v. *Commissioner of Correction*, 141 Conn. App. 674, 678, 62 A.3d 1144, cert. denied, 308 Conn. 935, 66 A.3d 498 (2013); *Davis* v. *Commissioner of Correction*, 140 Conn. App. 597, 607–608, 59 A.3d 403, cert. denied, 308 Conn. 920, 62 A.3d 1133 (2013); *State* v. *Morales*, 39 Conn. App. 617, 623–24, 667 A.2d 68, cert. denied, 235 Conn. 938, 668 A.2d 376 (1995).

In addition, there are "other facts" indicating that the test results in this case might have proved unfavorable to the defendant. *State* v. *Asherman*, supra, 193 Conn. 725. Drobnak testified that he provided the defendant with currency in exchange for narcotics. Likewise, the officers observed Drobnak in possession of the crack cocaine immediately after his encounter with the defendant in a location well-known for narcotics trafficking. Considered together, these facts suggest that the seized bills could have tested positive for Drobnak's DNA and/

or fingerprints, and, therefore, were as likely to be inculpatory as they were exculpatory. Indeed, had the test results returned positive for Drobnak's DNA or fingerprints, the defendant's theory of defense would have been severely undermined.

Finally, although the defendant repeatedly has argued that the seized currency was comprised of large bills, he has not provided any additional support for that contention. It is true that the defendant presented testimony at trial that detailed his alternative and legitimate sources of income. He has failed, however, to offer any evidence demonstrating that he received this income, or withdrew money, exclusively in large bills.[13] Accordingly, this claim is also speculative. In the absence of additional evidentiary support, the defendant cannot persuasively demonstrate that the ability to examine the currency prior to trial would have changed the outcome of the proceeding, especially in light of Pelchat's testimony regarding the denominations that were recorded on the police department's inventory envelope. We conclude, therefore, that the materiality of the missing currency weighs in favor of the state.

The second *Asherman* factor requires us to consider the likelihood of mistaken interpretation of the missing evidence by witnesses or the jury. The defendant argues

[13] At trial, the defendant presented testimony from Adam Stewart, the defendant's supervisor at the Lake of Isles golf course in North Stonington, where the defendant was employed for nineteen days, specifically, April 9 through April 28, 2018. Stewart testified that the defendant worked full-time as a greens mower during that period and was paid biweekly by either direct deposit or live check. We note that Stewart's testimony regarding the form of payment fails to support the defendant's contention that he was paid in large bills. The defendant also introduced testimony from Attorney Shawn Sims as a representative of the Department of Revenue Services. Sims testified that the defendant was, "at some point . . . issued a cigarette [vendor's] license." Similarly, although the defendant claimed to have earned additional income from the lawful sale of cigarettes, he did not introduce any evidence of sales transactions or proceeds from the alleged sales.

that the possibility of jury misinterpretation was substantial in this case because the testimony surrounding the currency denominations supported the inference that he was a narcotics dealer. Specifically, the state presented evidence that the seized currency was comprised of several small bills, which corroborated Drobnak's testimony that he provided the defendant with two $20 bills and one $10 bill in exchange for the crack cocaine. In the absence of the actual currency, the defendant argues that the jury was likely to misinterpret the evidence as supporting the state's version of the case.

This court, however, has held that "[m]istaken interpretation can be minimized at the trial by permitting testimony on the issue . . . ." (Internal quotation marks omitted.) *State* v. *Fox*, supra, 192 Conn. App. 240; see also *State* v. *Thompson*, 128 Conn. App. 296, 304, 17 A.3d 488 (2011), cert. denied, 303 Conn. 928, 36 A.3d 241 (2012). In the present case, the trial court allowed the defendant "full cross-examination" of the state's witnesses regarding why the seized currency was improperly deposited, the specific denominations, and the inability to test the currency for DNA and fingerprints. The defendant also testified that he had earned the money working as a greens mower and that the money seized was comprised exclusively of large bills. Moreover, although the court allowed the defendant considerable leeway to discuss the circumstances surrounding the missing currency, the defendant never requested an adverse inference instruction or a missing evidence instruction. See *State* v. *Barnes*, 127 Conn. App. 24, 33–34, 15 A.3d 170 (2011) (weighing mistaken interpretation prong in state's favor where defendant failed to request missing evidence instruction or adverse inference instruction), aff'd, 308 Conn. 38, 60 A.3d 256 (2013). Accordingly, the jury was presented with two different versions of the facts and was free

to determine how much weight to afford each version. We conclude, therefore, that the likelihood of mistaken interpretation at trial was minimal.

The third *Asherman* factor concerns the reason for the nonavailability of the evidence. "In weighing the third *Asherman* factor . . . our cases have focused on the motives behind the destruction of the evidence. . . . In examining the motives . . . our courts have considered such factors as whether the destruction was deliberate and intentional rather than negligent . . . or done in bad faith or with malice . . . or with reckless disregard . . . or calculated to hinder the defendant's defense, out of other animus or improper motive, or in reckless disregard of the defendant's rights." (Internal quotation marks omitted.) *State* v. *Thompson*, supra, 128 Conn. App. 304.

It is undisputed that the police department failed to notify the defendant of his right to a hearing on the disposition of the currency and the state concedes that the currency was improperly deposited into a secure bank account in violation of § 54-36a (b) (3) (B). The defendant argues that the police department's admitted mishandling of the currency weighs this factor in his favor. Conversely, the state argues that, in the absence of a showing of bad faith or improper motive on the part of the police department, the factor should weigh in the state's favor.

In considering whether the state acted with improper motive, or in reckless disregard of the defendant's rights, we must examine the requirements of § 54-36a (b) (3) (B). Section 54-36a (b) (3) (B) provides in relevant part that "[i]f the seized property is currency and is not stolen property, *the law enforcement agency seizing the currency shall, within ten days of such seizure, notify the defendant . . . if such currency was seized in connection with a criminal arrest . . . that such*

defendant . . . has the right to a hearing before the Superior Court on the disposition of the currency. Such defendant . . . may, not later than thirty days after receiving such notice, request a hearing before the Superior Court. The court may, after any such hearing, order that the law enforcement agency, after taking reasonable measures to preserve the evidentiary value of the currency, deposit the currency in a deposit account in the name of the law enforcement agency as custodian for evidentiary funds at a financial institution in this state or order, for good cause shown, that the currency be retained for a period to be determined by the court. If such defendant or person does not request a hearing, the law enforcement agency may, after taking reasonable measures to preserve the evidentiary value of the currency, deposit the currency in a deposit account in the name of the law enforcement agency as custodian for evidentiary funds at a financial institution in this state." (Emphasis added.)

It is clear from the plain language[14] of the statute that the legislature, in enacting § 54-36a (b) (3) (B), was particularly concerned with the preservation of currency by law enforcement in criminal proceedings and

[14] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Onofrio* v. *Mineri*, 207 Conn. App. 630, 645–46, 263 A.3d 857 (2021).

with providing individuals with the right to a hearing on the disposition of such currency. Indeed, subdivision (b) (3) was amended in 2001 specifically to provide a statutory right to notice of the opportunity to request a hearing before any currency is deposited. See Public Acts 2001, No. 01-104.[15]

Section 54-36a (b) (3) (B), therefore, required the police department to notify the defendant within ten days of May 9, 2018, the date of his arrest, of his right to a hearing on the disposition of the seized currency. During the pretrial hearing, however, the prosecutor indicated that the police department was using an outdated inventory form, which did not include the statutory mandate to inform criminal defendants of their right to a hearing on the disposition of seized currency. The prosecutor also indicated that it was the police department's standard "procedure at the time" to immediately deposit seized currency into a bank account. Such procedure clearly violates the requirements of § 54-36a (b) (3) (B) and deprives individuals, such as the defendant, of their statutory right to notice of a hearing on the disposition of currency seized during an arrest. Indeed, the police department's "outdated" form and practices failed to reflect a statutory amendment passed in 2001 for the purpose of preserving evidence. See Public Acts 2001, No. 01-104. As such, the police department's procedure stood in direct violation of Connecticut law for more than seventeen years. Although the record does not reflect animus or improper motive

[15] Prior to the 2001 amendment, subdivision (b) (3) read: "If the seized property is currency, the law enforcement agency seizing the property may deposit the currency in a safe deposit box in a financial institution in this state. No funds may be removed from such safe deposit box unless ordered by the court. The financial institution at which the safe deposit box is located shall not be responsible for monitoring activity in the safe deposit box or insuring that the contents of the safe deposit box are removed in accordance with the requirements of this subdivision." General Statutes (Rev. to 1999) § 54-36a (b) (3) (B), as amended by Public Acts 1999, No. 99-247, § 5.

on the part of the individual officers involved, it is clear that the police department's policy in this case constituted a reckless disregard of the defendant's rights. Accordingly, the reason for the unavailability of the evidence weighs in the defendant's favor.

The final *Asherman* factor involves the prejudice caused to the defendant as a result of the unavailability of the evidence. "In measuring the degree of prejudice to an accused caused by the unavailability of the evidence, a proper consideration is the strength or weakness of the state's case, as well as the corresponding strength or weakness of the defendant's case." (Internal quotation marks omitted.) *State* v. *Morales*, 90 Conn. App. 82, 91, 876 A.2d 561, cert. denied, 275 Conn. 924, 883 A.2d 1250 (2005). Our review of the record leads us to conclude that the direct and circumstantial evidence presented by the state provided strong evidence of the defendant's guilt. At trial, the state offered Drobnak's testimony that he had purchased crack cocaine from the defendant and had done so on at least two prior occasions. This court previously has held that such eyewitness testimony can provide critical evidence in cases where other evidentiary sources are lost or missing. See *State* v. *Barnes*, supra, 127 Conn. App. 33–36. Moreover, Drobnak's account was corroborated by Lynch and Zelinski, both of whom observed Drobnak enter the Toyota operated by the defendant and testified to finding Drobnak in possession of narcotics immediately after he exited the vehicle. The officers also testified, in light of their training and experience, that the limited exchange between Drobnak and the defendant, which occurred in an area well-known for frequent drug sales, was behavior indicative of a narcotics transaction. In addition, Drobnak provided the officers with the cell phone number of the individual he had contacted to arrange the narcotics transaction, a number belonging to the phone Pelchat recovered from the center

console of the defendant's vehicle. Finally, the defendant continued to operate the Toyota for two to four hundred feet after Moreau attempted to conduct a motor vehicle stop and the defendant stated "that's all I know" in response to Lynch's question regarding the defendant's involvement in narcotics trafficking.

By contrast, the defendant presented a largely unsubstantiated account of what transpired between himself and Drobnak during their brief interaction at the Gulf station. As discussed previously, the defendant could not demonstrate the currency's exculpatory value beyond speculative assertions. Although the defendant did offer witness testimony that he had legitimate sources of income, he presented no evidence indicating that he was either paid in large bills or had withdrawn large bills from his bank account.

Finally, this court repeatedly has held that a trial court may ameliorate any prejudice resulting from unavailable evidence by providing the defendant with unfettered cross-examination and by allowing the defendant to focus on the state's failure to produce such evidence during closing argument. See id., 36 ("any potential prejudice from the loss of [evidence] was ameliorated by the court's allowing the defendant unfettered cross-examination [and] . . . allowing the defendant to use, during closing argument, the fact that the [evidence was] missing in an attempt to raise reasonable doubt in the mind of the jury"); see also *State* v. *Kelsey*, 93 Conn. App. 408, 422, 889 A.2d 855 ("the court ameliorated any potential prejudice to the defendant by allowing unfettered cross-examination of the state's witnesses regarding the loss of the evidence and in allowing his closing argument to focus on the state's failure to produce the requested items that were seized"), cert. denied, 277 Conn. 928, 895 A.2d 800 (2006).

In the present case, the trial court provided the defendant with a full opportunity to question the officers

regarding the improper disposition of the currency and the accuracy of the denominations listed on the inventory list. He was also able to elicit inconsistencies in Drobnak's testimony, including his initial misidentification of the defendant. Similarly, the defendant provided his version of the facts on direct examination and argued that the currency's absence prejudiced him during closing argument. As a result, the defendant's narrative, the reasons for the currency's unavailability, and the prejudicial concerns stemming from the currency's unavailability were all before the jury for consideration. Accordingly, any prejudice to the defendant resulting from the missing currency was minimal. We conclude that the fourth *Asherman* factor weighs in favor of the state.

Considering the *Asherman* factors together, we conclude that the defendant was not deprived of his state constitutional right to due process. Although the police department's improper disposition of the currency demonstrated a reckless disregard of the defendant's statutory right to notice of a hearing on the currency's disposition under § 54-36a (b) (3) (B), we find that (1) the actual bills were immaterial because it is speculative whether the defendant's examination or testing of the currency would have led to exculpatory evidence that affected the outcome of the proceeding, (2) the currency's absence was unlikely to lead to misinterpretation of the evidence by the jury, and (3) considering the strength of the state's case, as well as the defendant's opportunity to engage in unfettered cross-examination and to raise doubt about the significance of the seized currency during closing argument, the defendant was not prejudiced by the currency's unavailability. The defendant's due process claim, therefore, must fail.

II

The defendant's second claim is that the trial court abused its discretion by denying his postverdict motions

for a new trial or, in the alternative, a mistrial based on the state's late disclosure of forensic lab photographs depicting the narcotics seized from Drobnak's vehicle on May 9, 2018. The defendant argues that the state's failure to timely disclose potentially exculpatory photographs violated his right to due process under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, the defendant contends that the state's delayed disclosure resulted in prejudice because it prevented the defendant from (1) pursuing an alternative trial strategy and (2) accepting a favorable plea agreement rather than proceeding to trial. We are not persuaded.

The following additional facts and procedural history are relevant to our disposition of this claim. On August 2, 2018, the state provided the defendant with a copy of the state's forensic lab report (report), generated by Ellen Conlon, an analyst with the division of scientific services of the Department of Emergency Services and Public Protection (lab), after testing the narcotics seized from Drobnak's vehicle. In the section entitled "Description of Evidence Submitted," the report stated that the white, rock like substance was contained within "knotted plastic."

On September 20, 2018, the defendant filed a motion to suppress the currency and the phone seized during the defendant's arrest, as well as the defendant's statements made to law enforcement during the arrest, on the ground that the police lacked any legal authority to stop the defendant's vehicle. The court subsequently held a suppression hearing on October 4, 2018, during which Lynch testified that, at the time he approached Drobnak's vehicle, he observed Drobnak "poking at [a] white rock like substance" with the ink cartridge of a pen.

After the suppression hearing, the defendant noticed that the report's description indicating the presence of

"knotted plastic" contradicted both Lynch's testimony and Drobnak's formal statement given to the police department that he had purchased "loose" crack cocaine from the defendant on May 9, 2018. The defendant subsequently argued that these discrepancies presented a chain of custody issue and requested that his standby counsel subpoena the lab for any photographs taken of the seized narcotics. In response to the defendant's subpoena, the lab sent Mark Anderson, its chemistry department supervisor[16] and the technical reviewer[17] in the present case, to testify as to the report and photographs.

At trial, Lynch again testified that he found Drobnak poking at a white, rock like substance with the ink cartridge of a pen. Likewise, Drobnak reiterated that the narcotics were not wrapped in plastic at the time he purchased them, but rather were "handed to [him] loose."

On the second day of trial, the state called Anderson to testify as to the lab's procedures and the results obtained in the defendant's case. Anderson testified that he oversaw Conlon's performance and verified that the white, rock like substance tested positive for cocaine. During cross-examination, the defendant inquired as to whether lab employees took photographs of the narcotics when they were initially received by the lab. Anderson then produced two photographs depicting the narcotics, which were subsequently introduced together as a full exhibit. Anderson proceeded to testify that, on the basis of the photographs, the narcotics appeared to be contained

[16] The chemistry department tests evidence for the presence of controlled drugs and narcotics. Members of the department also produce forensic reports and testify at trials, when necessary.

[17] The technical reviewer performs a supervisory role, evaluating work performed by analysts in a given case. Technical reviewers must examine the relevant data and agree with the analyst's conclusions before the analyst is permitted to release a formal report.

within a knotted plastic bag and identified the location of the purported plastic within one of the photographs. He stated that he did not know who placed the narcotics in knotted plastic, but testified that the narcotics were in that condition when received by the lab.

At the beginning of the defendant's case-in-chief, the defendant called Zelinski to testify as to the condition of the narcotics when they were initially seized. Specifically, the defendant inquired whether Zelinski, as the officer who initially recovered the narcotics from Drobnak's Volvo, remembered whether the narcotics were wrapped in knotted plastic or whether he manipulated the narcotics in any way. Zelinski testified that the narcotics were "loose" when he first took possession of them and that he did not place them in a plastic bag.

After Zelinski's testimony, the defendant argued, outside the presence of the jury, that the inconsistent evidence regarding the knotted plastic presented a significant question regarding the chain of custody of the narcotics such that the test results of the narcotics should be excluded. The court agreed with the defendant's contention that "nobody testified that [the narcotics were] recovered in a knotted plastic bag, and none of the officers stated that they placed it in a plastic bag. . . . [S]omewhere along the line, somebody put the rock like substance in a knotted plastic bag inside the [evidence] envelope." The court stated, however, that, because the defendant presented the chain of custody issue "last minute," it was going to allow the state time to investigate the matter and provide an explanation for the inconsistency. The defendant subsequently moved for a judgment of acquittal based on the chain of custody issue. He also argued that it would be improper for the state to present rebuttal witnesses after having rested its case-in-chief. The court disagreed and decided that it would delay its ruling on the defen-

dant's motion until after the state had an opportunity to present its rebuttal.

On rebuttal, the state recalled Lynch to testify as to the chain of custody issue. Lynch testified that the narcotics were "loose" when seized, subsequently packaged only in an official evidence bag, and then transferred to the police department's evidence officer, John Green. On cross-examination, Lynch testified that he would have documented the presence of knotted plastic, had the narcotics been seized in that condition. When shown the forensic lab photographs, Lynch stated that he was unsure whether the photographs depicted knotted plastic, but agreed that the presence of knotted plastic would contradict the manner in which he preserved the narcotics.

The state then called Green to testify as to the condition of the narcotics both before the narcotics were transferred from the police department to the lab and after the lab returned the narcotics to the police department. Green testified that the cocaine was not contained within knotted plastic when he originally received it from Lynch. He testified further that, after receiving the narcotics, he completed a request for analysis form before the narcotics were "sealed [and] transported to the lab."

Green proceeded to testify that, upon submitting the narcotics, he was given a written receipt from the lab (submission receipt). He testified that neither the request for analysis form he completed nor the submission receipt indicated the presence of a knotted plastic bag. Green also testified that the lab provided an additional receipt upon returning the narcotics to the police department (return receipt). Although the return receipt contained an itemized line listing "[r]ock-like material in knotted plastic," a handwritten notation indicated that the knotted plastic was "not applicable." When shown

the forensic lab photographs of the narcotics, Green stated that he did not believe the photographs depicted a knotted plastic bag.

At the conclusion of Green's testimony, the state informed the court that it did not intend to call additional rebuttal witnesses on the chain of custody issue. Regarding the defendant's motion for a judgment of acquittal, the state argued that the conflicting testimony surrounding the knotted plastic bag was an issue for the jury to resolve. In response, the defendant requested additional testimony from lab employees to clarify "the condition they received [the narcotics] in" and explain the significance behind the "not applicable" notation on the return receipt.

The trial court subsequently denied the defendant's motion for a judgment of acquittal, concluding that, "[u]ltimately it's up to the jury to decide whether or not [the narcotics are] in a knotted plastic bag or not, and that will determine what their verdict may be. And it's something [the defendant] could discuss on closing argument." Afterward, the defendant renewed his request to call additional lab employees as witnesses. The court stated that it was "a little late [to] subpoena" lab employees, but asked the state to contact the lab and produce any representatives who could explain "what was actually received and what was returned."

The next morning, the state informed the court that it was prepared to present testimony from Anderson and Conlon, the analyst who performed the forensic testing in the defendant's case and took the photographs in question. Before Anderson and Conlon took the stand, the defendant requested to speak with either witness regarding any evidence he or she intended to offer. The court denied the defendant's request, explaining that Anderson and Conlon were the state's witnesses, that it was still the state's case on rebuttal, and that

the defendant would have an opportunity to question them on the stand.

Anderson testified that, as a technical reviewer, he was not responsible for personally examining the narcotics in this case. Rather, his role involved reviewing photographs and notes from the case file before ultimately approving the forensic report. He clarified that, based on his view of the photographs taken by Conlon, he had originally believed that the narcotics were wrapped in a knotted plastic bag. Anderson proceeded to testify, however, that he later had an opportunity to enlarge and review one of the photographs. He explained that "[l]ooking at the zoomed-in photograph, it looks like . . . what I thought was the end piece of some plastic was probably glare now after I blew it up, and I can't definitively say if there's a knotted piece of plastic there or not." The court admitted the enlarged photograph as a full exhibit over the defendant's objection.

The state then called Conlon as a witness, who testified that, when she prepared the report in the defendant's case, she was working off the photographs she had taken of the narcotics as opposed to the actual narcotics.[18] She stated that the original photograph had led her to believe that the narcotics were contained within a knotted plastic bag. Upon viewing the enlarged photograph, Conlon testified that "there's no question it's—it certainly looks like a reflection here. . . . It means there was not a piece of plastic in that. . . . I looked at this and saw a piece of plastic, and obviously there wasn't one." The defendant was given a full opportunity to cross-examine both Anderson and Conlon regarding the discrepancies between the report, the original photograph, and the enlarged photograph.

[18] Conlon testified that her typical procedure upon receiving evidence involved checking the evidence for discrepancies between the physical item and the police report, photographing the evidence, and re-sealing the evidence before performing an analysis and preparing a report.

After the jury returned its verdict, the defendant filed a series of postverdict motions, seeking either a new trial or a mistrial.[19] The defendant's motions claimed, inter alia, that the state had violated his right to due process under *Brady* v. *Maryland*, supra, 373 U.S. 87, by failing to timely disclose the forensic lab photographs. Specifically, the defendant argued that the report's description of "knotted plastic" caused him to pursue a trial strategy based on the chain of custody. He contended that, had the photographs been disclosed earlier, he would have pursued alternative trial strategies[20] or reserved his chain of custody theory for closing argument. In response to the defendant's motions, the state argued that it had timely disclosed the report, that it was not in possession of the forensic lab photographs until the defendant subpoenaed them during trial, and that the actual narcotics were made available to the defendant before the start of trial.

On July 8, 2019, the court heard argument on the defendant's postverdict motions. In an oral ruling, the court held that the defendant had failed to establish a *Brady* violation. The court explained that "[the defendant] could've called for further witnesses to testify after it was established that the picture or the lab report was in error regarding the knotted plastic bag—there was a flash or something, some kind of shiny object

[19] The defendant filed a motion entitled "Defendant's Motion for New Trial or Alternatively Declare a Mistrial," dated April 8, 2019. The defendant subsequently filed a "Supplement to Defendant's Motion for New Trial or Alternatively Declare a Mistrial" dated May 9, 2019, and an "Amendment to Defendant's Motion for New Trial or Alternatively Declare a Mistrial Dated April 8, 2019" dated June 3, 2019. The defendant also filed a motion entitled "Defendant's Motion for New Trial for State's Failure to Provide *Brady* Material," dated April 10, 2019. Each of these motions alleged, inter alia, that the state had failed to timely disclose the forensic lab photographs in violation of *Brady*.

[20] Specifically, the defendant claimed that he would have argued that his arrest was the result of a targeted investigation coordinated by Zelinski and presented evidence attacking Zelinski's credibility.

that appeared in the initial photograph that made it look like it possibly could've been the knotted plastic bag, but again, both parties, as well as the court, saw that it—in fact, it was a flash; some kind of shiny object made it appear that way. . . . [T]he evidence is not exculpatory; in fact, it's inculpatory." The court subsequently denied each of the defendant's motions.

On appeal, the defendant claims that the trial court abused its discretion by denying his postverdict motions for a new trial or, in the alternative, a mistrial because the state's failure to timely disclose the forensic lab photographs violated his right to due process under *Brady*. The defendant further argues that the delayed disclosure resulted in prejudice by causing the defendant to (1) forgo alternative trial strategies and (2) reject a favorable plea agreement. We are not persuaded.

We begin by setting forth the appropriate standard of review and relevant principles of law that guide our resolution of the defendant's claim on appeal. "In *Brady* . . . the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . [T]he *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the suppressed evidence was favorable to the defense; and (3) that the evidence was material. . . .

"[E]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered

suppressed as that term is used in *Brady*. . . . Even if evidence is not deemed suppressed under *Brady* because it is disclosed during trial, however, the defendant nevertheless may be prejudiced if he is unable to use the evidence because of the late disclosure. . . . Under these circumstances, the defendant bears the burden of proving that he was prejudiced by the state's failure to make the information available to him at an earlier time. . . . Whether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Citation omitted; internal quotation marks omitted.) *State* v. *Washington*, 155 Conn. App. 582, 596–97, 110 A.3d 493 (2015).

In the present case, we need not reach the issue of whether the state's delayed disclosure prejudiced the defendant because the defendant cannot demonstrate that the forensic lab photographs were favorable to his defense. See *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 296, 979 A.2d 507 ("[i]f . . . the petitioner has failed to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred"), cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009). Although there was confusion at trial regarding the presence of a knotted plastic bag, the enlarged photograph clearly demonstrated that, what originally appeared to be knotted plastic, was actually glare or reflection from Conlon's camera. Indeed, the defendant conceded during the posttrial hearing on his motions that "[t]here's no denying that there is no knotted plastic bag inside of that container." Because the photographs did not depict knotted plastic, they were not favorable to the defendant because they did not support his challenge to the chain of custody. See *State* v. *Gradzik*, 193 Conn. 35, 40–41, 475 A.2d 269 (1984) (finding no *Brady* violation

where suppressed testimony was not exculpatory).[21] We conclude, therefore, that the defendant has failed to demonstrate a due process violation under *Brady*. Accordingly, the trial court did not abuse its discretion by denying the defendant's postverdict motions for a new trial or, in the alternative, a mistrial.

III

The defendant's final claim is that the court abused its discretion by permitting the state to present the enlarged lab photograph and related witness testimony on rebuttal. Specifically, the defendant argues that the court improperly (1) allowed the state to reopen its case-in-chief after the defendant moved for a judgment of acquittal, (2) admitted evidence on rebuttal that did not contradict the defendant's case-in-chief, and (3) denied the defendant's request to review the enlarged photograph prior to Anderson's and Conlon's testimony. He contends that these errors were harmful because they resulted in the "collapse" of his trial strategy. We conclude, however, that the defendant invited any error that may have arisen from the court's decision to permit such evidence. Accordingly, the defendant's claim is unreviewable.

[21] In his reply brief to this court, the defendant argues that the forensic lab photographs were exculpatory by drawing a distinction between the original and enlarged photographs. Specifically, the defendant claims that the original, unenlarged photographs were exculpatory because they purported to show the narcotics wrapped in a knotted plastic bag. He contends that had the photographs been timely disclosed, and had he learned that the enlarged photograph demonstrated the absence of knotted plastic, he would have attempted to introduce only the original photographs at trial. The defendant cites no authority standing for the proposition that the state must provide criminal defendants with neutral or inculpatory evidence so that the defendant can subsequently misrepresent that evidence as exculpatory at trial. See *Morant* v. *Commissioner of Correction*, supra, 117 Conn. App. 286 ("[o]ne does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). We conclude, therefore, that the defendant's argument is without merit.

"[T]his court routinely has held that it will not afford review of claims of error when they have been induced. . . . As we previously have explained, the term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [alleged] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional error and induced constitutional error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party." (Citations omitted; internal quotation marks omitted.) *State* v. *Martone*, 160 Conn. App. 315, 328, 125 A.3d 590, cert. denied, 320 Conn. 904, 127 A.3d 187 (2015).

On rebuttal, the state initially presented testimony from Lynch and Green. Both witnesses testified as to the condition of the narcotics before and after the narcotics had been tested by the lab, and offered their opinion on the presence of plastic in the original lab photographs. Upon the conclusion of Green's testimony, the state informed the court that it did not intend to call additional witnesses on the chain of custody issue. The state argued that the inconsistent testimony regarding the presence of knotted plastic was a matter to be resolved by the jury. The court agreed and subsequently denied the defendant's motion for a judgment of acquittal.

Although the defendant initially argued against the state's introduction of witness testimony on rebuttal, he repeatedly asked to call additional lab employees to testify as to the report, the return receipt, and the forensic lab photographs after the court denied his motion for a judgment of acquittal. Specifically, the defendant stated that "I'd like, I guess, [to] call somebody from the lab . . . back down here and then say if this is the

condition they received it in" and "I want somebody from the lab or whoever took the photos . . . ." The court denied the defendant's request to subpoena additional witnesses, but asked the state to contact the lab and produce employees that could clarify the documents and the photographs. Only thereafter did Anderson and Conlon examine the enlarged photograph and testify that, what originally appeared to be knotted plastic, was actually glare or reflected light.[22] As a result, the defendant invited the exact testimony he now complains undermined his defense. Further, the defendant was given a full and fair opportunity to cross-examine both Anderson and Conlon regarding the condition in which the lab received the narcotics and to elicit testimony regarding alleged discrepancies. We therefore decline to review his claim.

The judgment is affirmed.

In this opinion MOLL, J., concurred.

PRESCOTT, J., concurring. I agree with and join parts II and III of the majority opinion. I concur in the result reached by the majority with respect to the first claim of the defendant, Bennie Gray, Jr., but I write separately because I do not entirely agree with the majority's analysis of the "materiality" prong of the *Asherman/Morales*

[22] Although the defendant initially objected to the introduction of the enlarged photograph, his theory of objection was that the photograph was not authenticated, and not that the photograph was unduly prejudicial. After having an opportunity to examine the photograph, the defendant stipulated that the enlarged photograph was, in fact, a magnified version of the original. "Our Supreme Court has explained that, to afford [defendants] on appeal an opportunity to raise different theories of objection would amount to ambush of the trial court because, [h]ad specific objections been made at trial, the court would have had the opportunity to . . . respond." (Internal quotation marks omitted.) *State* v. *Chiclana*, 149 Conn. App. 130, 141, 85 A.3d 1251, cert. denied, 311 Conn. 950, 90 A.3d 977 (2014). Because the defendant failed to object on the ground that the enlarged photograph was unduly prejudicial, we conclude that his claim is not reviewable.

balancing test. My disagreement, however, largely derives from the lack of consistency and clarity within our *Asherman/Morales* jurisprudence concerning the meaning to be given to the test's materiality prong.

In a criminal case, if the state loses or destroys evidence, it may have deprived the defendant of the opportunity to test that evidence for fingerprints, DNA, or other forensic evidence. Without the evidence to test, the defendant often is unable to evaluate its exculpatory value. The state's failure to provide to the defendant potentially exculpatory evidence that was at one point, but is no longer, within its control may violate the defendant's right to due process of law under our state constitution. See *State* v. *Morales*, 232 Conn. 707, 719, 657 A.2d 585 (1995) (evaluating "whether the failure of the police to preserve potentially [exculpatory] evidence ha[s] *deprived a criminal defendant of due process of law under . . . the . . . state constitution*" (emphasis added)).

In *Morales*, our Supreme Court adopted a four-pronged balancing test that courts are to apply in reviewing a criminal defendant's state due process claim arising out of the state's destruction or loss of potentially exculpatory evidence. See id., 726–27. "[I]n determining whether a defendant has been afforded due process of law under the state constitution, the trial court must . . . [weigh] the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: 'the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence.' *State* v. *Asherman*, [193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied,

470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985)]." *State* v. *Morales*, supra, 232 Conn. 726–27.

Our courts, however, have employed the term "materiality" to have slightly different meanings in two closely related contexts: (1) in *Asherman/Morales* cases, like the present case, in which the state has failed to preserve potentially exculpatory evidence by losing or destroying it; and (2) in cases involving traditional *Brady* violations where the state has withheld exculpatory evidence from the accused.[1] See id., 714 (differentiating instances in which state failed to preserve potentially exculpatory evidence by losing or destroying it, like in present case, from strict *Brady* violations). Several cases within our *Asherman/Morales* jurisprudence have described the "materiality" prong using the following language: "[E]vidence is material *only* if there is a reasonable probability that," had the evidence been preserved and disclosed to the defense, "the *result of the proceeding would have been different*." (Emphasis added; internal quotation marks omitted.) *State* v. *Fox*, 192 Conn. App. 221, 237, 217 A.3d 41, cert. denied, 333 Conn. 946, 219 A.3d 375 (2019); see *State* v. *Baldwin*, 224 Conn. 347, 365, 618 A.2d 513 (1993) (same); *State* v. *Richard W.*, 115 Conn. App. 124, 141, 971 A.2d 810 (same), cert. denied, 293 Conn. 917, 979 A.2d 493 (2009); see also *State* v. *Valentine*, 240 Conn. 395, 417–18, 692 A.2d 727 (1997) ("[t]he measure of materiality is whether there is a reasonable probability that," had evidence been preserved and disclosed to defense, "the result of the proceeding would have been different" (internal quotation marks omitted)); *State* v. *Joyce*, 243

[1] "[T]o prove a . . . violation [of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)], [a] defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) *that the evidence was material*." (Emphasis added; internal quotation marks omitted.) *State* v. *Komisarjevsky*, 338 Conn. 526, 614, 258 A.3d 1166, cert. denied, U.S. , 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021).

Conn. 282, 301, 705 A.2d 181 (1997) (same), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998); *State* v. *Thompson*, 128 Conn. App. 296, 303, 17 A.3d 488 (2011) (same), cert. denied, 303 Conn. 928, 36 A.3d 241 (2012); *State* v. *Barnes*, 127 Conn. App. 24, 32, 15 A.3d 170 (2011) (same), aff'd, 308 Conn. 38, 60 A.3d 256 (2013).

On the other hand, the cases within our *Brady* jurisprudence have described materiality somewhat differently: "Evidence is material when there would be a reasonable probability of a different result if it were disclosed. . . . *A reasonable probability exists if the evidence could reasonably . . . put the whole case in such a different light as to undermine confidence in the verdict.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Komisarjevsky*, 338 Conn. 526, 633–34, 258 A.3d 1166, cert. denied, U.S. , 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021); see also *State* v. *Esposito*, 235 Conn. 802, 815, 670 A.2d 301 (1996) (requiring defendant to demonstrate "that the favorable evidence *could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict*" (emphasis added; internal quotation marks omitted)). Under our *Brady* jurisprudence, however, "[m]ateriality *does not require* . . . a demonstration . . . that disclosure of the suppressed evidence would have resulted ultimately in the defendant's *acquittal*. . . . Instead, the operative inquiry is *whether, in the absence of the evidence, the defendant received a fair trial . . . resulting in a verdict worthy of confidence.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Komisarjevsky*, supra, 634; see also *State* v. *Bryan*, 193 Conn. App. 285, 317, 219 A.3d 477 ("[t]he question is not whether the defendant would more likely than not have received a *different verdict* with the evidence, but whether in its absence he received a *fair trial*, understood as a trial resulting in a verdict worthy

of confidence" (emphasis added; internal quotation marks omitted)), cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). Thus, although many of our *Asherman/Morales* cases define "materiality" using somewhat similar language to that used within our *Brady* jurisprudence, our courts appear to have given two different meanings to the common factor of materiality.

Moreover, within our *Asherman/Morales* jurisprudence, our cases have sometimes confounded the first prong of the balancing test—that is, "the materiality of the missing evidence"; (internal quotation marks omitted) *State* v. *Morales*, supra, 232 Conn. 719; and the fourth prong of the balancing test—that is, "the prejudice to the defendant caused by the unavailability of the evidence." (Internal quotation marks omitted.) Id., 720. In other words, despite the fact that the *Asherman/Morales* balancing test differentiates between these two prongs, many cases within our *Asherman/Morales* jurisprudence appear to have construed the "materiality of the missing evidence" prong to evaluate "the prejudice to the defendant caused by the unavailability of the evidence." (Internal quotation marks omitted.) Id., 719–20. Accordingly, in several of these cases—including the majority's opinion in the present case—our courts have evaluated, under *Asherman/Morales*' materiality prong, whether the unavailability of the evidence at trial *prejudiced* the defendant. See, e.g., *State* v. *Joyce*, supra, 243 Conn. 301–302 (evaluating, under *materiality* factor, cumulative weight of remainder of state's case against defendant, outside of contested evidence); *State* v. *Fox*, supra, 192 Conn. App. 239 (same); *State* v. *Barnes*, supra, 127 Conn. App. 33 (same).

The inconsistencies *within* our *Asherman/Morales* jurisprudence have resulted in a lack of clarity as to how the materiality prong should be applied. To start, the definition of "materiality" adopted by many cases

within our *Asherman/Morales* jurisprudence strays significantly from how the *Asherman* court, as the majority notes, originally defined "materiality." As the majority recognizes, the *Asherman* court "set forth the standard for materiality in cases where evidence was lost or destroyed prior to forensic testing . . . [by holding] that, 'if the state has not tested an item of evidence before its loss or destruction, and no other facts indicate that test results might have proved unfavorable to the defendant, *little more is required* than a showing that the test could have been performed and results obtained which, in the context of the defendant's version of the facts, would prove exculpatory.' "[2] (Emphasis added.) Part I of the majority opinion; see *State* v. *Asherman*, supra, 193 Conn. 725. Thus, by maintaining that evidence is material "*only* if there is a reasonable probability that, had [it] been disclosed to the defense, the *result of the proceeding would have been different*"; (emphasis added; internal quotation marks omitted) *State* v. *Fox*, supra, 192 Conn. App. 237; our courts appear to have retreated from the *Asherman* court's initial, less demanding threshold for materiality.

[2] In *Correia* v. *Rowland*, 263 Conn. 453, 820 A.2d 1009 (2003), a habeas petitioner relied on this language; see id., 477 n.23; to argue that "a legal presumption ar[ose] that . . . untested evidence, not preserved by the state, would have [yielded results that would have] exonerated [him]," had it been tested. (Emphasis omitted.) Id., 473–74, 476. Our Supreme Court rejected this argument and stated: "We do not read *Asherman* to support th[at] [the law presumes that the lost or destroyed evidence, if tested, would have exonerated the petitioner]. To the contrary, although this section of *Asherman* does state '[o]n the other hand, if the state has not tested an item of evidence before its loss or destruction, and no other facts indicate that test results might have proved unfavorable to the defendant, little more is required than a showing that the test could have been performed and results obtained which, in the context of the defendant's version of the facts, would prove exculpatory'; [*State* v. *Asherman*, supra, 193 Conn. 725]; we note that *this passage*, particularly its reference to other facts indicating a test result unfavorable to the defendant, *is merely part of an explication of the balancing process that the court must undertake under both Asherman and Morales*." (Emphasis added.) *Correia* v. *Rowland*, supra, 477 n.23. In my view, the court's attempt in *Correia* to clarify its prior language in *Asherman* was not entirely successful.

Additionally, in at least one case following *Asherman*, our Supreme Court evaluated the materiality prong by using an entirely different definition of "materiality." In *State* v. *Estrella*, 277 Conn. 458, 893 A.2d 348 (2006), our Supreme Court initially stated: "The evidence is material *only* if there is a reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding would have been different*." (Emphasis added; internal quotation marks omitted.) Id., 485. Our Supreme Court, however, continued: "*In other words*, the defendant must show that [the evidence] would have been *helpful* to him."[3] (Emphasis added.) Id. In my view, there is a significant difference between evidence that raises a reasonable probability that the defendant would be found not guilty and evidence that would be "helpful" to the defendant's case.

The Supreme Court in *Estrella* ultimately concluded that, because "the defendant [did] not [demonstrate] that [the evidence] would have been *favorable*" to him, its "absence was [not] *prejudicial*" to the defendant and the materiality factor did not weigh in his favor. (Emphasis added.) Id., 486. The *Estrella* court's frequent interchanging of different terms to describe the materiality prong has resulted in inconsistencies between *Estrella* and other *Asherman/Morales* cases, further muddling the proper meaning to be ascribed to *Asherman/Morales*' materiality prong.

In sum, there exists a lack of consistency and clarity, both between our *Brady* jurisprudence and *Asherman/Morales* jurisprudence, and within our *Asherman/Morales* jurisprudence, as to the meaning to be given to the materiality prong of the *Asherman/Morales* balancing test. I encourage our Supreme Court, when pro-

[3] The *Estrella* court also stated that "[e]vidence is material when it is offered to prove a fact directly in issue or a fact probative of a matter in issue." *State* v. *Estrella*, supra, 277 Conn. 484 n.17.

vided an appropriate opportunity, to define more fully and definitively "materiality" in *Asherman/Morales* cases or to reformulate the *Asherman/Morales* test to address this lack of clarity.

Nonetheless, in the present case, even if I assume that the first three prongs of the *Asherman/Morales* test—including the materiality prong—weigh in favor of the defendant, the defendant has failed to persuade me that, under the fourth prong of the test, the admission of secondary evidence of the seized cash, in light of its unavailability for testing, caused him prejudice sufficient to reverse the judgment of the trial court. See *State* v. *Morales*, supra, 232 Conn. 723. In my view, even if the defendant's motion to suppress the secondary evidence of the seized cash had been granted, the remaining evidence against the defendant was quite strong.

"The fourth factor of the *Asherman*[*/Morales* balancing] test concerns the prejudice caused to the defendant as a result of the unavailability of the [missing evidence]. In measuring the degree of prejudice to an accused caused by the unavailability of the evidence, a proper consideration is the strength or weakness of the state's case, as well as the corresponding strength or weakness of the defendant's case." (Internal quotation marks omitted.) *State* v. *Morales*, 90 Conn. App. 82, 91, 876 A.2d 561, cert. denied, 275 Conn. 924, 883 A.2d 1250 (2005). In analyzing this prong, our courts have evaluated the strength of the state's case by reviewing the "testimony and exhibits [introduced at trial], *aside from*" the missing evidence. (Emphasis added.) Id., 92; see also *State* v. *Joyce*, supra, 243 Conn. 303 ("[i]n light of the state's *other evidence* connecting the defendant to the crime and the persuasive [other] evidence [the state presented], we conclude that the absence of the [missing evidence] did not prejudice the defendant" (emphasis added)).

Had the jury *not* heard testimony concerning the seized cash, the state's case against the defendant nevertheless was compelling. Brian Drobnak testified at trial concerning his purchase of crack cocaine from the defendant on May 9, 2018. After he was arrested at the Gulf gas station with crack cocaine in his possession and while still at the scene, Drobnak immediately volunteered to speak with the police. He reported to the police that he had purchased crack cocaine from an individual the police quickly identified as the defendant. Drobnak reiterated this version of events in a written statement at the police station[4] and later when he testified at trial. While at the scene, Drobnak also provided to the police the phone number he had contacted to arrange the narcotics transaction. The police confirmed that the phone number provided to them by Drobnak matched a cell phone found in the center console of the defendant's car. Further, Drobnak testified that he had purchased crack cocaine from the defendant on prior occasions.

At trial, Officers Todd Lynch and Jeremy Zelinski corroborated Drobnak's version of the events. Lynch and Zelinski testified that, at the gas station, they observed Drobnak pacing back and forth alongside his vehicle and checking his phone. They did not observe Drobnak purchase gasoline, enter the convenience store at the gas station, or use the air pressure machine nearby. Shortly thereafter, Lynch and Zelinski observed a car, operated by the defendant, pull into the gas station. They watched Drobnak enter the car operated by the defendant, remain in the car for less than one

[4] Drobnak testified that, in his written statement, he stated that he had purchased the crack cocaine from "G," whom Drobnak admitted on cross-examination referred to Greg Williams, a mutual acquaintance of Drobnak and the defendant. Drobnak clarified at trial, however, that he had intended to identify the defendant in his written statement, and he testified that there was "no doubt in [his] mind that [the defendant] [was] the man who sold [him] crack cocaine."

minute, and subsequently exit the vehicle to return to his car. As the majority states, the "limited exchange between Drobnak and the defendant . . . in an area well-known for frequent drug sales" indicated that a narcotics transaction had taken place between the defendant and Drobnak. Immediately after Drobnak returned to his car, Lynch and Zelinski approached Drobnak's vehicle. They testified that, once they approached the vehicle, they immediately observed Drobnak holding what appeared to be narcotics. Lynch and Zelinski recovered what field testing confirmed to be cocaine from Drobnak's car.

Immediately after the substance was field tested and confirmed as positive for cocaine, Sergeant Gregory Moreau attempted to initiate a motor vehicle stop of the defendant's vehicle by activating the siren and overhead lights of his police cruiser. Demonstrating consciousness of guilt, the defendant did not stop. Moreau used the public address system of his cruiser to instruct the defendant to pull over, and the defendant continued driving forward for another two to four hundred feet before he eventually stopped. The defendant subsequently was placed under arrest and transported to the police station. At the police station, Lynch asked the defendant why he was involved in selling narcotics. In response to Lynch's question, the defendant responded, "that's all I know."

Comparatively, the defendant's theory of the case was significantly weaker than the state's case against him. At trial, the defendant denied selling narcotics to Drobnak. The defendant testified that he had met Drobnak at the gas station to speak about his son's missing cell phone, because the defendant allegedly had left the phone in Drobnak's car a few days prior. The defendant testified that, upon entering the defendant's car, Drobnak requested a financial reward for finding the cell phone. According to the defendant, he denied Drobnak's request

and asked Drobnak to exit the car, and Drobnak did so less than a minute after he had entered. The defendant's version of events, as the majority notes, was "largely unsubstantiated" by any other evidence outside of his own testimony. Accordingly, the court's denial of the defendant's motion to suppress the secondary evidence of the cash does not justify reversal of the defendant's conviction under the *Asherman/Morales* standard.

For the foregoing reasons, I respectfully concur.

STATE OF CONNECTICUT *v.* KYLE A.*
(AC 43377)

Elgo, Suarez and Sullivan, Js.

Syllabus

Convicted, after a jury trial, of various crimes in connection with an altercation with his brother, A, the defendant appealed to this court. The defendant called A on the phone, and, during that call, A was given reason to believe that the defendant had been consuming alcohol. The defendant expressed his intent to go to A's home, where A lived with his minor daughter. A warned the defendant that he could not come to the home if he was intoxicated because A's daughter was with him. Later that day, while A and his girlfriend, T, were inside of the home, the defendant arrived. The defendant, who did not have a key to the home, banged on the locked front door, and then broke a window on the locked back door and entered the home. A and T fled the home through the front door. The defendant, brandishing a wooden baseball bat, emerged from the home and began to strike A's automobile, which was parked in the driveway, with the bat. The defendant also used the bat to damage property inside of the home. *Held*:

1. The defendant could not prevail on his claim that the state presented insufficient evidence that he committed burglary in the first degree: the state's theory of the case, that the defendant entered or remained unlawfully in the victim's home, was legally viable as the defendant's

* 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.

entry into the home was unlawful because A, who was occupying the home, testified that the defendant was not a resident of the home at the time of the incident, that A and his daughter resided there, and that A had communicated to the defendant that he was not permitted to enter the home and, although the defendant claimed that he was granted a license to enter the home by J, his mother and the undisputed owner of the home, this claim rested entirely on the credibility of J's testimony, which was challenged at trial, and this court presumed that the jury, the sole arbiter of the credibility of the witnesses, disbelieved J's testimony to the extent that she testified that she gave the defendant permission to enter the home; moreover, J's familial relationship to the defendant reasonably could have given the jury reason to consider with skepticism her testimony as, contrary to J's testimony that the defendant had a key to the residence, the state presented evidence that the defendant broke down a door in order to enter the home and that the defendant wrote letters to J in which he urged her not to cooperate with the prosecution; furthermore, the evidence was sufficient to prove beyond a reasonable doubt that the defendant was armed with a dangerous instrument as there was direct evidence, through T's testimony, regarding the defendant's use of a baseball bat in A's driveway immediately after he had illegally entered and remained in A's home, which made it more likely that the defendant possessed the baseball bat while he was inside of the home and that he used the bat to cause damage to property inside of the home, which was undamaged prior to his unlawful entry.

2. The defendant's unpreserved claim that the trial court's instruction to the jury concerning the charge of burglary in the first degree constituted plain error was unavailing: notwithstanding the defendant's claim that the court improperly omitted a necessary portion of the instruction because, although it instructed the jury that it needed to find that the defendant acted with the specific intent to commit either a felony or a misdemeanor in the home, it failed to identify by name one or more specific felony or misdemeanor offenses, the alleged error did not involve the court's failure to include language from a mandatory charging statute; moreover, this court was not persuaded that allowing the alleged error in the instruction to stand uncorrected would work a manifest injustice, as the defendant's argument was undermined by the fact pattern that was reflected in the evidence and expressly relied on by the prosecutor during oral argument, which pointed to the defendant's intent to commit three different crimes, all of which would rise to the level of intent required by the burglary statute; furthermore, although the better practice would have been for the trial court to have instructed the jury with respect to the intent to commit one or more named felony or misdemeanor offenses, the claimed error was unlikely to have guided the jury to an incorrect verdict in light of the evidence and arguments advanced in the present case.

Argued October 21, 2021—officially released May 3, 2022

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of burglary in the first degree, criminal mischief in the first degree, and threatening in the second degree, and substitute information, in the second case, charging the defendant with the crime of attempt to commit criminal violation of a protective order, and substitute information, in the third case, charging the defendant with the crime of criminal violation of a protective order, and substitute information, in the fourth case, charging the defendant with the crime of tampering with a witness, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *McShane*, *J.*; verdicts and judgments of guilty, from which the defendant appealed to this court. *Affirmed.*

Julia K. Conlin, assigned counsel, with whom were *James Sexton*, assigned counsel, and, on the brief, *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, was *Margaret E. Kelley*, state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Kyle A., appeals from the judgments of conviction, rendered following a jury trial, of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), criminal mischief in the first degree in violation of General Statutes § 53a-115 (a) (1), threatening in the second degree in violation of General Statutes § 53a-62 (a) (2) (A), criminal violation of a protective order in violation of General Statutes § 53a-223, tampering with a witness in violation of General Statutes § 53a-151, and attempt to commit criminal violation of a protective order in violation of General

Statutes §§ 53a-49 and 53a-223.[1] The defendant's appellate claims pertain solely to his burglary conviction. The defendant claims that, because the state did not present sufficient evidence that he committed the burglary offense, he is entitled to a judgment of acquittal with respect to that offense. Alternatively, the defendant claims that, because the court's instruction concerning the burglary offense constituted plain error, the conviction for burglary should be overturned and the case remanded for a new trial with respect to that offense. We affirm the judgments of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On August 28, 2016, A resided with his daughter, who was eight years old, in a single-family residence in West Haven. A's girlfriend, T, frequently visited him at the home. The home was owned by J, who is the mother of A and his brother, who is the defendant. J did not reside in the home at that time.

The defendant had been living in Maryland, but as of August 28, 2016, he made plans to move to Connecticut and live with his brother, A, at the West Haven home. The defendant called A at approximately 6 a.m. on August 28, 2016. During the call, the defendant gave A reason to immediately become concerned about his pending arrival. On the basis of statements made by the defendant, A believed that the defendant had been consuming alcohol and "partying . . . ." At one point in the conversation, the defendant asked A if he could provide him with "Adderall or something to help keep him awake." A warned the defendant that he could not come to the home if he was intoxicated because his daughter was at the home with him. A stated, "please

[1] The trial court imposed a total effective sentence of fourteen years of imprisonment, execution suspended after nine years, followed by five years of probation.

[do] not show up if you're drinking or anything . . . ." A also told the defendant that if he came to the home while intoxicated "that we probably couldn't let you in because my daughter was there." Initially, the defendant was upset with these restrictions, but after he spoke with A further, he asked A for time "to sober up and everything and do what I have to do." A agreed that he would talk to the defendant later that day.

At approximately 9 a.m., the defendant called A a second time. A asked the defendant if he was doing any better and again cautioned the defendant to "just please wear it off before you make any efforts or steps to come to the house." Once again, A asked the defendant not to come to the home in light of the defendant's condition or state of mind, and emphasized that, under the circumstances, the defendant could not come in contact with A's daughter. A offered to help the defendant, at a different location, but the defendant hung up on him. At approximately 1 p.m., the defendant called A a third time. He made it clear that he was coming to the house regardless of A's objections. Once more, A asked the defendant not to come if he was intoxicated and stressed that, because a child resided at the home, the defendant had to be sober. The defendant, upset with the restrictions being placed on him by A, sent A a text message that stated, "Do you want to play with fire, you are going to get burned."

Later that day, while A and T were inside of the home, the defendant arrived. The defendant, who did not have a key to the home, angrily banged on the front door, which was locked. The defendant was screaming and yelling. The defendant went to a locked back door, broke a window on the door, and entered the home. A and T, fearing for their safety, fled from the home by means of the front door. As he left the home, A saw the defendant entering and asked him to "please stop, stop . . . ."

After they exited the home, A and T stayed a safe distance away, while seeking the aid of neighbors and attempting to contact the police. The defendant, brandishing a wooden baseball bat, emerged from the home and began to strike A's automobile, which was parked in the driveway, with the bat. The defendant used the bat to cause significant damage to property inside of the home as well. The police arrived on the scene a short time later, at which point the defendant was inside of the home. The defendant exited the home when the police instructed him to do so and, while he was being taken into custody, he noticed A standing nearby and stated that he "was going to kill [him] when [he] get[s] out of this . . . ." Hours later, while in police custody at the police department and undergoing the booking process, the defendant repeated his threat to kill A.

Following the defendant's arrest, but prior to trial, the court issued three separate protective orders that, among other things, prohibited the defendant from having contact with A and A's daughter. The orders stated, "Do not contact the protected person in any manner, including by written, electronic or telephone contact, and do not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person." While he was bound by this provision, the defendant called A from prison on nine separate occasions. Also, on several occasions, the defendant mailed letters from prison to several persons in an attempt to persuade A not to cooperate with the prosecution of the charges related to his conduct on August 28, 2016, and the charges that related to his violation of a protective order. Additional facts will be set forth as necessary.

I

First, the defendant claims that because the state did not present sufficient evidence that he committed the

burglary offense, he is entitled to a judgment of acquittal with respect to that offense.[2] We disagree.

The present claim consists of two subclaims. First, relying on evidence that J, who owned the home, granted him permission to reside at the home, the defendant argues that the state's theory of the case, that he entered or remained unlawfully in the home on August 28, 2016, was not legally viable. Second, the defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was armed with a dangerous instrument.

Before analyzing each subclaim, we set forth our standard of review and relevant legal principles. "When a criminal conviction is reviewed for the sufficiency of the evidence, we apply a well established [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reason-

[2] Although it is not a prerequisite to our review of this claim, we note that, at the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal, asserting, in general terms, that the state "failed to make out a prima facie case, warranting submission of the case to the jury." The court denied the motion. After defense counsel rested his case, he renewed the motion for a judgment of acquittal, which the court again denied.

able view of the evidence that supports the [fact finder's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Fisher*, 342 Conn. 239, 249, 269 A.3d 104 (2022).

"Our review is a fact based inquiry limited to determining whether the inferences drawn by the [fact finder] are so unreasonable as to be unjustifiable. . . . [T]he inquiry into whether the record evidence would support a finding of guilt beyond a reasonable doubt does not require a court to ask itself whether it believes that the evidence . . . established guilt beyond a reasonable doubt. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . .

"We do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the [fact finder's] opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility. . . . We are content to rely on the [fact finder's] good sense and judgment." (Internal quotation marks omitted.) *State* v. *Whitnum-Baker*, 169 Conn. App. 523, 525–26, 150 A.3d 1174 (2016), cert. denied, 324 Conn. 923, 155 A.3d 753 (2017).

Section 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument . . . ." The state bore the burden of proving the following essential elements beyond a reasonable doubt: (1) the defendant entered or remained unlawfully in a building, (2) he did so with the intent to commit a crime therein, and (3) he was armed with a dangerous instru-

ment. See *State* v. *Weaver*, 85 Conn. App. 329, 341–42, 857 A.2d 376 (setting forth essential elements of offense), cert. denied, 271 Conn. 942, 861 A.2d 517 (2004).

A

With respect to the first essential element of the offense, that the defendant entered or remained unlawfully in a building, the state's theory of the case was that the defendant's entry into the home was unlawful because A, who currently occupied the home, expressly forbid him from entering the home. The prosecutor argued before the jury that A was residing at the home on August 28, 2016, that the defendant was not residing at the home on that date, and that A communicated to the defendant that he was not permitted to come into the home because he was not sober. Thus, the prosecutor argued to the jury that the defendant "unlawfully entered the home where [A] was living . . . ." The prosecutor acknowledged that there was testimony from J that she had granted the defendant permission to enter the home, which she owned. The prosecutor argued, however, that the privilege to enter the home could only be granted "by the person who has [a] possessory interest in the house." The prosecutor argued that A possessed the home on August 28, 2016, and that J was residing in Florida on that date, and, thus, the permission that she may have granted the defendant was "of no moment . . . ." Moreover, the prosecutor argued that, for several reasons, J's testimony that she gave the defendant permission to enter the home was not credible in light of other evidence presented at trial.

With respect to the "unlawful entry" essential element of the offense, the court instructed the jury in relevant part: "You must . . . determine whether the defendant unlawfully entered or remained in [a] building. A person unlawfully enter[s] or remains in a building at the time [that it] is not open to the public and

the defendant is not licensed or privileged to do so. To be licensed or privileged, the defendant must either have consent from the person in possession of the building or have some right to be in that building. . . . You must determine whether the defendant unlawfully entered or remained in a building. A person unlawfully enters or remains in a building when the building, at that time, is not open to the public and the defendant is not licensed or privileged to do so. When I say not licensed or privileged to do so, I mean the defendant must either have had consent from the person in possession of the building or have some other right to be in the building." In this appeal, the defendant does not raise a claim of error related to this instruction.

During her testimony, J testified that, in August, 2016, she was not residing in the West Haven home, which she owned since 1988. She testified that, prior to and including August 28, 2016, A and his daughter were residing at the home but that the defendant had been residing with a relative in Maryland.[3] She testified, however, that she gave the defendant permission to reside at the home, that it was "our home," and that she had not placed any restrictions on his right to enter the home. J testified that the defendant has "always had a key" to the home. When asked if the defendant had a right to damage her property, J testified that she "can't answer that . . . ."

The defendant, relying on the testimony of J, asserts that, "to the extent that [he] needed an express license or privilege to be in the home, the homeowner had granted it to him, so the evidence was insufficient to establish that he entered or unlawfully remained in the house." The defendant also argues that "[he] did not 'remain unlawfully' in the house as his license to be there never was extinguished by the licensor, i.e., his

[3] A testified that he was residing at the home with J's permission.

mother; nor did she place any limitations on the scope of that license." The defendant asserts that the state's theory of the case was not legally viable because it rested on the flawed premise that "one can burglarize one's own residence . . . ." The defendant argues that "[w]hile [his] conduct at the home could have potentially given rise to other criminal charges, it strains the bounds of logic that [he] was charged with and convicted of burglary of his own home." The defendant argues that he neither unlawfully entered nor unlawfully remained in the home because the evidence reflects that, after he entered the home, he did not interact with anyone therein.

Although the defendant's claim is couched in terms of the sufficiency of the evidence, he purports to challenge the viability of the legal theory advanced by the state. In other words, he questions whether his conduct in entering or remaining in the home could be unlawful in light of the evidence that the owner of the home, J, granted him permission to reside there. We conclude that the state's theory was legally viable and that the evidence sufficiently supported the jury's guilty verdict with respect to the burglary offense.

Because we must examine one of the essential elements of burglary in the third degree, related to unlawful entry and remaining in the home, we note that this issue presents an issue of law that we review under the plenary standard of review. As we stated previously, § 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument . . . ." "A person 'enters or remains unlawfully' in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when

the actor is not otherwise licensed or privileged to do so." General Statutes § 53a-100 (b).

"To enter unlawfully means to accomplish an entry by unlawful means, while to remain unlawfully means that the initial entering of the building . . . was lawful but the presence therein became unlawful because the right, privilege or license to remain was extinguished. When either of these situations is established, the threshold element of burglary is present." *State* v. *Edwards*, 10 Conn. App. 503, 511, 524 A.2d 648, cert. denied, 204 Conn. 808, 528 A.2d 1155 (1987).

"A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein. . . . Generally, a license to enter premises is revocable at any time by the licensor. . . . It is exercisable only within the scope of the consent given. . . . The term, privilege, is more general. It is a right or immunity granted as a peculiar benefit, advantage, or favor; special enjoyment of a good or exemption from an evil or burden; a peculiar or personal advantage or right esp. when enjoyed in derogation of common right; prerogative. . . . The phrase, licensed or privileged, as used in [our burglary statutes], is meant as a unitary phrase, rather than as a reference to two separate concepts." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Marsan*, 192 Conn. App. 49, 56, 216 A.3d 818, cert. denied, 333 Conn. 939, 218 A.3d 1049 (2019).

The state's theory of the case was that, on August 28, 2016, the defendant lacked a license or privilege to enter or remain in the home in which he was not a resident and which was occupied by A and his daughter. The prosecutor argued that, in the absence of any credible evidence that the defendant was licensed or privileged to enter or remain in the home, his forcible entry

into the home and his remaining in the home were, for purposes of § 53a-103 (a), unlawful. In light of the foregoing authorities, we conclude that the state's theory of the case, which focused on a lack of a license or privilege to enter and remain, was legally viable.

It cannot be disputed that the defendant's arguments concerning the license or privilege that was allegedly granted to him by the undisputed owner of the home, J, rest entirely on the credibility of J's testimony that she had granted the defendant license or privilege with respect to entering the home. The legal flaw in the defendant's argument is that he treats the challenged testimony of J as if it constituted an unassailable fact. As we have stated previously in this opinion, this court evaluates sufficiency of the evidence claims by viewing the evidence in the light most favorable to the prosecution. See *State* v. *Fisher*, supra, 342 Conn. 249. Accordingly, we presume in this case that the jury, the sole arbiter of the credibility of the witnesses, disbelieved the testimony of J to the extent that she testified that she gave the defendant a license or privilege to enter or to remain in the home. We do so mindful that the state presented ample fodder for the jury's consideration that supported a determination that J, in an attempt to assist the defendant, testified untruthfully in this regard. J's familial relationship to the defendant reasonably could have given the jury reason to consider with skepticism her testimony. We note that, contrary to J's testimony that the defendant had a key to the residence, the state presented evidence that the defendant, armed with a baseball bat, broke down a door in order to gain entry into the home on August 28, 2016. Moreover, the state presented evidence that, while he was awaiting trial, the defendant wrote letters to J in which he urged her not to cooperate with the prosecution and to create an untruthful narrative that would assist his defense,

including suggesting that she inform "the judge" that he "[had] permission to be there . . . ."

The jury, having discredited the testimony of J, reasonably could have found that there was no other evidence that the defendant had a license or a privilege to enter the home or to remain in the home. Certainly, the testimony of A, which we presume the jury found persuasive, reflects that, as of August 28, 2016, the defendant was not a resident of the home, A and his daughter resided at and were the occupants of the home, and A had communicated to the defendant that he was not permitted to enter the home. The evidence also supported a finding that the defendant's conduct on his arrival at the home was that of someone who lacked a license or a privilege to enter. Specifically, the defendant did not use a key to enter the home, he did not wait for an occupant of the home to let him in, and he did not contact J, who presumably could have spoken with A to resolve any dispute concerning the defendant's arrival, for her assistance to gain entry to the home. Rather, the evidence reflects that the defendant forcibly entered the home and caused substantial damage to the property.

In light of the foregoing, we reject the defendant's claim that the jury could not reasonably have concluded that his entry of or remaining in the home was unlawful.

B

With respect to the third element of the offense, that the defendant was armed with a dangerous instrument, the prosecutor argued that the evidence demonstrated that the defendant used a bat inside of the home after his illegal entry therein. With respect to this essential element, the prosecutor argued that the defendant used a wooden baseball bat during the commission of the offense. The defendant argues that although the evidence demonstrated that he used a baseball bat outside

of the home to damage A's automobile that was parked in the driveway, the state did not present any evidence to support a finding that he was armed with a baseball bat while he was inside of the home.

General Statutes § 53a-3 (7) defines "[d]angerous instrument" in relevant part as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ." Although the defendant disputes that he used a wooden baseball bat inside of the home on August 28, 2016, he does not dispute that a wooden baseball bat could constitute a dangerous instrument.

We now turn to the evidence. A testified that when the defendant arrived at the home, he heard a bang on the front door and then, shortly thereafter, he heard the sound of glass breaking at the back door. A testified that, as he fled from the home by means of the front door, he saw the defendant entering the home. T, who fled the home with A as the defendant was entering through the back door, testified that while she was exiting through the front door, she heard "a bat or a kick" and "things smashing . . . ." There was photographic evidence presented that the glass on the rear door was broken, and A testified that the glass on the rear door was not broken prior to the defendant's arrival. A and T testified that, after they exited the home, they remained nearby while attempting to summon assistance. The state presented photographic evidence of damage inside of the home, including a damaged table with a ceramic or marble top in the kitchen, pieces of which were cracked and strewn about the kitchen floor, as well as a damaged television set in the living room. T testified that neither the table nor the television set were damaged prior to the defendant's entry into the home. As he was being questioned about the damage

in the home, A, without objection, identified the television set in the living room as "the TV that was hit with a baseball bat."

T testified about what she observed after she exited the home. In relevant part, she testified that as she and A were running from the home, she stopped and turned around. She saw the defendant near A's automobile, "[h]itting the car with a bat." Photographic evidence presented by the state depicted damage to multiple windows on the automobile. A testified that this damage did not exist prior to that time.[4]

As the defendant acknowledges, the state did not need to prove that the defendant was armed with a dangerous instrument on his entry into the home. It was sufficient for the state to prove that, at some point while he remained unlawfully in the home, the defendant armed himself with a dangerous instrument. See, e.g., *State* v. *Belton*, 190 Conn. 496, 505, 461 A.2d 973 (1983). The gist of the defendant's argument is that the state did not satisfy its burden of proof with respect to his being armed with a baseball bat inside of the home because there was no direct evidence of this fact, and there were no " 'proven facts' " on which the jury reasonably could have inferred this fact.

"It is axiomatic that the burden in criminal cases is on the prosecution to prove each essential element of the alleged crime beyond a reasonable doubt and that there is no burden on the defendant to prove his innocence. . . . In finding guilt beyond a reasonable doubt, a jury may not resort to speculation and conjecture but it is clearly within the province of the jury to draw reasonable, logical inferences from the facts proven." (Citations omitted.) *State* v. *Morrill*, 193 Conn. 602, 608,

[4] The state also presented evidence that the police officers who responded to the scene located shards of a wooden baseball bat in various places outside of the home, including near the rear door.

478 A.2d 994 (1984). We emphasize that "the probative force of the evidence is not diminished because it consists, in whole or in part, of circumstantial evidence rather than direct evidence. . . . It has been repeatedly stated that there is no legal distinction between direct and circumstantial evidence so far as probative force is concerned. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Sanchez*, 50 Conn. App. 145, 149, 718 A.2d 52, cert. denied, 247 Conn. 922, 722 A.2d 811 (1998).

"The law regarding inferences . . . is clear. Due process does not . . . require that each subordinate conclusion established by or inferred from evidence, or even from other inferences, be proved beyond a reasonable doubt. We have regularly held that a jury's factual inferences that support a guilty verdict need only be reasonable. . . . Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts. . . .

"It is axiomatic that the state's burden of proof beyond a reasonable doubt applies to each and every element comprising the offense charged. But this burden of proof does not operate upon each of the many subsidiary, evidentiary, incidental or subordinate facts . . . upon which the prosecution may collectively rely to establish a particular element of the crime beyond a reasonable doubt. . . . Where the prosecution must rely upon circumstantial evidence, either in part or in whole, each link in the chain of circumstantial evidence need not be established beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Hersey*, 78 Conn. App. 141, 167, 826 A.2d 1183, cert. denied, 266 Conn. 903, 832 A.2d 65 (2003).

In the present case, there was direct evidence, by means of the testimony of T, of the defendant's violent

use of a baseball bat in A's driveway immediately after he had illegally entered and remained in the A's home. This evidence made it more likely that the defendant possessed the baseball bat while inside of the home. It also supported a finding that the defendant, who was the only person inside of the home after A and T fled, used the baseball bat to cause the damage that was discovered inside of the home. Moreover, the photographic and testimonial evidence concerning the nature and extent of the damage to items inside of the home that were undamaged prior to the defendant's unlawful entry into the home, including damage to the kitchen table and the television set, was entirely consistent with damage that would have been caused by a baseball bat. On the basis of the evidence as a whole and the rational inferences to be drawn therefrom, the jury could have reasonably concluded beyond a reasonable doubt that the defendant either entered the home with a baseball bat or that he armed himself with a baseball bat while inside of the home.

II

Next, the defendant claims that the court's instruction concerning the burglary offense constituted plain error and that the conviction for burglary should be overturned and the case remanded for a new trial with respect to that offense. We disagree.

We begin our analysis of this claim by setting forth the relevant procedural history. The court distributed to the parties a written draft of its jury instructions and, after affording the parties a meaningful opportunity to review the instructions, held a charging conference during which defense counsel did not raise any objections to the court's burglary charge. Defense counsel submitted a written request to charge but it did not include a burglary instruction.

During closing argument, the prosecutor argued to the jury that, with respect to the second essential element of the offense, that the defendant intended to commit a crime in the home; see General Statutes § 53a-101 (a) (1); the evidence supported a finding that the defendant acted with the requisite mental state required for the commission of the crime. The prosecutor suggested that the crime that the defendant intended to commit was criminal mischief.[5] The state charged the defendant with criminal mischief in the first degree in violation of § 53a-115 (a) (1), a felony, and in connection with this offense, it relied on evidence that he caused damage to tangible personal property inside of the home. The jury ultimately found the defendant guilty of this offense as well. In her arguments, the prosecutor also focused on the evidence of the defendant's comments concerning A, made before and after he arrived at the home. The prosecutor argued, "[i]ntent to commit a crime, the criminal mischief, crime of violence and assault, a threatening, an intent to commit a crime. The threatening threatens to commit a crime of violence with an intent to terrorize another. . . . I ask you to remember the words that were spoken by the defendant and the substance of the text messages, how could that be anything other than to terrorize . . . ."

Later, the court instructed the jury concerning the burglary offense: "The statute defining this offense reads in pertinent part as follow[s]: A person is guilty of burglary in the first degree when he unlawfully enters or remains in a building with the intent to commit a crime therein and he is armed with a dangerous instrument." After discussing the first essential element of

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

the offense, that the defendant unlawfully entered or remained in a building, the court addressed the second element of the offense: "The second element is that the defendant unlawfully entered or remained in the building with the intent to commit a crime in that building. A person acts intentionally with respect to a result when his conscious objective is to cause such result. Even if the defendant never actually committed a crime in the building, if the evidence establishes beyond a reasonable doubt that there was such an intention, this is sufficient to prove the defendant unlawfully entered or remained in the building with the intent to commit a crime therein. Furthermore, the necessary intent to commit a crime must be an intent to commit either a felony or a misdemeanor in addition to the unlawful entering or remaining in the building." The court then addressed the third essential element of the offense, that the defendant be armed with a dangerous instrument in the building. Following the court's charge, defense counsel did not take an exception related to the burglary instruction.

The defendant, acknowledging that he failed to preserve the present claim of instructional error at trial, argues that he is entitled to relief under the plain error doctrine. "It is well known that the plain error doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment

. . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. . . .

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Citation omitted; internal quotation marks omitted.) *State* v. *Jones*, 210 Conn. App. 249, 271–72, 269 A.3d 870 (2022).

The gist of the defendant's argument is that the court improperly omitted a necessary portion of the instruction because, although it instructed the jury that it needed to find that the defendant acted with the specific intent to commit either a felony or a misdemeanor in the home, it failed to *identify by name* one or more specific felony or misdemeanor offenses. The defendant

argues that the court deviated from the model criminal jury instruction[6] and that "[t]he court's failure to include this portion of the charge impermissibly permitted the jury to craft its own understanding of what constitutes a felony or misdemeanor, resulting in patent and readily discernible error." The defendant asserts that, in light of the evidence before the jury, "the jury could have believed any host of morally offensive behaviors, such as angrily attempting to confront his brother, to constitute a 'crime,' thereby using its own, incorrect interpretation of criminal conduct as support for the intent element."

Because the present claim of plain error arises in the context of a claim of instructional error, we are mindful that, "[a]lthough, on rare occasions, [our Supreme Court has] granted plain error review for claims of improper jury instructions . . . [it has] done so only when the instruction in question either failed to include language from a mandatory charging statute, or when the instruction was so patently improper that to allow it to stand uncorrected would work a manifest injustice." (Citations omitted.) *State* v. *Kelly*, 256 Conn. 23, 58 n.18, 770 A.2d 908 (2001).

For several reasons, we disagree that the alleged instructional error rises to the level of plain error. First, it cannot be disputed that the alleged error does not involve the court's failure to include language from a mandatory charging statute.

Second, we are not persuaded that allowing the alleged error in the instruction to stand uncorrected would work a manifest injustice. In *State* v. *Zayas*, 195 Conn.

[6] See Connecticut Criminal Jury Instructions 9.2-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 18, 2022); see also *State* v. *Gomes*, 337 Conn. 826, 853 n.19, 256 A.3d 131 (2021) (cautioning that model jury instructions are to be used as " 'guide' " and are for instructive purposes).

611, 612, 616–18, 490 A.2d 68 (1985), our Supreme Court rejected a similar claim, albeit one of constitutional magnitude, which was raised by a defendant who was convicted of attempted burglary in the second degree in violation of General Statutes (Rev. to 1979) § 53a-102 and § 53a-49. In *Zayas*, "[t]he [trial] court charged the jury that in order to convict the defendant they must find that he intended to commit a crime inside the dwelling. The court did not instruct the jury on any particular crime regarding this element of attempted burglary. The defendant argue[d] that this lack of specificity in the jury instructions deprived him of due process of law because it allowed the jury to find him guilty without necessarily finding all of the elements of attempted burglary to have been proved beyond a reasonable doubt." Id., 616. Our Supreme Court noted that it did not approve of the court's instruction and that "[t]he better practice would have been to instruct the jury on the statutory names and definitions of specific crimes for which there was sufficient evidence of an intent to commit." (Internal quotation marks omitted.) Id., 618. Nonetheless, the court rejected the defendant's constitutional challenge and concluded that it was not possible that the jury was misled because (1) the trial court instructed the jury that it must find that the defendant acted with the intent to commit a felony or a misdemeanor offense in the home that he entered unlawfully, and (2) the fact pattern, presented by the evidence, was such that it was not likely that the jury would have viewed noncriminal conduct to constitute a felony or a misdemeanor offense. Id., 617–18. The court stated: "If the fact pattern, presented by the evidence, was such that it was capable of varying interpretations, some criminal but others noncriminal though perhaps morally offensive, we would find persuasive the defendant's assertion that, by failing to specify the crime or crimes which the evidence suggested, the court

impermissibly allowed the jury to define criminal conduct. . . . But on the record before us we cannot conclude that, taken as a whole and specifically related to the facts of this case, the trial court's instructions failed to guide the jury to a clear understanding of the offense." (Citations omitted.) Id., 618.

In the present case, the defendant's attempt to demonstrate that the alleged error resulted in a manifest injustice is undermined by the fact pattern that was reflected in the evidence and expressly relied on by the prosecutor during oral argument. This fact pattern points to the defendant's intent to commit three different crimes, all of which would rise to the level required by the burglary statute. The defendant was charged with and convicted of *criminal mischief* based on his destructive conduct inside of the home. As the prosecutor stated during oral argument, there was evidence that the defendant had made *threatening* statements to A prior to his arrival at the home and after the police arrived at the scene. The jury reasonably could have viewed the defendant's statements, made in the presence of the police, in which he expressed an intent to "kill" A, combined with the evidence of the defendant's violent entry into the home and his destructive use of a baseball bat while he was inside of the home, as reflecting an intent to *assault* A. Against this factual backdrop, we do not conclude that, taken as a whole and specifically related to the facts of this case, the court's instructions did not guide the jury to a clear understanding of the offense.

Third, in light of the foregoing, the defendant has not demonstrated that the claimed error is of such monumental proportion that it threatens to erode our system of justice and result in a serious and manifest injustice. Although we do not approve of the instruction provided and note that the better practice would have been for the trial court to have instructed the jury with respect

to the intent to commit one or more named felony or misdemeanor offenses, the claimed error was unlikely to have guided the jury to an incorrect verdict in light of the evidence and arguments advanced in the present case. The claimed error is not patently unjust nor does it threaten to erode our system of justice. In short, the defendant has raised an unpreserved instructional error claim that does not give rise to concerns of manifest injustice in this case, let alone concerns that affect our system of justice generally. Thus, the defendant's claim of plain error is not persuasive.

The judgments are affirmed.

In this opinion the other judges concurred.

RANDALL CHAPNICK ET AL. *v.* BRIDGET DILAURO ET AL.
(AC 43128)

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

Syllabus

The plaintiffs brought an action for, inter alia, nuisance, against several of their neighbors, alleging that the neighbors encouraged and allowed their dogs to urinate and defecate near the windows of the plaintiffs' condominium properties and that several neighbors, including the defendants F and P, made false or exaggerated statements to the police in an investigation of the plaintiff R's interactions with some of his neighbors related to the dog issues that led to his arrest. The trial court granted the special motions filed by F and P, pursuant to Connecticut's anti-SLAPP statute (§ 52-196a), to dismiss the counts of the complaint asserted against them. On appeal, the plaintiffs claimed that the court erred in dismissing the counts of the complaint against F and P alleging nuisance. *Held* that, as F and P failed to satisfy their initial burden under § 52-196a as to the claims alleging nuisance, the trial court incorrectly granted the special motions to dismiss as to those claims: the alleged conduct of F and P, including walking a dog and allowing it to urinate and defecate in a certain location and encouraging such behavior with the dog, did not fit within the ambit of protected constitutional conduct as defined by § 52-196a, which concerns the exercise of free speech, the right to petition and the right of association; moreover, the alleged

conduct relating to the nuisance claims was not done in connection with a matter of public concern, as the dispute did not relate to the government, zoning, regulatory matters, a public official or figure, or an audiovisual work, the location of the conduct did not relate to health or safety, and the well-being of the community was not affected by the conduct.

Argued January 20—officially released May 3, 2022

Procedural History

Action to recover damages for, inter alia, nuisance, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *S. Richards*, *J.*, granted the special motions to dismiss filed by the defendants Cynthia Flaherty and John Popolizio, Jr., and rendered judgment thereon, from which the plaintiffs appealed to this court; thereafter, the action was withdrawn as against the named defendant et al.; subsequently, this court granted the motion to substitute Dominica M. Chapnick, administratrix of the estate of Randall Chapnick, for the named plaintiff. *Affirmed in part*; *reversed in part*; *judgment directed.*

Robert M. Frost, Jr., with whom, on the brief, was *Erica A. Barber*, for the appellants (plaintiffs).

Maureen E. Burns, with whom was *John E. Ranges*, for the appellees (defendants Cynthia Flaherty and John Popolizio, Jr.).

Opinion

LAVINE, J. The plaintiff Dominica Chapnick, individually and as administratrix of the estate of Randall Chapnick,[1] appeals from the portion of the judgment of the trial court dismissing, pursuant to Connecticut's

[1] Pursuant to General Statutes § 52-599, Dominica Chapnick filed a suggestion of death in October, 2021, regarding Randall Chapnick, and in November, 2021, filed a motion to substitute in place of the deceased, Dominica Chapnick as the administratrix of his estate. The trial court granted the motion.

anti-SLAPP[2] statute, General Statutes § 52-196a, the counts of the complaint against the defendants Cynthia Flaherty and John Popolizio, Jr.,[3] alleging nuisance and seeking injunctive relief. We reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our analysis. In November, 2018, Dominica Chapnick and Randall Chapnick (Chapnicks) commenced the present action against the defendants and several other neighbors. In the complaint, the Chapnicks alleged against both defendants causes of actions of nuisance, as to which they sought compensatory and punitive damages and injunctive relief.[4] In particular, counts 26, 32, 71, and 77 of the complaint alleged that the defendants' acts constituted a nuisance for which the plaintiffs were entitled to damages. Counts 31, 34, 76, and 79 alleged the same acts as were alleged in the nuisance counts and claimed entitlement to injunctive relief. The Chapnicks also alleged against the defendants claims of intentional infliction of emotional distress, as to which they sought compensatory and punitive damages. In addition, Randall Chapnick alleged

[2] "SLAPP is an acronym for strategic lawsuit against public participation, the distinctive elements of [which] are (1) a civil complaint (2) filed against a nongovernment individual (3) because of their communications to government bodies (4) that involves a substantive issue of some public concern. . . . The purpose of a SLAPP suit is to punish and intimidate citizens who petition state agencies and have the ultimate effect of chilling any such action." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

[3] The complaint also listed as defendants Christopher Elgee, Sandra Elgee, Hannah Bosworth, Melody Hawkins, and Mary Ellen DiLauro, individually and as the executrix of the estate of Vincent DiLauro, and the action was later withdrawn as to each of them. Flaherty and Popolizio will be referred to collectively as the defendants and individually by name, where appropriate.

[4] Although the Chapnicks assert separate counts of their complaint against each defendant "for injunctive relief," injunctive relief is a remedy and not a cause of action. Furthermore, the counts seeking injunctive relief allege that the defendants' "acts are a nuisance." We thus treat the Chapnicks' counts for injunctive relief as merely restatements of their nuisance claims.

against both defendants claims of malicious prosecution, false imprisonment, and civil conspiracy, as to which he sought compensatory and punitive damages. The allegations underlying the nuisance claims were as follows. The parties resided at the Harbour Landing Condominium complex in New Haven. The Chapnicks owned three condominium units, residing in one and renting the remaining two units. Flaherty, who lived in a nearby unit, allegedly allowed her dog to urinate and defecate on the lawn near the windows of the Chapnicks' three condominium units, despite having been asked by Randall Chapnick numerous times to stop permitting this. Popolizio, also a neighbor of the Chapnicks, allegedly encouraged one or more residents of the condominium complex to bring their dogs to urinate and defecate on the lawn near the windows of the Chapnicks' units. The remaining counts of the complaint were based on the following additional allegations. Because Flaherty wanted to continue to bring her dog to urinate and defecate on the lawn near the Chapnicks' condominium units and because Popolizio wanted to support such behavior and because they both wanted to stop Randall Chapnick from complaining about their conduct, the defendants intentionally made false and/or exaggerated statements to the police in order to have Randall Chapnick arrested. New Haven police officers arrested Randall Chapnick for stalking in the second degree in violation of General Statutes § 53a-181d and breach of the peace in the second degree in violation of General Statutes § 53a-181, which charges ultimately were dismissed.

In November, 2018, the defendants separately filed, pursuant to § 52-196a (b),[5] special motions to dismiss

[5] General Statutes § 52-196a (b) provides: "In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connec-

the counts of the complaint asserted against them. The defendants argued that the counts of the complaint against them should be dismissed because the action was a SLAPP suit seeking to punish them for having made statements to the police in connection with a criminal investigation, which statements were protected communications made in connection with a matter of public concern. In support of their respective special motions to dismiss, both defendants attached a police report regarding a breach of the peace complaint made by another resident of the condominium complex, Bridget DiLauro, against Randall Chapnick for having approached her on more than one occasion in a "very aggressive manner" in response to her having walked her dog near the windows of his condominium units on what DiLauro described as a "dog run." According to the police report, Popolizio informed the investigating officer that, in March, 2016, he told Randall Chapnick to "back off" from a verbal confrontation with DiLauro concerning the location in which she walked her dog. Popolizio stated that Randall Chapnick then "got in his face" momentarily and walked away while continuing to "yell about dog urine and feces."

The police report further indicated that Flaherty informed the investigating officer that, in September, 2015, Randall Chapnick started "screaming" at her for "walking her dog on the same dog run" that DiLauro had used. In affidavits attached to their respective special motions to dismiss, both defendants stated that, after they provided statements to the police, Randall Chapnick threatened them with litigation. The Chapnicks filed oppositions to the special motions to dismiss. In an affidavit attached to the opposition to Flaherty's motion, Randall Chapnick stated that Flaherty was in the habit of allowing her dog to urinate and defecate

tion with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim."

on the lawn near the windows of his condominium units, which was not designated as a "dog run," and that the last time he interacted with Flaherty was in September, 2015, but that she continued to walk her dog in the same area despite his repeatedly having asked her to not to do so.

On June 17, 2019, the court, *Richards*, *J.*, issued a memorandum of decision on the defendants' special motions to dismiss. The court reasoned that the defendants "made an initial showing that, after the court's examination of the complaint, supporting and opposing affidavits, they were exercising their rights, by a preponderance of the evidence, of free speech, the right to petition the government, and/or the right of association under the constitution of the United States or the constitution of the state of Connecticut with a matter of public concern during a police investigation relating to the plaintiff Randall Chapnick . . . ." The court granted the motions and dismissed all the counts of the complaint against the defendants. This appeal followed.

The plaintiff claims that the court incorrectly granted the defendants' special motions to dismiss as to the nuisance claims.[6] The plaintiff argues that the court incorrectly concluded that the defendants satisfied the initial burden of showing that those claims were based on the defendants' exercise of their right of free speech, right to petition the government, or right of association under the federal or state constitution in connection with a matter of public concern.[7] We agree.

[6] The plaintiff does not challenge on appeal the court's granting of the special motions to dismiss as to the remaining counts of the complaint against the defendants. See footnote 4 of this opinion.

[7] The plaintiff also argues, in the alternative, that the court failed to consider whether the second prong of the anti-SLAPP statute, concerning the existence of probable cause to prevail on the merits of the complaint, was satisfied. Because we agree with the plaintiff that the defendants have not satisfied their initial showing with respect to the nuisance claims; see footnote 4 of this opinion; we do not address this issue.

The following relevant legal principles guide our analysis. Connecticut's anti-SLAPP statute provides a mechanism for early dismissal of SLAPP suits by way of a special motion to dismiss. See General Statutes § 52-196a (b). Section 52-196a (e) (3) provides in relevant part: "The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint . . . is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint . . . sets forth with particularity the circumstances giving rise to the complaint . . . and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint . . . ." According to § 52-196a (e) (2): "When ruling on a special motion to dismiss [filed pursuant to the anti-SLAPP statute], the court shall consider pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability . . . is based." "A special motion to dismiss filed pursuant to § 52-196a . . . is not a traditional motion to dismiss based on a jurisdictional ground. It is, instead, a truncated evidentiary procedure enacted by our legislature in order to achieve a legitimate policy objective, namely, to provide for a prompt remedy." *Elder* v. *Kauffman*, 204 Conn. App. 818, 824, 254 A.3d 1001 (2021).

Our review of the court's conclusion that the initial burden was satisfied involves a question of whether certain alleged conduct falls within the ambit of the anti-SLAPP statute. In general, whether conduct falls within the province of a statute is a matter of statutory construction presenting a question of law over which our review is plenary. See, e.g., *Sandella* v. *Dick Corp.*,

53 Conn. App. 213, 226, 729 A.2d 813, cert denied, 249 Conn. 926, 733 A.2d 849 (1999).

The nuisance claims are based on allegations that Flaherty brought her dog to urinate and defecate near the windows of the Chapnicks' condominium units, a behavior that Popolizio allegedly encouraged one or more residents to engage in, resulting in an interference with the Chapnicks' use and enjoyment of their property and with the quality of their lives. As to the nuisance claims against Flaherty, the Chapnicks further alleged that they "do not want to have feces residue and soaked in urine on the lawn beneath the windows" of their condominium units.

We note that "[a] private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. . . . The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor. . . . The essence of a private nuisance is an interference with the use and enjoyment of land."[8] (Citations omitted; internal quotation marks omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 352, 788 A.2d 496 (2002).

The alleged private nuisance of a neighbor walking a dog and permitting it to relieve itself in a location that is disagreeable to another neighbor, while a third neighbor encourages such behavior, does not fit within the ambit of protected constitutional conduct as defined

[8] "To establish a nuisance four elements must be proven: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages." (Internal quotation marks omitted.) *Dingwell* v. *Litchfield*, 4 Conn. App. 621, 624, 496 A.2d 213 (1985).

by the anti-SLAPP statute. The anti-SLAPP statute concerns the exercise of the right of free speech, the right to petition, and the right of association. See General Statutes § 52-196a. According to the definitions provided in § 52-196a (a), "(2) 'Right of free speech' means communicating, or conduct furthering communication, in a public forum on a matter of public concern; (3) 'Right to petition the government' means (A) communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body, (B) communication that is reasonably likely to encourage consideration or review of a matter of public concern by a legislative, executive, administrative, judicial or other governmental body, or (C) communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial or other governmental body; (4) 'Right of association' means communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ." General Statutes § 52-196a (a). Specifically, the conduct on which the nuisance claims in the present case is based does not involve: a communication in a public forum; any communication that is in connection with, reasonably likely to encourage, or reasonably likely to enlist public participation to effect an issue under consideration or review by a government body; or communication among individuals who join together to collectively express, promote, pursue or defend common interests. Although the United States Supreme Court in *Dallas* v. *Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989), stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection

of the [f]irst [a]mendment," it is difficult to discern in the present case even such a kernel of expression in the dispute between neighbors regarding the location at which a dog relieves itself.

Additionally, the second requirement of the initial burden that the conduct be done in connection with a matter of public concern also is not satisfied. Section 52-196a (a) (1) defines a " 'matter of public concern' " as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ." First, it needs no further elaboration that, according to the plain and unambiguous language of the statute,[9] the dispute in the present case between neighbors does not relate to the government, zoning and other regulatory matters, a public official or public figure, or an audiovisual work. Second, the location in which the dog walking and relieving occurs, namely, whether a dog is walked near the windows of the Chapnicks' condominium units or on some other lawn, does not relate to health or safety except, perhaps, in the most attenuated way. Finally, although the location in which a dog is walked may relate to the well-being of the Chapnicks themselves, who allege an interference with their use and enjoyment of land and with the quality of their lives, any well-being is personal to the Chapnicks and does not involve the well-being of the community.

The defendants' counsel admitted at oral argument before this court that, if the complaint sounded only in nuisance, then the anti-SLAPP statute would not apply. The defendants, however, argue that the court correctly

[9] See *Gould* v. *Freedom of Information Commission*, 314 Conn. 802, 810, 104 A.3d 727 (2014) ("[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature" (internal quotation marks omitted)); see also General Statutes § 1-2z.

determined that the first prong of the anti-SLAPP statute was satisfied because the complaint was brought in retaliation for the defendants having assisted in a criminal investigation and because Randall Chapnick threatened them with litigation after they gave statements to the investigating officer. We are not persuaded.

According to the statutory language of § 52-196a (e) (3), the initial showing is satisfied when the moving party shows, by a preponderance of the evidence, that the complaint is *based on* the moving parties' exercise of certain constitutional conduct in connection with a matter of public concern. The alleged act of threatening litigation prior to filing a complaint does not mean that the nuisance counts were *based on* such threats, and that the complaint arguably was filed in retaliation for the defendants having assisted in a criminal investigation does not mean that the nuisance claims were *based on* the conduct that arguably spurred such retaliatory motives.[10] Not every matter with secondary legal aspects involves a matter of public concern. The first prong of the anti-SLAPP statute is not satisfied in the present case where the nuisance claims were based on the unprotected conduct of walking a dog in a location that is disagreeable to another neighbor, and the encouragement of such behavior, which unprotected conduct was not done in connection with a matter of public concern. Accordingly, because the defendants have not satisfied their initial burden under the anti-SLAPP statute as to the nuisance claims, we conclude

[10] In the present case, the complaint involves a mix of allegations, wherein some causes of action, such as the nuisance claims, are based on unprotected conduct, while other causes of action, such as those stemming from the allegations in the malicious prosecution counts, are based on the defendants' communications with the police involving a criminal investigation, which conduct the trial court determined to be protected, a conclusion that the plaintiff does not challenge on appeal. The defendants' counsel, however, agreed at oral argument before this court that we must engage in a count by count analysis of the complaint when analyzing the plaintiff's claim on appeal, and we agree.

that the court incorrectly granted the special motions to dismiss as to those claims.

In short, the claims for nuisance concern what is a private dispute involving private interests. For the foregoing reasons, these claims do not fall within the ambit of the anti-SLAPP statute.

The judgment is reversed only with respect to the dismissal of counts 26, 31, 32, 34, 71, 76, 77, and 79 of the complaint against Cynthia Flaherty and John Popolizio, Jr., and the case is remanded with direction to set aside the dismissal; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

SANDHYA DESMOND *v.* YALE-NEW HAVEN HOSPITAL, INC., ET AL.
(AC 44180)
(AC 44181)
(AC 44182)

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

Syllabus

The plaintiff appealed to this court from the judgments of the trial court dismissing the substitute complaints in three cases she had filed against her former employer, the defendant hospital, as barred by the exclusivity provision (§ 31-284 (a)) of the Workers' Compensation Act (§ 31-275 et seq.). The plaintiff had been employed by the defendant when she suffered an injury for which she sought workers' compensation benefits, and the defendant accepted the claim. The plaintiff filed functionally identical substitute complaints in each of the three actions, alleging, inter alia, that the defendant had engaged in retaliatory and discriminatory conduct against her in violation of statute (§ 31-290a) as a result of her having sought workers' compensation benefits. The trial court granted the defendant's motions to strike all three complaints, determining that they did not allege employment discrimination claims pursuant to § 31-290a but, rather, bad faith processing of a workers' compensation claim, which was barred by § 31-284 (a). *Held* that the trial court properly struck the complaints as being barred by § 31-284 (a), as the plaintiff

failed to allege any adverse employment action by the defendant, none of its alleged behavior related to or had any effect on her employment status, she admitted in her complaints that the defendant's behavior did not arise out of or in the course of her employment, and, despite her attempt to recast her claims as alleging employment discrimination, she alleged nothing more than bad faith processing of her workers' compensation claim.

Argued January 20—officially released May 3, 2022

Procedural History

Action to recover damages for, inter alia, statutory theft, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Nazzaro*, *J.*, granted the defendants' motion to strike; thereafter, the court denied the plaintiff's request for leave to amend her substitute complaint; subsequently, the court, *Ecker*, *J.*, granted the defendants' motion for judgment and rendered judgment of dismissal, from which the plaintiff appealed to this court, *Sheldon*, *Keller* and *Bright*, *Js.*, which reversed the judgment in part and remanded the case for further proceedings; thereafter, the court, *Young*, *J.*, consolidated the case with two separate actions the plaintiff had brought alleging discriminatory and retaliatory conduct by the named defendant in connection with her claim for workers' compensation benefits and transferred the cases to the Superior Court in the judicial district of Waterbury, Complex Litigation Docket; subsequently, the court, *Bellis*, *J.*, granted the named defendant's motions to strike and for judgments of dismissal, from which the plaintiff filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Eric M. Desmond, for the appellant (plaintiff).

Phyllis M. Pari, for the appellee (named defendant).

Opinion

ALVORD, J. In these consolidated actions, the plaintiff, Sandhya Desmond, a former employee of the defendant Yale-New Haven Hospital, Inc.,[1] appeals from the judgments of the trial court rendered following the granting of the defendant's motions to strike her complaints. On appeal, the plaintiff claims that the court incorrectly construed her claims as alleging bad faith processing of a workers' compensation claim rather than as claims made pursuant to General Statutes § 31-290a and, therefore, erred in determining that her claims were barred by the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq. We disagree and, therefore, affirm the judgments of the trial court.

We begin with the relevant portions of the lengthy procedural history of these actions, which is set forth in part in this court's decision in *Desmond* v. *Yale-New Haven Hospital, Inc.*, 138 Conn. App. 93, 50 A.3d 910, cert. denied, 307 Conn. 942, 58 A.3d 258 (2012) (*Desmond I*). "[T]he plaintiff was an employee of the [defendant]. On December 30, 2004, she was injured in the course of her employment. According to the plaintiff, she suffered a spill-related fall while at work and subsequently was diagnosed with bilateral, acute posttraumatic carpal tunnel injuries. Her physicians have advised her that, absent medical treatment, she permanently will be unable to use her hands.

"Subsequently, she filed a workers' compensation claim with regard to her injury, and the [self-insured defendant] accepted the claim. On March 6, 2008, she

[1] Although in the first action at issue in this appeal, Docket No. CV-13-6045184-S, the plaintiff initially also named Yale-New Haven Health Services, Inc., as a defendant, the operative complaint in that action alleged no claims against Yale-New Haven Health Services, Inc., and did not list it as a defendant. Accordingly, we refer in this opinion to Yale-New Haven Hospital, Inc., as the defendant.

filed a federal action in United States District Court for the District of Connecticut, in which she alleged various claims under state law and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. On March 23, 2009, the District Court granted the [defendant's] motion to dismiss as to the plaintiff's state law claims, allowing the action to proceed only on her claim under the Americans with Disabilities Act.[2]

"On May 20, 2010, the plaintiff filed in the Superior Court the operative complaint [of the first appeal] . . . . [That] complaint contained ten counts, alleging . . . workers' compensation fraud, statutory negligence, breach of contract, unfair and deceptive acts and practices in violation of [the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes 42-110a et seq.] and delay in the delivery of benefits under the act in violation of the plaintiff's state constitutional right to due process. The complaint alleged that the [defendant] had made various filings with the workers' compensation commission (commission) in a bad faith and fraudulent attempt to delay treatment. The complaint alleged that these bad faith attempts to delay treatment caused the plaintiff's condition to worsen, as she did not receive necessary treatment." (Footnote added.) Id., 95–96.

Following the defendant's filing of a motion to dismiss, the court, relying on our Supreme Court's decision in *DeOliveira* v. *Liberty Mutual Ins. Co.*, 273 Conn. 487, 870 A.2d 1066 (2005) (holding that causes of action alleging bad faith processing of workers' compensation claim are barred by exclusivity provision of act), dismissed the action on the ground "that the plaintiff's

[2] See *Desmond* v. *Yale-New Haven Hospital, Inc.*, Docket No. 3:08-cv-00346 (VLB) (D. Conn. March 23, 2009). The District Court later granted the defendant's motion for summary judgment, rendering judgment in favor of the defendant on the remaining claim. See *Desmond* v. *Yale-New Haven Hospital, Inc.*, 738 F. Supp. 2d 331, 333 (D. Conn. 2010).

claims did not allege conduct that was sufficiently egregious to remove the claims from the exclusive jurisdiction of the commission."[3] *Desmond I*, supra, 138 Conn. App. 96. The plaintiff thereafter appealed to this court. Id.

On appeal in *Desmond I*, this court held that, despite the labels the plaintiff placed on her claims, "[a]pplying the rule articulated in *DeOliveira* to the facts of [the] case, it is clear that the plaintiff's claimed injuries, allegedly caused by the [defendant's] bad faith delays in medical treatment, arose out of and in the course of the workers' compensation claims process. Therefore, we conclude that the plaintiff's alleged injuries fall within the jurisdiction of the commission and that, accordingly, the court properly granted the [defendant's] motion to dismiss." Id., 102. Accordingly, this court in *Desmond I* affirmed the judgment of the trial court dismissing the plaintiff's action. See id., 105.

Following our decision in *Desmond I*, the plaintiff, in August, 2013, brought a new action (2013 action) against the defendant. This court, in *Desmond* v. *Yale-New Haven Hospital, Inc.*, 181 Conn. App. 201, 185 A.3d 665, cert. denied, 330 Conn. 902, 191 A.3d 1001 (2018) (*Desmond II*), set forth additional procedural history related to the 2013 action. "On October 3, 2013, the plaintiff filed her [first] amended complaint . . . wherein she again set forth ten counts against the

[3] The exclusivity provision of the act limits tort remedies available to workers' compensation recipients. *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 496. In *DeOliveira*, the court explained that there is a "narrow exception to the exclusivity provision for intentional torts." Id., 506. Specifically, the court "recognize[d] that there could be an instance in which an insurer's conduct related to the processing of a claim, separate and apart from nonpayment, might be *so egregious* that the insurer no longer could be deemed to be acting as an agent of the employer and, thus, a claim arising from such conduct would not fall within the scope of the act." (Emphasis in original.) Id., 507. That narrow exception is not at issue in the present appeal. See footnote 15 of this opinion.

[defendant], claiming statutory theft, common-law fraud, violation of CUTPA, breach of contract and statutory negligence. The [defendant] moved to strike all of the plaintiff's claims on the ground, inter alia, that they are barred by the exclusivity provision of the act, and thus that the trial court had no jurisdiction over them. The plaintiff filed an objection, arguing, inter alia, that her claims were not barred by the exclusivity of the act. . . .

"By way of a memorandum of decision filed on November 26, 2014, the court granted the [defendant's] motion to strike the plaintiff's entire complaint on the ground that all of the plaintiff's claims fell within the exclusive jurisdiction of the commission. The court reasoned that the alleged misconduct of the [defendant], which the court found to be 'identical to that alleged in *Desmond* [*I*] . . . but for the addition of some conduct by the [defendant] postdating the prior suit,' was not so egregious to invoke the exception to exclusivity.

"The plaintiff did not appeal from the trial court's ruling striking her complaint. Rather, on December 11, 2014, pursuant to Practice Book § 10-44, the plaintiff, in her view, as advanced before this court, filed a substitute complaint 'in an effort to plead additional facts and to amplify the allegations such that viability of the . . . [General Statutes] § 52-564 [statutory theft] claim (and associated claims) would be sufficient to allow the claim to proceed to the merits.'

"On February 5, 2015, the plaintiff filed a request for leave to amend her substitute complaint, pursuant to Practice Book § 10-60, to incorporate a claim for retaliatory discrimination pursuant to General Statutes § 31-290a. . . . On April 23, 2015, the court, *Nazzaro*, *J.*, denied the plaintiff's request for leave to amend, and sustained the [defendant's] objection thereto. . . .

"On May 7, 2015, the [defendant] filed a request to revise the plaintiff's substitute complaint, which she had filed on December 11, 2014. The [defendant] sought to have the plaintiff's entire substitute complaint deleted because the allegations of the substitute complaint were substantially similar to those contained in the plaintiff's previously stricken complaint and the allegations added to the substitute complaint failed to cure the deficiencies of the earlier complaint." (Footnote omitted.) Id., 205–207. The plaintiff objected to the defendant's request to revise. Id., 207.

"On March 4, 2016, the court, *Ecker*, *J.*, issued an order overruling the plaintiff's objections to the [defendant's] request to revise and rendered judgment dismissing her complaint. In so doing, the court held, inter alia: '[I]t is the court's opinion that the substitute complaint is not, in substance, materially different from the . . . stricken . . . complaint. In other words, the new allegations in the substitute complaint do not cure the legal deficiencies that caused Judge Nazzaro to strike the [amended] complaint. The substitute complaint contains many more pages of allegations, but those allegations, in this court's view, do not change the nature or character of the underlying claims in a manner that would alter the outcome of Judge Nazzaro's memorandum of decision striking the [amended] complaint.' The court also explained that it was disinclined to revisit Judge Nazzaro's decision striking the plaintiff's complaint, but that, even if it did so, it would agree that the plaintiff's allegations could not overcome the exclusivity of the act. The plaintiff subsequently sought reargument, which the court denied." Id., 209. The plaintiff then appealed. Id.

In *Desmond II*, this court declined to review the plaintiff's appellate claim that the trial court erred in determining that her claims were barred by the exclusivity

of the act, concluding that the claim was inadequately briefed. See id., 213. This court did determine, however, that the trial court "considered the wrong complaint when it denied the plaintiff's request for leave to amend" her substitute complaint in order to add a claim for retaliatory discrimination under § 31-290a, and, therefore, this court reversed the judgment in part and remanded the case for further proceedings on her request to amend the complaint and the defendant's objection thereto. Id., 215.

In the meantime, in 2015, and later, in 2016, the plaintiff filed two additional actions (2015 and 2016 actions) against the defendant arising from the same conduct, both captioned as seeking relief pursuant to § 31-290a.

On remand from *Desmond II*, on October 19, 2018, the court, *Young*, *J.*, issued a memorandum of decision in which it granted the plaintiff's request for leave to amend her complaint in the 2013 action to add retaliation and discrimination claims under § 31-290a. In the same memorandum of decision, the court, sua sponte, consolidated the 2013 action, which had been the subject of our review in *Desmond II*, with the 2015 and 2016 actions, and all three actions were transferred to the complex litigation docket.

On November 27, 2019, the plaintiff filed functionally identical substituted complaints in each of the three actions.[4] In the complaints, the plaintiff alleged that the defendant sought to delay or terminate her medical

[4] In the operative complaint in the 2013 action, Docket No. CV-13-6045184-S, the plaintiff set forth thirty-four pages of allegations and requested relief pursuant to § 31-290a. In the 2015 and 2016 actions' operative complaints, Docket Nos. CV-15-6045183-S and CV-16-6045181-S, the plaintiff organized the same allegations into two counts: discrimination in violation of § 31-290a and retaliation in violation of § 31-290a. The allegations in each count are virtually identical with the exception of the terminology: in count one, the plaintiff characterizes the defendant's actions as "discriminatory" and in count two as "retaliatory."

treatment and discriminated against her as a result of her having filed and maintained a workers' compensation claim "by intentionally or deliberately engaging in fraudulent, deceptive, misleading, and misrepresentative conduct . . . ." Specifically, she alleged that the defendant "engaged in aggressive vehicular surveillance of the plaintiff and her family"; "fabricated allegations" about the plaintiff's health and treatment and presented those allegations to the commission and the plaintiff's doctors; delayed payment for treatment that it had approved; and otherwise disrupted the plaintiff's ability to access treatment for her injury. As a result, the plaintiff alleged that she suffered a reduction in benefits, a denial of treatment, a delay in treatment, and an overall worsening of her medical condition. The plaintiff specifically stated that "the harm . . . from the defendant's discriminatory conduct did not 'arise out of or in the course of her employment' with the defendant."

On December 23, 2019, the defendant filed a motion to strike each of the substituted complaints, arguing, inter alia, that the actions "are barred by the exclusivity of the [act]."[5] The plaintiff objected.

On June 3, 2020, the court, *Bellis*, *J.*, issued three memoranda of decision, one in each action, striking all three of the complaints.[6] The court determined that the allegations in the plaintiff's complaints were properly construed as alleging bad faith processing of a workers' compensation claim, not employment discrimination

[5] The defendant also argued that the complaints failed to allege the requisite elements of a § 31-290a claim and that they were barred by the law of the case doctrine, the absolute litigation privilege, res judicata and collateral estoppel, the prior pending action doctrine, and the applicable statute of limitations.

[6] In the memoranda of decision in the 2015 and 2016 actions, the court referred to its analysis in the memorandum of decision issued in the 2013 action as the basis for striking those complaints, determining that the complaints in the 2015 and 2016 actions were "virtually indistinguishable" from the complaint in the 2013 action.

claims pursuant to § 31-290a. The court set forth the elements of an employment discrimination cause of action pursuant to § 31-290a as requiring adverse employment action and determined that "[a] close review of the allegations of the plaintiff's complaint makes clear that all of the alleged wrongdoing on the part of the defendant concerns its administration of the plaintiff's workers' compensation claim. Notably, there are no specific factual allegations that the defendant discriminated against the plaintiff with respect to her employment." The court then determined that such a claim was barred by the exclusivity provision of the act, relying on *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 487. Finally, the court noted that, even if the complaint properly was construed as alleging a claim of employment discrimination pursuant to § 31-290a, "such a claim would be legally insufficient because the plaintiff fail[ed] to allege that the defendant took any adverse employment action against her."

On June 23, 2020, the plaintiff filed motions for reargument and reconsideration as to the court's decisions striking all three complaints. The court denied the motions on July 6, 2020, and subsequently granted the defendant's motions for judgment on the stricken complaints. On July 24, 2020, the plaintiff appealed from each of the court's decisions striking the complaints, and this court, sua sponte, consolidated the three appeals.[7]

On appeal, the plaintiff claims that the trial court erred in striking her complaints. She argues that the court improperly construed her claims as alleging bad faith processing of a workers' compensation claim because she asserted claims pursuant to § 31-290a, which are not barred by the exclusivity provision of the act. The

[7] The plaintiff thereafter filed motions for articulation, which were denied. The plaintiff then filed motions for review with this court, which granted review but denied the relief requested.

defendant responds that the court properly construed the claims as alleging bad faith processing of a workers' compensation claim and, therefore, properly struck the claims. We agree with the defendant.

We first set forth the applicable standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Karagozian* v. *USV Optical, Inc.*, 335 Conn. 426, 433–34, 238 A.3d 716 (2020). "Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 649, 126 A.3d 569 (2015). Although "[w]e assume the truth of both the specific factual allegations and any facts fairly provable thereunder. . . . A [motion to strike] admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Binkowski* v. *Board of Education*, 180 Conn. App. 580, 585, 184 A.3d 279 (2018). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 349, 63 A.3d 940 (2013). Furthermore, "[t]he interpretation of pleadings is always a question of law for

the court and . . . our interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 573 n.12, 864 A.2d 1 (2005).

We next set forth the act's exclusivity provision which provides in relevant part: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . . but an employer shall secure compensation for his employees as provided under this chapter . . . . All rights and claims between an employer who complies with the requirements of subsection (b) of this section and employees . . . arising out of personal injury or death sustained in the course of employment are abolished other than rights and claims given by this chapter . . . ." General Statutes § 31-284 (a).

In *DeOliveira*, our Supreme Court held that § 31-284 bars actions that allege bad faith processing of workers' compensation claims.[8] The court explained that "[t]he legislature . . . expressly has conferred jurisdiction upon the commission to adjudicate claims related to untimely payment of benefits and has developed a scheme under which remedies may be provided."[9] *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn.

[8] In *DeOliveira*, "the plaintiff asserted claims of negligent, reckless and intentional conduct, implied breach of the covenant of good faith, negligent and intentional infliction of emotional distress and a violation of [CUTPA]"; *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 493; after his employer "contest[ed] that the plaintiff's injury arose in the course of his employment." Id., 491. The claims were, however, construed as "alleging, in essence, that the defendant unreasonably delayed its processing of the plaintiff's workers' compensation claim . . . ." Id., 489.

[9] "As a general matter, the [workers' compensation] commissioners have jurisdiction to hear all claims . . . arising under [the act] . . . . General Statutes § 31-278. Specifically, the commissioners have the authority to hear an employee's claim that, through the fault or neglect of an employer or insurer, the adjustment or payment of compensation due . . . [has been] unduly delayed and to assess a civil penalty of up to $500 for each case of

496–97. In addition, as the court explained, "[t]he legislature has empowered the commission to take other measures to ensure prompt payment of benefits . . . ." Id., 497. "In other words, by providing remedies for such conduct, the legislature evinced its intention to bar a tort action for the same conduct proscribed and penalized under the act. . . . Indeed, construing the act to permit a tort action for an injury for which a remedial process is provided under the act would invite the indefinite prolonging of litigation and risk double recoveries and inconsistent findings of fact, a result which the legislature, in enacting a system of compensation in place of common law remedies, certainly wished to avoid." (Citations omitted; internal quotation marks omitted.) Id., 499–500.

Thus, the court concluded: "In light of the remedies expressly provided, we decline to construe § 31-284 as not barring [actions alleging bad faith processing of a workers' compensation claim] . . . [because] to do so would . . . usurp the legislative function. . . . [A] damage suit as an alternative or additional source of compensation, becomes permissible only by carving a judicial exception in an uncarved statute. . . . Neither moral aversion to the [insurer's act] nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the [l]egislature."

delay. General Statutes § 31-288 (b). If an employer or insurer unreasonably contests liability, the commissioners have authority to award attorney's fees to the employee. General Statutes § 31-300. Similarly, if a commissioner determines that, through the fault or neglect of the employer or insurer, payments or adjustments in payment have been delayed unduly or unreasonably, the commissioner may include interest and attorney's fees in an award. General Statutes § 31-300. Finally, if an employer fails to make payments due under an award or voluntary agreement within the statutorily prescribed period, a commissioner shall assess a penalty for each late payment, in the amount of [20 percent] of such payment, in addition to any other interest or penalty imposed pursuant to the provisions of this chapter. General Statutes § 31-303." (Internal quotation marks omitted.) *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 497.

(Internal quotation marks omitted.) Id., 501. "[I]njuries arising out of and in the course of the workers' compensation claims process fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury." (Internal quotation marks omitted.) Id., 503. "It is also clear that [i]nsurer activity intrinsic to the workers' compensation claims process is also a risk contemplated by the compensation bargain. Thus, insurer actions[10] closely connected to the payment of benefits fall within the scope of the exclusive remedy provisions. . . . Consistent with this reasoning, we conclude that we must construe the exclusionary provision's prohibition on damages actions for injuries arising out of and in the course of . . . employment to include injuries arising out of and in the course of the *workers' compensation claims process*." (Citation omitted; emphasis in original; footnote added; internal quotation marks omitted.) Id., 504.

We next set forth the principles governing a claim of employment discrimination brought pursuant to § 31-290a,[11] which provides in relevant part: "(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter. . . .

"(b) Any employee who is so discharged or discriminated against . . . may . . . (1) [b]ring a civil action

[10] The court noted that exclusivity applies to "wrongful, not merely negligent, conduct." *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 507. Indeed, the court explained that the exclusivity provision only allows an exception for intentional torts when the behavior alleged is "egregious . . . ." Id.; see also footnote 3 of this opinion.

[11] Although § 31-290a has been amended since the events at issue; see Public Acts 2021, No. 21-18, § 1; Public Acts, Spec. Sess., June, 2021, No. 21-2, § 90; those amendments are not relevant to this appeal. We therefore refer to the current revision of § 31-290a.

in the superior court for the judicial district where the employer has its principal office for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if he had not been discriminated against or discharged and any other damages caused by such discriminated or discharge. The court may also award punitive damages. Any employee who prevails in such a civil action shall be awarded reasonable attorney's fees and costs to be taxed by the court . . . ."

"To establish a prima facie case of discrimination under § 31-290a, the plaintiff must show that she was exercising a right afforded her under the [act] and that the defendant discriminated against her for exercising that right. . . . [T]he plaintiff must show a [causal] connection between exercising her rights under the act and the alleged discrimination she suffered. Implicit in this requirement is a showing that the defendant knew or was otherwise aware that the plaintiff had exercised her rights under the act. . . . [T]o establish [a] prima facie case of discrimination, the plaintiff must first present sufficient evidence . . . that is, evidence sufficient to permit a rational trier of fact to find [1] that she engaged in protected [activity] . . . [2] that the employer was aware of this activity, [3] that the employer took adverse action against the plaintiff, and [4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in *the adverse employment action*. . . ." (Emphasis added; internal quotation marks omitted.) *Callender* v. *Reflexite Corp.*, 143 Conn. App. 351, 364, 70 A.3d 1084, cert. denied, 310 Conn. 905, 75 A.3d 32 (2013); see also *Gibilisco* v. *Tilcon Connecticut, Inc.*, 203 Conn. App. 845, 860–61, 251 A.3d 994, cert. denied, 336 Conn. 947, 251 A.3d 77 (2021).[12]

[12] The plaintiff argues that a claim of employment discrimination brought pursuant to § 31-290a does not require adverse employment action and asserts a variety of arguments in support of that position; however, after

"A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment. . . . To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . [A]n adverse employment action [has been defined] as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Internal quotation marks omitted.) *Heyward* v. *Judicial Dept.*, 178 Conn. App. 757, 767–68, 176 A.3d 1234 (2017).

On review, it is clear that the plaintiff did not allege a claim of employment discrimination pursuant to § 31-290a, as the complaints in these consolidated actions failed to allege any adverse employment action. In the complaints, the plaintiff admitted that the defendant's behavior "did not 'arise out of or in the course of her employment' . . . ." As the court determined, "all of the alleged wrongdoing on the part of the defendant concerns its administration of the plaintiff's workers' compensation claim." None of the alleged behavior related to or had any effect on her employment status, and, thus, the plaintiff did not allege any adverse employment action.[13] See *Heyward* v. *Judicial Dept.*,

careful review of these arguments, the applicable law, and the record, we conclude that these arguments are meritless.

[13] The plaintiff argues, in the alternative, that, if a § 31-290a claim requires an adverse employment action, the trial court "fail[ed] to recognize that adverse employment actions include discrimination against workers' compensation claimants." According to the plaintiff, "[t]he relationship between the plaintiff and the defendant constitutes a type of implied employment relationship that is contingent upon an underlying employer-employee relationship. This is sufficient to find that the defendant's actions constitute adverse employment actions with respect to the plaintiff's exercises of rights under the act . . . [because], when [the] defendant discriminatorily targets the plaintiff . . . it causes a materially adverse change to the uninterrupted receipt by [her] of employment related wages and benefits." (Internal quotation marks omitted.) We reject this argument as meritless.

supra, 178 Conn. App. 767–68. Not only did the plaintiff fail to allege any adverse employment action, her allegations form the type of claim that *DeOliveira* prohibits.[14]

We reject the plaintiff's attempt to recast her claims as alleging employment discrimination pursuant to § 31-290a. Despite the labels the plaintiff has affixed to her complaints, she has alleged nothing more than bad faith processing of her workers' compensation claim. See *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 348, 780 A.2d 98 (2001) ("the labels placed on the allegations by the parties [are] not controlling"); see also *Gazo* v. *Stamford*, 255 Conn. 245, 263, 765 A.2d 505 (2001) ("we look beyond the language used in the complaint to determine what the plaintiff really seeks"). Therefore, the court properly determined that the plaintiff's complaints alleged claims of bad faith processing. Furthermore, as § 31-284 bars actions that relate to the processing of workers' compensation claims, the court properly struck the complaints as being barred by the exclusivity provision of the act. See *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 501; see also *Karagozian* v. *USV Optical, Inc.*, 335 Conn. 433–34.

The judgments are affirmed.

In this opinion the other judges concurred.

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[14] We note that the plaintiff never argued, and does not do so on appeal, that she has alleged conduct that was sufficiently egregious to remove the claims from the exclusive jurisdiction of the commission. See footnote 3 of this opinion.

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NOTICE

Public Hearing on Practice Book Revisions Being Considered by the Rules Committee of the Superior Court

On Monday, May 9, 2022, at 10:00 a.m., the Rules Committee of the Superior Court will conduct a public hearing for the purpose of receiving comments concerning Practice Book revisions that are being considered by the Committee and for the purpose of receiving comments on any proposed new rule or any change in an existing rule that any member of the public deems desirable. Those revisions were published in the Law Journal of April 26, 2022, and are published on the Judicial Branch website at www.jud.ct.gov/pb.htm. The public hearing will be followed by a Rules Committee meeting.

The Rules Committee public hearing and meeting will be conducted electronically using *Microsoft Teams* communication and collaboration platform. Individuals who would like to access the public hearing and/or meeting may do so by clicking here. Individuals who wish to access the public hearing and/or meeting but who do not wish to speak at the hearing, may do so by clicking https://youtu.be/9TuaU5mlAUk.

It is important that certain procedures are followed by every individual who wishes to access the public hearing and/or meeting, and for those who wish to speak at the public hearing. All individuals who access the public hearing and meeting must at all times act in a professional and respectful manner. Any individual whose conduct is deemed by the Rules Committee to be disruptive or inappropriate will be removed from the public hearing or meeting.

Individuals who would like to speak at the public hearing should access the hearing one-half hour before the hearing begins in order to be recognized and placed in line while waiting to speak. Each such speaker will be allowed five minutes to offer remarks. Anyone who believes that they cannot cover their remarks within the five minute time period allowed during the public hearing, and anyone who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions, may submit their written comments to the Rules Committee by email at RulesCommittee@jud.ct.gov.

Any written comments should be received before Tuesday, May 3, 2022.

Hon. Andrew J. McDonald

Chair, Rules Committee of the Superior Court

NOTICE

Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On May 24, 2022, at 2 p.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom, 231 Capitol Avenue, Hartford, for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure which are being considered by the Justices and Judges, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the April 26, 2022 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit or who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions may submit their comments to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or by forwarding their comments to the co-chairs at the following address:

Co-Chairs of the Advisory Committee on Appellate Rules

Attn: Attorney Jill Begemann

Connecticut Appellate Court

75 Elm Street

Hartford, CT 06106

All comments should be received by May 18, 2022.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail ADA.Contact@connapp.jud.ct.gov or call (860) 757-2200, ext. 3141 before May 18, 2022.

Hon. Gregory T. D'Auria

Hon. Eliot D. Prescott

Co-Chairs, Advisory Committee on Appellate Rules

NOTICE OF CONNECTICUT STATE AGENCIES

CT PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO CLARIFY POLICIES RELATING TO CONCURRENT GOVERNMENTAL BENEFITS AND PRIVATE PLAN CONTRIBUTIONS

In accordance with sections 1-121 and 31-49o of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority (''hereinafter the CT Paid Leave Authority'') intends to revise its consolidated policies regarding the administration of the CT Paid Leave Act as follows:

- To establish a three-part test to identify the circumstances when federal or state income-replacement benefits will not be deemed to be received concurrently with CT Paid Leave benefits.
- To clarify that contributions made by an employee to an approved private plan will not count toward the contribution limit in connection with the CT Paid Leave program

To request a copy of these proposed revisions to its consolidated policies regarding the administration of the CT Paid Leave Act, please email erin.choquette@ct.gov, including ''Revisions to Consolidated Policies'' in the subject line.

To submit comments regarding these proposed revisions, please email erin.choquette@ct.gov, including ''Comments regarding Revisions to Consolidated Policy'' in the subject line.

All written comments regarding either of these documents must be submitted by June 3, 2022.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in March 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Al Harbi, Omar A. of West Hartford, CT
Bishop, Chelsea Nicole of Revere, MA
Chatila, Tarek Maher of Stamford, CT
Diodati, Nicole M. of Poughkeepsie, NY
Ertle, Sarah Elizabeth Tausta of Larchmont, NY
Ferber, Bradley Daniel of White Plains, NY
Greiner, Kaitlyn A. of Marlboro, NY
Irizarry, Jonathan of Brentwood, NY
Mahalek, Maximillian Raymond of New York, NY
Maier, Natalie Switzer of New York, NY
Martin, Nicholas J of Newtown, CT
Ravelo, Michael B of New Haven, CT
Redman, James Michael of Stamford, CT
Rolston, Kaitlin of Wantagh, NY
West, Catherine Sinkel of Keene, NH

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in March 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Bass, Joshua S of New Canaan, CT
Cooper, Mark J of Westport, CT
Feuer, Lindsay Shana of Westport, CT
Jaslow, Howard Marc of Roslyn, NY
Johansen, Jacqueline L. of Ridgefield, CT
Kim, Hih Song of Brooklyn, NY
Lieberman, Michael Ross of New York, NY
Maltese, Matthew Nicholas of New Rochelle, NY
McLaughlin, Maura DeLacy of Boston, MA
Rudnicki, Evan Brett of Wilton, CT
Rusch Bellucci, Patricia of Pawling, NY
Sanders, Olga of Old Greenwich, CT
Vaughn, Jenny Schiller of Greenwich, CT
Volpe, Richard J. of East Hartford, CT