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*ton* and *Bourjaily*, Calabrese's statement was elicited in circumstances under which the objectively manifested purpose of the encounter was not to secure testimony for trial. Calabrese made his statements in an informal setting, his prison cell, to his cellmate, who undoubtedly actively questioned Calabrese but did so in an evidently sufficiently casual manner to avoid alerting Calabrese that his statement was going to be relayed to law enforcement. Cf. *United States* v. *Dargan*, supra, 738 F.3d 650–51 (statements by defendant's coconspirator to cellmate were clearly nontestimonial because they were made "in an informal setting—a scenario far afield from the type of declarations that represented the focus of *Crawford*'s concern" and declarant "had no plausible expectation of 'bearing witness' against anyone"). The admission of Calabrese's dual inculpatory statement, therefore, did not violate the defendant's confrontation rights under the federal constitution.

B

We next turn to the defendant's confrontation clause challenge under article first, § 8, of the Connecticut constitution. The defendant asks this court to hold that, under our state constitution, a statement qualifies as "testimonial" if the reasonable expectation of either the declarant *or the interrogator/listener* is to establish or to prove past events potentially relevant to a later criminal prosecution. (Internal quotation marks omitted.) We are not persuaded that the defendant has established the necessary predicates for departing from the federal standard. We do not, however, foreclose the possibility of departing from the federal standard under appropriate circumstances in a future case, and raise a strong cautionary note about the present circumstances.

e.g., *State* v. *Rivera*, 268 Conn. 351, 365 n.13, 844 A.2d 191 (2004) ("[b]ecause the United States Supreme Court [in *Crawford*] has characterized [the] statement [in *Dutton*] as nontestimonial . . . it would follow that the statement [against penal interest to a fellow inmate] . . . is also nontestimonial").

In *State* v. *Geisler*, supra, 222 Conn. 684–85, this court identified factors to be considered to encourage a principled development of our state constitutional jurisprudence. Those six factors are (1) persuasive relevant federal precedents, (2) the text of the operative constitutional provisions, (3) historical insights into the intent of our constitutional forebears, (4) related Connecticut precedents, (5) persuasive precedents of other state courts, and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. Id., 685; accord *Feehan* v. *Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

The defendant concedes that the first, second, and fifth factors do not support a more protective interpretation under state law. The text of the two clauses are nearly identical. Compare Conn. Const., art. I, § 8 (guaranteeing defendant's right "to be confronted *by* the witnesses against him" (emphasis added)) with U.S. Const., amend. VI (guaranteeing right "to be confronted *with* the witnesses against him" (emphasis added)). The federal and state precedent we have addressed in part I A of this opinion does not support the defendant's proposed standard. To this we would add that we are aware of only one state that has charted an independent course under its state constitution's confrontation clause with regard to this issue.[13] That state did not

[13] There are examples of courts relying on their respective state constitutions to fill gaps in the United States Supreme Court's testimonial framework, at least until the court does so itself. See, e.g., *State* v. *Scanlan*, 193 Wn. 2d 753, 766, 445 P.3d 960 (2019) (concluding that Washington case law articulating comprehensive definition of "testimonial" statements and specific test for applying that definition to statements to nongovernmental witnesses under Washington constitution due to gap in federal jurisprudence was superseded by subsequent decision of United States Supreme Court applying its primary purpose test to statements to nongovernmental witnesses), cert. denied, U.S. , 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020); see also *State* v. *Rodriguez*, supra, 337 Conn. 226–27 (*Kahn*, *J.*, concurring) (filling gap regarding admissibility of forensic evidence with its own test

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# Vol. 343

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT

OF THE

## STATE OF CONNECTICUT

# CENTERPLAN CONSTRUCTION COMPANY, LLC, ET AL. *v.* CITY OF HARTFORD (SC 20526)

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

*Syllabus*

The plaintiffs, C Co. and D Co., which had contracted with the defendant, the city of Hartford, to construct a baseball stadium, appealed from the judgment of the trial court in favor of the city. The city had entered into an agreement with an architectural firm, P Co., to design the stadium. After P Co. began work, the city, in February, 2015, entered into a development agreement with D Co. whereby D Co. would serve as the developer and administer and complete P Co.'s plans. In turn, C Co. and D Co. entered into a builder agreement with each other, and they both entered into a direct agreement with the city. In May, 2015, the city assigned its agreement with P Co. to C Co. and D Co. In December, 2015, a dispute arose between the parties. C Co. and D Co. claimed that they had never been given control over P Co. or its design of the stadium,

and that the scope of the project had increased because of design changes made by the city and the team that would be occupying the stadium. The city and D Co. resolved the dispute in January, 2016, by executing a term sheet that increased the budget for the project and extended the substantial completion deadline from March 11 to May 17, 2016. The term sheet, which C Co. did not sign, also prevented changes to the project without the city's consent and modified the liquidated damages provision in the city's agreement with D Co. After C Co. and D Co. failed to meet the extended substantial completion deadline, the city terminated its contractual relationship with C Co. and D Co. on the grounds that C Co. and/or D Co. had failed to construct the ballpark in a workmanlike manner and to pay the city liquidated damages that had accrued since their failure to substantially complete the project. C Co. and D Co. thereafter brought the present action against the city, claiming that the city had breached its contracts with them by failing to provide them with notice and an opportunity to cure the alleged defaults before terminating their contractual relationship. The city filed a counterclaim, alleging breach of contract against C Co. and breach of the implied covenant of good faith and fair dealing against C Co. and D Co. Prior to trial, and in response to various motions filed by the parties, the trial court determined that the city's contracts with C Co., D Co., and P Co. granted the city the right to approve the architectural plans and changes to them but granted C Co. and D Co. the right to control how the plans were carried out, including control over P Co. and responsibility for P Co.'s errors and omissions. The court further determined that the city's agreement with D Co. vested the city with the right of commercially reasonable approval over the project plans but that it was the parties' intention that D Co. would have complete control over the stadium design and construction. With respect to the assignment of the city's agreement with P Co. to C Co. and D Co., the court determined that C Co. and D Co. were able to present evidence at trial only as to the city's interference with their legal control over P Co. and the stadium's design after the term sheet was executed. The court instructed the jury that the only issue for it to decide was who was to blame for the stadium's not being ready by the May 17, 2016 deadline. The jury found C Co. and D Co. responsible for failing to complete the stadium by the contractually agreed on deadline, returned a verdict against C Co. and D Co. on their breach of contract claim against the city, and awarded the city $335,000 in liquidated damages in connection with its counterclaim. The trial court rendered judgment for the city, and C Co. and D Co. appealed. *Held*:

1. D Co. did not waive its right to contest errors by the city that occurred prior to the execution of the term sheet, including any architectural or design errors over which the city previously had control; accordingly, the trial court improperly precluded D Co. from presenting evidence of such errors and pursuing the claims against the city that it was entitled to pursue under the term sheet.

2. The parties plainly and unambiguously provided in their agreements that, until the city assigned the agreement that it had with P Co. to C Co. and D Co., the city maintained legal control of and responsibility for P Co.'s work, including any errors or omissions that occurred between February and May, 2015; the city's assignment of its agreement with P Co. in May, 2015, to C Co. and D Co. would have been superfluous if C Co. and D Co. already had legal control of and responsibility for P Co.'s work prior to that assignment, and the assignment's recitals comported with the understanding that it was the parties' intent that there would be a subsequent assignment to C Co. and D Co. of the agreement between the city and P Co.
3. The clear language of the city's assignment of its agreement with P Co. to C Co. and D Co. plainly and unambiguously provided that C Co. and D Co. had legal control of and responsibility for P Co. and the stadium design upon the execution of that assignment in May, 2015, until January, 2016, when the term sheet was executed, including responsibility for any design errors committed during that time period; contrary to the trial court's determination, however, the assignment's plain and unambiguous language established that the city retained all obligations as to P Co. arising out of P Co.'s services before the assignment in May, 2015, including responsibility for any of P Co.'s errors or omissions before May, 2015.
4. This court determined that it was unclear under the term sheet whether the city, on the one hand, or C Co. and D Co., on the other, had control of P Co. and the stadium design after the execution of the term sheet in January, 2016, until June, 2016, when the city terminated its contractual relationship with C Co. and D Co.; accordingly, that issue was to be determined by the fact finder on remand.
5. The term sheet did not unambiguously divest C Co. of the right, in its agreement with D Co., to notice and an opportunity to cure any default prior to termination, the issue of whether the city improperly failed to provide C Co. with the required notice and cure period was a question of fact for the fact finder, and the city and C Co. should have been permitted to introduce evidence regarding whether the city gave C Co. notice and an opportunity to cure prior to terminating their contractual relationship:

   a. Although the city gained the right under the term sheet to remove C Co., without first terminating D Co., in the event that C Co. failed to meet the substantial completion deadline, the term sheet was ambiguous as to whether the right to remove C Co. was a newly created, unqualified right or involved the assignment to the city of D Co.'s preexisting right that D Co. had under its agreement with C Co.; however, under either interpretation of the term sheet, C Co. had an implied common-law right or a contractual right to notice and an opportunity to cure, as the term sheet did not unambiguously divest C Co. of such a right, and, accordingly, the trial court incorrectly determined that the term sheet did not

require the city to provide C Co. with notice and an opportunity to cure prior to termination.

b. The city could not prevail on its claim that, even if C Co. had been given an opportunity to cure, it could not establish that it would have achieved substantial completion of the project within the allotted cure period, as it was the city's burden, rather than that of C Co., to demonstrate that providing an opportunity to cure would have been futile or that C Co.'s breach was incurable; because the trial court's ruling with respect to this issue was improper and the court did not present the issue to the jury, the parties were prevented from developing the record, and the case was remanded for further development of the record and a determination by the fact finder with respect to that issue.

c. The record was inadequate to determine whether C Co. ratified the term sheet, as the trial court made no preliminary finding of fact regarding ratification, and, thus, the parties did not have the opportunity to offer evidence on this issue, but the issue of whether C Co. ratified the term sheet must be addressed on remand only if the fact finder determines that the term sheet granted the city a newly created right to terminate C Co. for failing to meet the substantial completion deadline; accordingly, on remand, the fact finder must first determine whether the term sheet granted the city that newly created right or assigned to the city a preexisting right under D Co.'s agreement with C Co., and, if it determines that the term sheet granted the city a newly created right, it then must determine whether C Co. ratified the term sheet; moreover, if the fact finder determines that C Co. did ratify the term sheet, which C Co. would have to have done to consent to its requirements, the scope of the trial on remand would be limited to claims that arose after the execution of the term sheet in January, 2016.

Argued April 26, 2021—officially released May 24, 2022

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket; thereafter, the defendant filed a counterclaim; subsequently, the court, *Moukawsher*, *J.*, granted the defendant's motions to add Centerplan Development Company, LLC, et al. as third-party counterclaim defendants and the plaintiffs' motion to implead Pendulum Studio II, LLC, et al. as third-party defendants; thereafter, the defendant withdrew the counterclaim as to third-party counterclaim defendant Leyland Alliance, LLC, et al.; subsequently, the court

granted in part the defendant's motion to preclude certain evidence and the case was tried to the jury before *Moukawsher*, *J.*; verdict and judgment in part for the defendant, from which the plaintiffs and third-party counterclaim defendant Centerplan Development Company, LLC, et al. appealed to the Appellate Court; thereafter, the court, *Moukawsher*, *J.*, denied the plaintiffs' motion for remittitur and ordered the discharge of notices of lis pendens on certain of the defendant's real properties, and the plaintiffs and third-party counterclaim defendant Centerplan Development Company, LLC, et al. filed an amended appeal; subsequently, the appeal was transferred to this court. *Reversed*; *new trial.*

*Louis R. Pepe*, with whom was *Laura W. Ray*, for the appellants (plaintiffs and third-party counterclaim defendant Centerplan Development Company, LLC, et al.).

*Leslie P. King*, with whom, on the brief, were *Sylvia H. Walbolt*, pro hac vice, *James E. Parker-Flynn*, pro hac vice, and *Ryan D. Class*, for the appellee (defendant).

*Opinion*

D'AURIA, J. The case before us involves a dispute over the party responsible for delays in constructing Dunkin Donuts Park, home of Hartford's minor league baseball team, the Yard Goats, and a key part of the planned economic revitalization of Connecticut's capital city. As often occurs with such projects, the parties blame one another for the delays. The dispositive issue in this appeal is whether the trial court correctly concluded, as a matter of law, that the plaintiffs, the project's developer, DoNo Hartford, LLC (DoNo), and the project's design-builder, Centerplan Construction Company, LLC (Centerplan), "controlled" the architect and were therefore responsible for any mistakes in and

changes to the stadium's design.[1] Specifically, the plaintiffs claim that, in its pretrial interpretation of various agreements the plaintiffs and the defendant, the city of Hartford (city), had executed to construct the ballpark, the trial court incorrectly concluded that the agreements plainly had assigned to the plaintiffs both the power to direct the design of the ballpark as well as the responsibility for the architect's errors and omissions. After the trial court's ruling, a jury found the plaintiffs responsible for failing to complete the stadium by the contractually agreed on deadline, returned a verdict against the plaintiffs on their claim against the city, and awarded the city $335,000 in liquidated damages on its counterclaim.

Upon our careful review of the contracts at issue, we conclude that, contrary to the trial court's pretrial ruling, the parties' contracts did not unambiguously grant the plaintiffs legal control of the architect and the stadium's design across all relevant time periods. Because the trial court's pretrial ruling improperly took several questions of fact from the jury's consideration, we must

[1] The plaintiffs advance four additional claims on appeal: (1) Did the trial court err in deciding as a matter of law that, under the parties' agreements, the city did not breach its agreements with the plaintiffs by terminating Centerplan without affording it an opportunity to cure? (2) Did the trial court err in refusing to instruct the jury that, if it found that there was concurrent delay by virtue of the city's acts or omissions, Centerplan would be entitled to an extension of time and DoNo could not be in default? (3) Did the trial court err by directing the jury to award liquidated damages to the city without allowing it to consider offsetting the benefit conferred by the plaintiffs on the city? (4) Did the trial court err in discharging the lis pendens filed by DoNo and its counterclaim defendant affiliates, the leaseholders, on the parcels surrounding the ballpark? Because we have concluded that the plaintiffs' first issue disposes of their appeal and requires a new trial, we would not, in the ordinary course, need to reach these other issues. We have determined, however, that the issue of whether the city, as a matter of law, breached its agreements with the plaintiffs by terminating Centerplan without affording it an opportunity to cure is likely to arise on remand, and we therefore have addressed this issue as well. We decline to reach all other issues.

reverse the judgment and remand the case for a new trial.

I

The record reveals the following facts and procedural history. The city contracted with DoNo to serve as the developer for the stadium. We refer to their contract as the Developer Agreement. (It is also referred to in the record as the Development Services Agreement). DoNo, in turn, contracted with design-builder Centerplan. We refer to their contract as the Builder Agreement. (It is also referred to in the record as the Design-Build Agreement). Finally, all three parties—the city, Centerplan, and DoNo—also entered into a Direct Agreement.

In December, 2015, a dispute arose between the plaintiffs and the city. Specifically, Centerplan and DoNo claimed that they never were given control over the architect or its design of the stadium as called for by the Developer Agreement, that the scope of the project had increased because of changes the city and the baseball team had made to the stadium's design, and, as a result, DoNo was entitled to additional time and money to complete the stadium. Centerplan therefore sent a notice of claim to DoNo, and, in turn, DoNo sent a notice of claim to the city, requesting a budget increase.[2]

To resolve DoNo's claim, DoNo and the city executed a term sheet on January 19, 2016. The term sheet, among other things, extended the substantial completion deadline for the ballpark from March 11, 2016, to May 17, 2016, prevented any changes to the stadium's design without the city's consent, and modified the liquidated

[2] The city asserts that the notice of claim was sent on behalf of both Centerplan and DoNo, and that the city, Centerplan, DoNo, and the baseball team negotiated new terms to complete the stadium. The plaintiffs contend that DoNo alone sent a notice of claim to the city and that the term sheet resolved the issues raised in that notice of claim between only the city and DoNo. This issue is addressed more fully in part III B and D of this opinion.

damages provision in the Developer Agreement. There was no signature line in the term sheet for Centerplan, and, in fact, Centerplan did not sign it. The record does not divulge any reason why Centerplan did not sign the term sheet or was not asked to do so, and counsel for the city, when asked at argument before this court, professed not to know why. The parties also agreed to a change order, dated January 28, 2016, increasing the contract price from $56 million to approximately $63.5 million.

It is undisputed that the extended substantial completion deadline was not attained. On June 6, 2016, the city terminated the Developer Agreement with DoNo and the Builder Agreement with Centerplan. In its termination letter, the city explained that "[t]his termination is based on the continued defaults of [DoNo] and [Centerplan] regarding the design and construction of the Minor League Ballpark . . . . The defaults include, but are not limited to: (1) the failure to pay liquidated damages that have been accruing since the failure to reach substantial completion by May 17, 2016; and (2) the failure to construct the [ballpark] in a workmanlike manner . . . ."[3]

Following the city's termination of Centerplan's and DoNo's contracts, the plaintiffs brought an action seeking an injunction against the termination. The plaintiffs later amended their complaint to include a claim for breach of contract, including allegations that the city had failed to provide notice of and an opportunity to

[3] Although the termination letter does not expressly list "failure to meet the substantial completion deadline" as a reason for terminating Centerplan, the city argued before the trial court that the termination letter encompassed this reason because it stated that the defaults "include, but are not limited to," the listed reasons. In addition, the city contended, its pursuit of liquidated damages as a result of the plaintiffs' failure to meet the substantial completion deadline made plain that the failure itself constituted a reason for termination. On appeal, the plaintiffs do not argue that the termination letter did not specifically include this ground as a reason for termination.

cure the alleged defaults before termination, and a claim for breach of the implied covenant of good faith and fair dealing. The amended complaint eliminated any claim for injunctive relief. The city asserted a counterclaim in eighteen counts but withdrew all but two of its counts before the end of trial. Along with the plaintiffs' claims, the remaining two counts of the counterclaim—breach of contract against Centerplan and breach of the implied covenant of good faith and fair dealing against Centerplan and DoNo—were tried to a jury.

In its instructions, the trial court tasked the jury with deciding one question: "Which side is to blame for the stadium not being ready by its May 17, 2016 deadline?"[4] The jury found in favor of the city and against the plaintiffs on the plaintiffs' affirmative claims and in favor of the city on its counterclaim against the plaintiffs, awarding liquidated damages of $335,000.

The plaintiffs jointly appealed to the Appellate Court and moved to transfer the appeal to this court pursuant to Practice Book §§ 65-2 and 66-2. We granted that motion over the city's objection. We will provide additional facts and procedural history as necessary.

## II

Centerplan and DoNo claim that the trial court erroneously construed the parties' contracts to place responsibility for the architect and design errors on them across all relevant time periods, including both before and after the term sheet's execution. The city responds that the plain and unambiguous language of the parties' contracts placed this responsibility on the plaintiffs,

[4] In the transcript of the trial court's jury instructions, the question appears as, "[w]hich side is to blame for the stadium not being ready by its March [17] 2016 deadline?" In the court's written instructions and on its verdict form, however, the deadline appears correctly as May 17, 2016, the extended substantial completion date reflected in the term sheet. Neither party has raised a claim of error as to this aspect of the jury instructions.

precisely as the trial court ruled it did. The city further argues that it is irrelevant whether the contracts made the plaintiffs legally responsible for the architect and the design before the execution of the term sheet because the term sheet fully waived any preterm sheet claims regarding architect control, design errors, and increased construction costs.

We disagree with the city that the term sheet waived the plaintiffs' claims and, accordingly, must address the plaintiffs' claim regarding legal control of the architect and stadium design. Our review of the parties' contracts leads us to conclude that they did not unambiguously grant the plaintiffs legal control of the architect and the stadium's design across all relevant time periods. First, we hold that, under the contracts, the city plainly and unambiguously maintained legal control of the architect and stadium design as a matter of law from the signing of the original agreements in February, 2015, to the assignment of the agreement between the city and Pendulum Studios II, LLC, (Architect Agreement) in May, 2015, and that the city retained responsibility for the architect's errors during this time period. Second, we hold that, from the assignment of the Architect Agreement in May, 2015, to January, 2016, when the term sheet was executed, the plaintiffs plainly and unambiguously had legal control of the architect and stadium design as a matter of law. Last, we hold that, from the term sheet's execution in January, 2016, until the city terminated its contractual relationship with Centerplan and DoNo in June, 2016, the question of which party had legal control of the architect and stadium design is ambiguous. Because the trial court's pretrial ruling improperly took from the fact finder several questions of fact, including the issue of the parties' intent regarding architect control during this third period of time—after the term sheet's execution and

until the city terminated the plaintiffs' contracts—we must remand the case for a new trial.[5]

A

The record reveals the following additional facts and procedural history relevant to these issues. Count one of the plaintiffs' complaint alleges that the city materially breached its contractual obligations under the Developer Agreement by not relinquishing control of the architect and the stadium's design. The plaintiffs allege that this material breach prevented Centerplan from controlling the design and staying within the project's budget. The plaintiffs also allege that the city continued to issue changes to the design after the execution of the term sheet, that Centerplan lacked the ability to reject the changes, and that these additional changes made it impossible to finish construction by the substantial completion deadline. As a result, the plaintiffs allege, the city wrongfully terminated their contracts despite the city's own material default for issuing design changes that increased costs and prevented Centerplan from finishing on time.

Only weeks before trial, at the trial court's behest, the parties filed a number of motions to narrow the scope of the upcoming trial. Among the motions the city filed was a motion in limine asking the trial court to rule, as a matter of law, that the plaintiffs had waived any claims against the city predating or arising out of the subject matter of the term sheet. The city argued that the term sheet had released any claims against the

[5] We note that the plaintiffs may still proceed with the theory they advanced at the first trial, which was that, even if they had legal control of the architect and the stadium's design, the city interfered with that control. Our conclusions of law are limited to the interpretation of the parties' contracts. The question of whether the city in fact interfered with the plaintiffs' legal control of the architect and the stadium's design, thereby delaying construction and breaching its contractual duties to the plaintiffs, is more appropriately addressed by the fact finder on remand.

city as of the term sheet's execution, including claims regarding "control over and scope of the [s]tadium design, purported design errors and omissions, the cost of construction, and the substantial completion deadline." The city sought to limit the issues at trial to whether it had made material changes to the stadium design after the execution of the term sheet such that Centerplan could not meet the substantial completion deadline. The plaintiffs responded that, because the city was exercising its reserved rights under the term sheet to contest the preterm sheet claims and a preterm sheet change order, dated December 24, 2015, notwithstanding the release language contained in the term sheet, Centerplan and DoNo should also be able to pursue their claims.

When the parties appeared before the trial court to argue the motion in limine, among other motions, the trial court signaled its interpretation of the release provisions: that, if the city did not dispute the preterm sheet claims and preterm change order, then those topics were no longer "fair game" for trial. In response, the city withdrew its counterclaims against Centerplan and DoNo contesting the preterm sheet claims and the preterm sheet change order. The plaintiffs then argued that, notwithstanding the city's withdrawal of those counterclaims, they were still entitled to present evidence of architect and design control to establish that the city was in fact in charge of the architect before the execution of the term sheet and that, during that time, the architect committed errors that led to Centerplan's inability to meet the substantial completion deadline even after the term sheet's execution. The city filed a renewed motion in limine to preclude that evidence. The trial court granted the motion, in part, on the record, noting that the plaintiffs could still present evidence of design problems as background for their

postterm sheet design claims but not as a basis for liability or damages.

At the same time, the trial court issued a ruling as to legal control of the architect and design under the parties' agreements. The court determined that the plain language of the contracts granted the city "the right to approve the architectural plans and changes to them" but granted Centerplan and DoNo "the right to control how the plans were carried out, including control over the architect." This authority, the trial court reasoned, derived from the Developer Agreement, the Builder Agreement, and the Architect Agreement. The trial court emphasized provisions in the Developer Agreement that, in its view, promised DoNo operational control over architectural issues, assigned DoNo the job of completing the in progress project plans, and provided that DoNo would assume the city's rights and obligations under the Architect Agreement. The trial court noted that the Developer Agreement allowed the baseball team to visit the stadium and granted the team the right to request certain modifications to the design, so long as the team did not "hinder or interfere with the construction of the Project Facilities or the activities of [DoNo's] contractors . . . ." (Internal quotation marks omitted.) The trial court also emphasized that the Developer Agreement granted the city " 'commercially reasonable approval' " over the project plans, but, otherwise, it was the parties' intention that DoNo would have complete control over the stadium design and construction, and that DoNo would be responsible for the architect's acts and omissions. The trial court highlighted that the Builder Agreement placed the same emphasis on the plaintiffs' bearing responsibility for design issues as did the Developer Agreement.

Regarding the assignment, the trial court observed that, "to carry out its earlier promise to let DoNo assume [the city's] rights over the architect, [the city] signed

a document assigning its right under the architect's contract with the city." The trial court then determined that the only obligations the city retained after the assignment was the obligation to pay the architect for part A and part B services detailed in the Architect Agreement, which included concept design, programming confirmation, schematic design, foundation and seating permits, design development, and construction documentation. Centerplan was responsible for paying for everything else referred to in the assignment, including part C work, also detailed in the Architect Agreement, which included construction administration and " 'the applicable representations . . . terms, and conditions' of part A, part B, and every other contractual matter related to the architect." The trial court concluded that, as a whole, the "agreements plainly assign to Centerplan and DoNo the dominant power over design issues that arise while carrying out the plans. This power includes the right to direct architect activities during the design and construction process, and explicit responsibility for the architects' acts and omissions. [The city] must agree to the plans and changes to them. DoNo and Centerplan are in charge of carrying them out." Therefore, the trial court explained, if construction slowed because of design issues, "the contracts make Centerplan and DoNo responsible." The trial court specifically reserved for the jury's determination the issue of whether the city "violated [the plaintiffs' rights regarding the architect and design] by frustrating the development team's work [and thereby] causing [it] to miss the deadline; then, it would be fair for the jury [to] find for Centerplan and DoNo."

Pursuant to the trial court's rulings, the plaintiffs were therefore able to present evidence at trial only as to the city's interference with the plaintiffs' legal control over the architect and the stadium's design after the term sheet's execution. The plaintiffs consistently main-

tained throughout trial that the city controlled the architect prior to the execution of the term sheet, and the plaintiffs attempted to present evidence to that effect, as well as evidence that the architect made design errors during that time period that prevented the plaintiffs from meeting the substantial completion deadline. Those attempts prompted objections from the city, in response to which the trial court issued curative instructions to the jury that the testimony was only background to the key period after the execution of the term sheet, and that, ultimately, the plaintiffs were always responsible for the architect and the design.

At the end of trial, the trial court charged the jury that "[t]he parties also agreed that Centerplan and DoNo would be responsible for the architects and any mistakes they may have made; so, if the architects did something wrong, you have to start with the assumption that Centerplan and DoNo are to blame for it."[6] Because of the trial court's rulings on the various motions in limine, the only issue left for the jury to decide was, as the court stated: "Which side is to blame for the stadium not being ready by its May 17, 2016 deadline?"

B

Before addressing the issue of which party controlled the architect under the parties' agreements as a matter of law, both before and after the execution of the term sheet, we must determine whether, by executing the term sheet, the plaintiffs waived any contractual right to litigate claims predating the term sheet. If we conclude that the plaintiffs waived such rights, we must then limit our review to a determination of which party

[6] Contrary to its prior ruling, the trial court did not instruct the jury that, if the city "violated [the plaintiffs' rights regarding the architect and design] by frustrating the development team's work [and thereby] causing [it] to miss the deadline, then it would be fair for the jury [to] find for Centerplan and DoNo." On appeal, the plaintiffs make no claim of error in this regard.

controlled the architect after the term sheet's execution and pursuant to its language. We conclude that the term sheet did not fully waive the plaintiffs' claims.

On appeal, the plaintiffs claim that the trial court erroneously placed responsibility for the architect and design errors on Centerplan and DoNo across all relevant time periods. Specifically, they argue that both prior to and after the May, 2015 assignment, the city and the baseball team secretly met with the architect and ordered changes to the design. According to the plaintiffs, these changes delayed the substantial completion date and substantially increased construction costs. Therefore, in December, 2015, DoNo sent a notice of claim to the city, pursuant to the Developer Agreement, seeking additional time and money to complete the stadium. The city responds that, under the plain language of the term sheet, which the parties intended to resolve DoNo's claim against the city, the plaintiffs waived any right to contest any errors by the city that occurred before the term sheet's execution, including any architect errors over which the city previously had control.[7]

At the pretrial hearing to resolve the city's motion to preclude evidence and testimony of preterm sheet claims, the trial court ruled that the reserved rights provisions of the term sheet meant that, if the city did not dispute the preterm sheet claims and preterm sheet change order, then Centerplan and DoNo did not have the right to press those same claims. In the court's view, the city's

[7] The plaintiffs also argue that the city continued to issue changes to the design plans for the stadium after the execution of the term sheet, thereby disrupting the plaintiffs' ability to finish on time. The city responds that the term sheet plainly and unambiguously vested control over the architect with the plaintiffs, and, thus, the trial court properly determined, as a matter of law, that any architect and design errors after the execution of the term sheet must be attributable to the plaintiffs. We address this argument in part II C 3 of this opinion.

challenge to the plaintiffs' claims was a condition precedent to the plaintiffs' ability to prosecute their preterm sheet claims, and, therefore, it precluded the plaintiffs from presenting evidence of architect and design errors that arose prior to the term sheet that the plaintiffs contend led to their failure to meet the substantial completion deadline. The trial court did not treat Centerplan and DoNo as separate entities or discuss the differences in the language of the reserved rights provisions relating to these two entities. To assess the plaintiffs' claim that the trial court erroneously ruled that they waived their rights to prosecute their preterm sheet claims, we discuss in turn each applicable provision of the term sheet.

Given the trial court's sole reliance on the term sheet's language and the parties' disagreement about the meaning of that language, "the first question that this court must address is not whether the trial court's substantive interpretation of the [term sheet] was correct, but the more fundamental question of whether the relevant language was plain and unambiguous. . . . [T]hat determination is a question of law subject to plenary review." *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101, 84 A.3d 828 (2014). "A contract is unambiguous when its language is clear and conveys a definite and precise intent." (Internal quotation marks omitted.) Id., 102–103. By contrast, a contract is ambiguous if its language is susceptible to more than one reasonable interpretation. Id., 103. The trial court held that the language of the term sheet was plain and unambiguous.

Paragraph 15 of the term sheet provides: "[DoNo] and the [city] each waive any and all claims that each may have against the other, or that might arise from, the matters that are subject of this agreement (*subject only to the reserved rights in* [*paragraphs*] *2 and 4* . . . )." (Emphasis added.) Given the term sheet's qualification of the release provision, the plain language of paragraph 15 manifests a more limited waiver of the parties'

rights to sue than the city contends. The reserved rights in paragraphs 2 and 4 provide the parties the ability to contest certain claims despite the release provision. Thus, we must determine whether the claim that the trial court precluded the plaintiffs from raising at trial fell within the limited scope of paragraphs 2 and 4.

Paragraph 4 provides that, if the interim milestones to complete the stadium established in paragraph 3 of the term sheet[8] are not met, and Centerplan does not provide a recovery plan and updated schedule, the city shall "[h]ave the right to contest the Claim dated December 17, 2015 and the resulting Change order . . . . *If this option is pursued*, [DoNo] and [Centerplan] shall likewise have the right to assert and prosecute such Claim and to assert any and all defenses in response to any claim by the city." (Emphasis added.)

The phrase, "[i]f this option is pursued," supports the trial court's interpretation that the city must first contest the claims before Centerplan has the ability to assert and prosecute its claims and defenses. Use of the qualifier "if" in a contract often creates a condition precedent. See, e.g., *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 361, 166 A.3d 800 (2017); id. ("parties often signal their agreement to create an express condition precedent by using words such as . . . 'if' "). "A condition precedent is a fact or event [that] the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into exis-

[8] The interim milestones included the completion of (1) structural steel erection and exterior wall enclosures by March 9, 2016, (2) watertight roofing areas by April 7, 2016, (3) brick veneer by April 15, 2016, and (4) front counters, ventilation hoods, overhead cooling door, refrigerant piping, remote refrigeration, walk-in coolers, and equipment by April 21, 2016.

tence. . . . Whether a provision in a contract is a condition the [nonfulfillment] of which excuses performance depends [on] the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 341 Conn. 430, 440, 267 A.3d 1 (2021). "[T]his option" plainly refers to the city's "option" to contest the preterm sheet claims if the interim milestones were not achieved. The phrase appears after the articulation of the city's right to contest the December, 2015 claims and preterm sheet change order, and prior to the articulation of Centerplan and DoNo's parallel rights.

The circumstances surrounding the term sheet's execution lead us to conclude that the word "[i]f" in paragraph 4 of the term sheet was in fact intended to create a condition precedent. The parties wanted to finish the stadium by May 17, 2016, and the city wanted to "neutralize [the] plaintiffs' threat to stop construction." Allowing the plaintiffs to prosecute their preterm sheet claims earlier would have worked against meeting the substantial completion deadline, thereby jeopardizing the ability of the baseball team to fully use the stadium by the beginning of the baseball season. It also would have undermined the purpose of the term sheet as a settlement agreement if the plaintiffs had the ability to reassert their preterm sheet claims every few weeks. Thus, we conclude that the trial court correctly determined that paragraph 15 of the term sheet clearly and unambiguously waives Centerplan's right to pursue its preterm sheet claims at trial because the city withdrew its counterclaims against the plaintiffs' contesting the preterm sheet claims and the preterm sheet change order, and, therefore, the condition precedent in paragraph 4 did not arise.[9]

[9] Our analysis as it relates to Centerplan does not end there, however, because, as discussed in part III of this opinion, it is unclear whether Cen-

Further, paragraph 2 of the term sheet modifies the parties' agreement regarding liquidated damages, found in the Developer Agreement. Paragraph 2 provides in relevant part: "If the Substantial Completion Date is not attained," the city "shall have the right to contest the Claim dated December 17, 2015, and the resulting Change Order . . . and [DoNo] shall likewise have the right to assert and prosecute such Claim and to assert any and all defenses in response to any claim by the city." We concede that, at first glance, the phrase, "and [DoNo] shall likewise have the right," contained in paragraph 2, might evince an intent to base DoNo's right to contest the claims on the city's having first contested the claims if the substantial completion deadline were not attained. We must read this provision, however, in the context of the entire agreement. See, e.g., *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, 259 Conn. 665, 671, 791 A.2d 546 (2002) ("[t]he contract must be viewed in its entirety, with each provision read in light of the other provisions"). When we read the entire term sheet in context, this interpretation of paragraph 2 is belied by the parties' use of more restrictive language in a later provision. Specifically, as discussed, under paragraph 4 (c), unlike paragraph 2, if the interim milestones to complete the stadium, as established in the term sheet, were not met, the parties explicitly conditioned Centerplan's and DoNo's rights to prosecute their claims on the city's having first contested the claims

terplan ratified the term sheet. If, on remand, the fact finder determines that Centerplan ratified the term sheet, then the dispositive issue will, at least as to Centerplan, be limited to which party had control over the architect, as a matter of law, after the term sheet's execution. In the event the fact finder determines that Centerplan did not ratify the term sheet and, thus, did not waive its contractual right to prosecute its preterm sheet claims, we have provided additional analysis, to the extent it applies on remand, regarding whether the relevant contracts make clear and unambiguous which party had control over the architect across all relevant time periods. See part III B and D of this opinion.

and preterm sheet change order. The use of restrictive language in paragraph 4 shows that the parties knew how to condition the plaintiffs' right to prosecute certain claims on the city's first having contested the claims. See *Zhang* v. *Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 639, 866 A.2d 588 (2005) ("[a]lthough we recognize that the introductory paragraph of the deed references only an easement for the transmission of electric current, that fact does not overcome strong evidence of a contrary intent in the more specific provision setting forth the permissible uses of the easement"). The fact that the parties did not use similar conditional language in paragraph 2 compels the conclusion that, because the substantial completion deadline was not attained, DoNo has the right to prosecute its claims, irrespective of whether the city contests the claims or the change order, and, therefore the trial court's ruling was erroneous as it applied to DoNo. As a result of the trial court's incorrect ruling as to DoNo regarding waiver, we conclude that the trial court erroneously prevented DoNo from fully pursuing the claims against the city that it was entitled to pursue under the term sheet.

C

Nevertheless, the trial court's improper ruling regarding waiver is pertinent only if the parties' contracts do not plainly and unambiguously grant the plaintiffs control over the architect across all relevant time periods. We thus address the claim that the trial court incorrectly concluded, as a matter of law, that the plaintiffs controlled the architect and were therefore responsible for any mistakes in and changes to the stadium's design.

We interpret the parties' legal rights and responsibilities regarding the architect under the collective agreements, both before and after the execution of the term

sheet.[10] "[W]hen there are multiple writings regarding the same transaction, the writings should be considered together in construing the contract." (Internal quotation marks omitted.) *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, supra, 259 Conn. 671, quoting *Mongillo* v. *Commissioner of Transportation*, 214 Conn. 225, 229, 571 A.2d 112 (1990). Interpretation of an unambiguous contract is subject to plenary review, as is "the determination [of] whether [the] contractual language is plain and unambiguous . . . ." *Cruz* v. *Visual Perceptions, LLC*, supra, 311 Conn. 101–102. "When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . ." (Internal quotation marks omitted.) Id.

1

Legal Control of Architect from February to May, 2015

We begin with the parties' original agreements—the Architect Agreement, the Developer Agreement, and the Builder Agreement—which governed the project from February to May, 2015.

On August 29, 2014, the city and Pendulum Studios II, LLC, entered into the Architect Agreement, which initially governed the architect's responsibilities regarding the stadium's design. After the architect began designing the stadium, the city entered into the Developer Agreement with the plaintiffs to administer and complete the architect's in progress plans, and Centerplan and DoNo entered into the Builder Agreement to do the same. The plaintiffs claim that the terms of the Developer Agreement required the city to assign the Architect Agreement to them before or during the

[10] If the fact finder determines as a matter of law that Centerplan ratified the term sheet, and therefore waived the ability to prosecute the preterm sheet claims, then the only issue as to Centerplan is legal control of the architect and design of the stadium after execution of the term sheet.

stadium design phase but that the city never actually did so during that time period; in fact, the architect had already completed the stadium's design by the time the parties effectuated the assignment. In further support of this claim, the plaintiffs argue that the Builder Agreement defined "architect" as the person "having a direct contract with the Design-Builder to perform design services," but Centerplan never had a direct contract with the architect for design services during the entire project.

The city responds that the unambiguous language of the parties' agreements allocated to the plaintiffs both responsibility for and control of the architect and the stadium's design. The city argues that no provision in the parties' original agreements conditioned the exercise of the plaintiffs' rights over the architect and the stadium's design on the city's having first formally assigned the Architect Agreement to the plaintiffs because the Builder Agreement and the Developer Agreement explicitly provided the plaintiffs with the ability to control the architect. Centerplan did not need a direct contract with the architect, the city contends, to bear legal responsibility for the architect's acts and omissions because the Builder Agreement made Centerplan responsible for design professionals generally. In any event, because time was of the essence to complete the stadium by March 11, 2016, the city argues that it is unreasonable to infer that the plaintiffs' control of the architect was silently conditioned on a future assignment. We agree with the plaintiffs that the contracts contemplated a subsequent assignment of the Architect Agreement.

The plain language of the Developer Agreement and the Builder Agreement clearly manifests the parties' intent that Centerplan and DoNo would control the architect and the stadium's design. No party disputes this, nor can they. For example, the Developer Agreement between the city and DoNo mandates that DoNo

shall "retain . . . Pendulum Studio II, LLC, as Project Architect," "supervise, manage and administer the completion of the In Progress Project Plans," and "have sole control over the design of the Project Facilities and finalization of the In Progress Project Plans (subject only to [the] city's right to review and approve any Material Changes in its sole discretion . . .)." The Developer Agreement also states that DoNo "shall assume [the] city's rights and obligations under the [Architect Agreement] by and between [the] city and [the architect]," and that it is the parties' intention that DoNo "have complete control over the design and construction means and methods to be performed at the Project Facilities, subject to the approval rights of [the] city . . . ." Likewise, the Builder Agreement provides that, "[s]ubject to the [city's] rights with respect to direction or approvals of design," Centerplan "shall have sole control and discretion over the design of the Project," including "all aspects of management and administration of the design and construction of the Project . . . ." The Builder Agreement further provides that Centerplan shall be responsible for the "acts and omissions of the . . . Architect, Contractors, Subcontractors and their agents and employees, and other persons or entities, including the Architect and other design professionals, performing any portion of [Centerplan's] obligations under the Design-Build Documents."[11]

[11] The city additionally points to language in the Developer Agreement that provides that DoNo "shall have control of . . . management of all other third party vendors . . . including, without limitation, architects," and sole responsibility and control of the stadium's design. The city also cites language in the Builder Agreement that provides that Centerplan is not required to "take direction from or accept any changes to the design or construction of the Project from the [city]." We agree with the city that this language supports its position that the parties intended that the plaintiffs would control the architect and the stadium's design, but, as we explain, the contracts do not indicate whether they automatically assigned control to the plaintiffs.

The original agreements, however, are silent as to whether the parties intended for the agreements automatically and implicitly to assign legal control of the architect to Centerplan and DoNo, or whether this control was conditioned on the parties' first entering into a separate assignment. The mere existence of the May, 2015 assignment clarifies the parties' intent. "[I]n construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 698, 711, 980 A.2d 880 (2009). This wisdom also applies when giving effect to provisions in subsequent contracts. See *Tomey Realty Co.* v. *Bozzuto's, Inc.*, 168 Conn. App. 637, 653, 654–55, 147 A.3d 166 (2016) (reversing grant of summary judgment when trial court failed to give effect to operative provisions in lease, amendment to that lease, and assignment of that lease). The later assignment of the Architect Agreement would have been superfluous if Centerplan and DoNo already had legal control of the architect from the outset. As we will explain in more detail, the assignment was not a formality or technicality but a full assignment that affected the parties' contractual rights related to the control of and payment for the architect. It would therefore be incongruous to read the parties' earlier contracts as automatically granting Centerplan and DoNo legal rights over the architect and design.

The assignment's recitals also comport with the understanding that the parties intended that there would be a future assignment. Specifically, the assignment states that the Developer Agreement "contemplated that DoNo would design, develop and construct the Stadium and that [the city] *would assign* the [Architect] Agreement . . . to DoNo . . . ." (Emphasis added.) Although, as "a general rule, [r]ecitals in a con-

tract, such as whereas clauses, are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations unless referred to in the operative provisions of the contract"; (internal quotation marks omitted) *Tomey Realty Co.* v. *Bozzuto's, Inc.*, supra, 168 Conn. App. 653 n.10; recital language is context that confirms that the parties intended that there would be a subsequent assignment of the Architect Agreement. In fact, that assignment occurred in May, 2015, three months after the city entered into the contracts with the plaintiffs.

We therefore conclude that the parties plainly and unambiguously provided that, until the city assigned the Architect Agreement to Centerplan and DoNo, the city maintained legal control of and responsibility for the architect, including any errors or omissions that occurred before May, 2015.

2

Legal Control of Architect from May, 2015, to January, 2016

Next, we discuss the city's May, 2015 assignment of the Architect Agreement to the plaintiffs, which affects who had control of the architect from May, 2015, to January, 2016.

The plaintiffs argue that this assignment is only a partial assignment, as the recitals note that the design was complete by May, 2015, leaving only part C services, related to construction administration, for the plaintiffs to direct. The city, on the other hand, argues that it is "an assignment of the entire Architect Agreement" rather than a partial assignment. The city further argues that the assignment's plain language transferred to Centerplan the city's obligation to pay the architect and relieved the city of future payments. The trial court agreed with the city, concluding that the city's only

"obligations" were those that "derive[d]" from parts A and B of the Architect Agreement, and that "this language means that [the city kept] the obligation to pay the architect under part[s] A and B and Centerplan pick[ed] up everything else the assignment refers to . . . ."

We hold that the assignment's clear language plainly and unambiguously provides that the plaintiffs had legal control of the architect and design as a matter of law, upon the assignment's execution, including responsibility for any design errors committed after the assignment's execution, consistent with the trial court's ruling. Where we depart from the trial court's ruling is its determination, as a matter of law, that, by the assignment, the city plainly and unambiguously retained only the "obligation" to pay the architect for part A and part B services already rendered but not responsibility for any preexisting architect or design errors. We conclude that the assignment's plain and unambiguous language establishes that the city retained all obligations regarding the architect arising out of the architect's services before the assignment, including responsibility for any of the architect's errors and omissions. See part II C 1 of this opinion.

"[T]o constitute an assignment there must be a purpose to assign or transfer the whole or a part of some particular thing . . . and the subject matter of the assignment must be described with such particularity as to render it capable of identification." (Internal quotation marks omitted.) *Dysart Corp.* v. *Seaboard Surety Co.*, 240 Conn. 10, 17, 688 A.2d 306 (1997). "Unless the language or the circumstances indicate the contrary . . . an assignment of the contract or of all [the assignor's] rights under the contract . . . is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract." (Internal quotation marks omitted.) *Brett Stone Painting & Maintenance*,

*LLC* v. *New England Bank*, 143 Conn. App. 671, 689, 72 A.3d 1121 (2013), quoting 3 Restatement (Second), Contracts § 328, pp. 44–45 (1981).

Facially, the May, 2015 assignment does not purport to be only a partial assignment. The full Architect Agreement was appended to the assignment, and the recital to the assignment states that the city is assigning "*all* of [the city's] right, title, and interest" in the Architect Agreement to Centerplan. (Emphasis added.) Paragraph 7 of the assignment provides in relevant part that "[Centerplan], by its acceptance of this [a]ssignment, hereby assumes and agrees to be bound by the applicable representations, obligations, terms, and conditions of the [Architect] Agreement . . . ." Paragraph 5 of the assignment provides in relevant part that, upon delivery of the assignment, the architect "shall commence work on Part C . . . of the [Architect] Agreement and shall complete the same under the purview and direction of [Centerplan]."

"The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity." (Internal quotation marks omitted.) *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, supra, 259 Conn. 670. Under the clear and unambiguous language of the assignment, the plaintiffs were legally responsible for the architect's errors and omissions committed after the assignment, even if the design was "complete" and the architect was providing only construction administration services at the time. The plaintiffs' contention that they did not assume responsibility for design errors after the assignment because the architect had completed the design and transitioned to only construction administration cannot be reconciled with the plain language of the assignment and the arguments the plaintiffs made at trial and on appeal to this court. The architect may have completed certain parts of its design responsibilities, but that does not alter the assignment language,

which transferred all "representations, obligations, terms, and conditions of" the Architect Agreement—and with it, control of and liability for the architect—wholly to Centerplan. The plaintiffs claimed throughout the litigation that there were architect and design errors throughout the construction of the stadium, including after the assignment and the term sheet. Additionally, on appeal, the plaintiffs argue that the change directives issued by the architect *after* the assignment were changes to the stadium design that delayed construction. It can hardly be said now that the language providing that the architect will commence construction administration services "under the purview and direction of [Centerplan]" somehow limits the plaintiffs' responsibility for design errors from the date of the assignment or to review of past architectural work. We therefore conclude that it is plain and unambiguous that the May, 2015 agreement constitutes a full assignment of the Architect Agreement, with all the attendant rights, responsibilities, and liabilities regarding the architect and stadium design, from the city to the plaintiffs.

We also conclude that the plain and unambiguous language of the assignment establishes that the city retained responsibility for the architect's errors and omissions prior to the assignment. Paragraph 7 of the assignment provides in relevant part that "[Centerplan], by its acceptance of this Assignment, hereby assumes and agrees to be bound by the applicable representations, obligations, terms, and conditions of the [Architect] Agreement . . . ." The assignment continues, providing that the city "shall be relieved of further obligation pursuant to the same should such obligation arise on or after execution of this Assignment and pertain to any matter that does not derive from Part A or Part B of Exhibit B of the [Architect] Agreement."

The assignment does not define the term "obligation." "We often consult dictionaries in interpreting contracts

. . . to determine whether the ordinary meanings of the words used therein are plain and unambiguous, or conversely, have varying definitions in common parlance." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 193, 112 A.3d 144 (2015). Black's Law Dictionary defines "obligation" as a "legal or moral duty to do or not [to] do something," a "formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp[ecially], a duty arising by contract," and a "legal relationship in which one person, the obligor, is bound to render a performance in favor of another, the obligee." Black's Law Dictionary (11th Ed. 2019) p. 1292. The definition of "obligation," therefore, includes not only the duty to pay but also any broader legal duties the city may owe to the architect under the contract.

When "obligation" is read in the context of the entire provision, as well as the rest of the assignment, it is clear that the parties intended the term to be construed broadly. See, e.g., *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, supra, 259 Conn. 671. The sentence in question states that the city "shall be relieved of further obligation . . . should such obligation arise on or after execution of this Assignment and pertain to *any matter that does not derive from Part A or Part B* . . . ." (Emphasis added.) The use of the phrase "any matter that does not derive from Part A or Part B" to describe the obligations that the city is relieved from undertaking indicates responsibility beyond just paying the architect. This provision states that the city is relieved from further obligations related to "any matter" that *does not* derive from part A or B work. The necessary inference is that the city also retains obligations related to "any matter" that *does* derive from part A or B work. We have previously explained that, in the absence of a clear limitation in the text of a contract,

the word "any" gives the resulting phrase an expansive meaning. See, e.g., *Salce* v. *Wolczek*, 314 Conn. 675, 686, 104 A.3d 694 (2014). The provision is not limited to payment. Two other provisions in the assignment state that the city "will remain responsible to [the architect]" to pay for additional part B services. Another provision states that Centerplan will pay the architect for part B services, notwithstanding the additional services for which the city agreed to reimburse. The use of more specific language pertaining to payments, including invoice numbers and dollar amounts, in other provisions and not when discussing the city's future obligations supports the conclusion that the terms "obligations" and "any matter" in paragraph 7 of the assignment do not contain a limitation as to paying the architect. See *Zhang* v. *Omnipoint Communications Enterprises, Inc.*, supra, 272 Conn. 639; see also *Miller Bros. Construction Co.* v. *Maryland Casualty Co.*, 113 Conn. 504, 514, 155 A. 709 (1931) ("we must bear in mind that the particular language of a contract must prevail over the general"). In the absence of limiting language, the plain meaning of the sentence, therefore, is that the city has an "obligation" of liability for design errors that arise out of "any matter" related to the architect's part A and part B services. This is consistent with the city's control of the architect before the assignment, given that the majority of the architect's design responsibilities were completed during that time.

This broader interpretation of the word "obligation" is also informed by our case law regarding assignments. "[U]nless there has been an express assumption of liability, the assignee is not liable to the debtor for liabilities incurred by the assignor in connection with the subject matter of the assignment. . . . As such, [i]n the absence of an express contract provision, an assignee generally does not assume the original responsibilities of the assignor . . . ." (Citation omitted; internal quo-

tation marks omitted.) *Hartford* v. *McKeever*, 139 Conn. App. 277, 285, 55 A.3d 787 (2012), aff'd, 314 Conn. 255, 101 A.3d 229 (2014). Because no other part of the assignment expressly provides for the transfer of liability, the implication of the city's argument that the assignment pertained only to the obligation of paying the architect is that the plaintiffs did not assume future responsibility for the architect's errors and omissions, and, thus, all liability regarding the architect and the stadium defaults to the city as the assignor. Given that we hold that the plain and unambiguous language of the assignment vests the plaintiffs with legal control of the architect, it would be an absurd result to interpret "obligations" not to include liability for the architect's errors and omissions. See, e.g., *Grogan* v. *Penza*, 194 Conn. App. 72, 79, 220 A.3d 147 (2019).

We therefore hold that, for the period of time between May, 2015, to January, 2016, it is plain and unambiguous as a matter of law that the plaintiffs assumed legal control of the architect and the stadium's design upon assignment of the Architect Agreement, and that the city retained liability for preexisting architect and stadium design errors that occurred before May, 2015.

3

Legal Control of Architect from January to June, 2016

Finally, we turn to the term sheet itself to determine whether it clearly and unambiguously provides which party had control of the architect from January to June, 2016, as a matter of law.

The plaintiffs claim that the term sheet clearly and unambiguously gave the city exclusive control of the design of the stadium. Specifically, they point to the term sheet's provision that "[t]here will be no new design changes to the Ballpark without the express written

consent of the city" and that such consent "may be withheld in its sole and absolute discretion . . . ." The city argues that, on its face, the term sheet does not allow the city to make changes to the design; rather, it only allows the city to withhold its consent to changes sought by others. The city further argues that there was no reason for the plaintiffs to cede design control to the city in light of the new substantial completion deadline.

We cannot say that it is plain and unambiguous as a matter of law which party had legal responsibility for the architect and design under the language of the term sheet. On the one hand, the term sheet language lends support to the interpretation that the plaintiffs maintained full legal control of the architect and design after the assignment. Nothing in the term sheet explicitly provides that the plaintiffs ceded control back to the city or that the city gained or received control. The term sheet provided the plaintiffs with what they wanted when they sent the notice of claim in December, 2015: "no new design changes . . . ." The term sheet, therefore, can quite reasonably be read to set a fixed design for the plaintiffs to complete by the substantial completion deadline. The notices of claim filed in December, 2015, complained primarily about the city's delay in assigning the plaintiffs the Architect Agreement such that the plaintiffs would be unable to finish the stadium on time. It would be incongruous, then, for the plaintiffs to transfer control back to the city. Thus, one reasonable interpretation of the term sheet is that it did not affect the legal control of the architect and stadium design that the assignment had delegated to the plaintiffs.

The other reasonable interpretation is that the term sheet ceded legal control of the architect and the design to the city. The Developer Agreement provides that "[a] change order requested by [the] Developer shall be subject to the approval of [the] city (which may be

granted or denied in [the] city's sole discretion) *only if it is for a Material Change to the In Progress Project Plans* . . . ." (Emphasis added.) The term sheet, however, provides that the city must consent to any "design changes," not just material changes. The use of more general language regarding the city's right to consent (or not to consent) to design changes in the term sheet compared to the Developer Agreement suggests that, after the term sheet, the city gained additional control over the architect and design. See *Zhang* v. *Omnipoint Communications Enterprises, Inc.*, supra, 272 Conn. 639. Given the circumstances leading to the term sheet—including the city's desire to achieve substantial completion by the deadline—it is at least plausible, and perhaps logical, for the city to have desired to exercise greater control over the architect and design. We are not convinced that the power to withhold consent, paired with the requirement that every design change after the term sheet be given consent before commencing, amounts to a *lack* of control over the architect and the design. See *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 47–51, 165 A.3d 193 (2017) (recognizing that common interest community association has broad design control powers through granting or withholding consent to construction sought by unit owners in community).

We conclude that both parties' interpretations are reasonable, and, therefore, the issue of architect control after the term sheet is ambiguous. The extent of legal responsibility over the architect and design from January to June, 2016, must be determined by the fact finder.[12]

## III

Because we have concluded that this case must be remanded for a new trial, we would not ordinarily find

[12] We leave it to the trial court on remand to determine whether, with a fuller record, these questions may be resolved through summary judgment.

it necessary to address the plaintiffs' further claim that the term sheet does not unambiguously eliminate Centerplan's right to notice and an opportunity to cure under the Builder Agreement.[13] Because this issue is likely to arise at a new trial, however, we conclude that it is appropriate to address it. See Practice Book § 84-11; *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009).

The plaintiffs argue that the term sheet could not have superseded the original notice and cure provision in the Builder Agreement because it makes no mention of that provision. According to the plaintiffs, this silence cannot be read to alter Centerplan's rights under the Builder Agreement because the term sheet does not conflict with the Builder Agreement. They further argue that rights to notice and an opportunity to cure must be expressly waived and that the term sheet's silence necessarily means the notice and cure provision still applies. The plaintiffs argue in the alternative that the language of the term sheet is ambiguous and, therefore, that the interpretation of the term sheet was a question of fact for the jury.

The city contends that, read naturally, the extended deadline contained in the term sheet was firm and that the city's right to replace Centerplan was absolute. In support of this contention, the city asserts that the purpose of a firm deadline was to ensure that at least some portion of the scheduled baseball season would be played in the stadium in 2016. The city further contends that Centerplan ratified and benefited from the term sheet. Finally, the city contends that, without the

[13] The claim as articulated by the plaintiffs is: "[Did] the trial court err in treating DoNo and Centerplan as a single entity and thereby wrongly [strip] them of their legal rights?" However, the plaintiffs do not argue that the trial court erroneously treated DoNo and Centerplan as a single legal entity; rather, they argue that the trial court incorrectly interpreted the agreements between the parties.

unqualified right to terminate Centerplan, the promise in the term sheet would be illusory and that the plaintiffs' defaults could not have been cured with more time.

We conclude that paragraph 2 (c) of the term sheet did not unambiguously eliminate Centerplan's notice and cure rights in the Builder Agreement. The question of whether the city breached the Builder Agreement by failing to provide Centerplan with the required notice and cure period was a question of fact for the fact finder, and both parties should have been permitted to introduce evidence regarding whether the city gave Centerplan notice and a cure period.

The following facts and procedural history are relevant to our resolution of this issue. Days before trial began, the city filed a motion in limine, asking the trial court to rule that Centerplan's and DoNo's claims of default on the basis of the city's failure to provide notice and a cure period were barred as a matter of law.[14] Specifically, the city argued that the term sheet modified the terms of the Developer Agreement and Builder Agreement, eliminating the cure period under certain circumstances. In response, the plaintiffs argued that the city was required to provide Centerplan with notice and an opportunity to cure prior to termination, that the term sheet did not bind Centerplan because Centerplan did not sign it, and that the only way the city could terminate Centerplan for failing to meet the substantial completion deadline was to terminate DoNo using the step-in provision in paragraph 8 of the Direct Agreement. The step-in provision would equip the city with DoNo's rights under that agreement, including the

[14] It is possible that this motion in limine was prompted by a question from an order of the trial court during a hearing on May 13, 2019. First, the trial court asked the parties whether the city could still prevail if it wrongly terminated Centerplan. The court then asked the parties to submit "all the legal conclusions that you would want [it] to incorporate into any contracts . . . ."

power to terminate subject to applicable notice and cure requirements.

After a hearing, the trial court ruled, as a matter of law, that the city did not breach its agreements by terminating Centerplan without an opportunity to cure.[15] The trial court ruled that the term sheet superseded Centerplan's rights under the original contract documents and that the term sheet allowed the city to terminate and replace Centerplan without providing for a right to cure. The trial court emphasized that the term sheet explicitly preserved certain provisions of the Developer Agreement but that the notice and cure provision of the Builder Agreement was not among them. The term sheet, the trial court determined, "can't fairly be read to have required notice [and] cure rights . . . . Not only do the words used not provide for it, but keeping such rights would have frustrated the basic bargain in the term sheet. The term sheet gave Centerplan two months more time. In exchange, it provided that, if Centerplan didn't meet this extended deadline, it faced termination and higher liquidated monetary damages. If the new, two month extended deadline could be extended more by the rights to cure, the bargain would have been meaningless." Finally, the trial court reasoned that it "[does not] matter that DoNo signed the agreement, not Centerplan. Section 8.1.10 of Centerplan's agreement [with DoNo] requires Centerplan to comply with the 'terms, conditions, obligations and requirements' of the developer's contract, and the term sheet amended the developer's contract." We disagree with the position of the city and the trial court.

It is useful first to consider the parties' rights as they stood before DoNo and the city executed the term sheet.

[15] The trial court announced this ruling orally during a hearing on May 29, 2019, before the start of trial. The court issued a written decision on June 14, 2019, during the trial.

Centerplan was not a party to the Developer Agreement. But in both the Builder Agreement and the Direct Agreement, Centerplan agreed to adhere to certain provisions of the Developer Agreement. The Developer Agreement defines "developer default" as consisting of ten different ways DoNo could default. The defaults relevant to this appeal are contained in paragraph 7 (b) of that agreement: paragraph 7 (b) (1) (i) (failure to construct the stadium in a "workmanlike manner"); paragraph 7 (b) (1) (iii) (failure to meet substantial completion deadline); and paragraph 7 (b) (1) (v) (failure to pay liquidated damages).

Paragraph 7 (c) of the Developer Agreement describes the city's remedies in the event of DoNo's default. Paragraph 7 (c) (1) provides that, if a developer default exists "beyond all applicable notice and cure periods, [the] city may take any one or more of the following remedial steps . . . ." Under paragraph 7 (c) (1) (i), those remedial steps include the city's right to terminate the Developer Agreement and the right to remove Centerplan after providing all applicable notice and cure periods. In the event of a developer default for failure to meet the substantial completion deadline under paragraph 7 (c) (1) (iii), "the city shall be entitled to liquidated damages only."

The Builder Agreement between DoNo and Centerplan contains a provision, § A.14.2.1, "Termination by the Owner for Cause," that lists specific reasons permitting DoNo to terminate Centerplan. Pursuant to that section, DoNo had the ability to terminate Centerplan for any "substantial breach" of the design-build documents, subject to notice and an opportunity to cure.[16] Under

[16] "Substantial breach" is not defined in the Builder Agreement or the Developer Agreement. For purposes of this analysis, we assume, without deciding, that failure to meet the substantial completion deadline amounts to a substantial breach of the Developer Agreement. Section 8.1.10 of the Builder Agreement defines the design-build documents as including the Developer Agreement.

§ A.14.2.2, when one of the reasons for termination for cause arises, DoNo "may without prejudice to any other rights or remedies of the Owner and after giving [Centerplan] and [Centerplan's] surety, if any, seven days' written notice to cure, upon [Centerplan's] failure to cure, terminate [the] employment of [Centerplan] . . . ."

The Direct Agreement, signed by the city, DoNo, and Centerplan, contains a provision allowing the city to step into DoNo's shoes, replacing DoNo as a party to the Builder Agreement, but only in the event the city first terminated the Developer Agreement with DoNo. The Direct Agreement further provides that, until the city exercises this step-in provision, the "city shall have no direct rights under the [Builder Agreement] and shall not be considered nor is a party thereto." The Direct Agreement is the only contract between the city and both plaintiffs.

Prior to the term sheet, the Developer Agreement limited the city's remedy, upon the plaintiffs' failure to meet the substantial competition deadline, to liquidated damages. Thus, the only way the city could gain the right to terminate Centerplan for failing to meet the substantial completion deadline was pursuant to the Direct Agreement, which allowed the city to terminate DoNo and then step into DoNo's shoes for the purposes of the Builder Agreement. The city would thereby have all of the same rights and obligations DoNo had under that agreement, including the obligation to provide Centerplan with notice and an opportunity to cure before termination of the Builder Agreement.

Paragraph 14 of the four page term sheet provides: "All of the agreements between the city and [DoNo] (and [Centerplan], to the extent applicable) shall be amended to reflect the terms and conditions herein." The term sheet extended the substantial completion deadline from March 11 to May 17, 2016. Paragraph 2

of the term sheet modified the Developer Agreement's provision for liquidated damages as follows: "If the Ballpark is delivered after the Substantial Completion Deadline and Liquidated Damages are triggered pursuant to the terms of the [Developer Agreement], the first day damages shall be $50,000"; thereafter, "damages shall accrue at a rate of $15,000 per day," and "[i]f the Substantial Completion Date is not attained, the city shall have the option to remove Centerplan . . . ."

A

When the trial court relies solely on the language of an agreement, which it determines to be plain and unambiguous, and when the parties disagree on the meaning of that language, "the first question that this court must address is not whether the trial court's substantive interpretation of the [agreement] was correct, but the more fundamental question of whether the relevant language was plain and unambiguous. . . . [T]hat determination is a question of law subject to plenary review." *Cruz* v. *Visual Perceptions, LLC*, supra, 311 Conn. 101. Similarly, interpretation and construction of an unambiguous contract is subject to plenary review. Id., 101–102. "A contract is unambiguous when its language is clear and conveys a definite and precise intent." (Internal quotation marks omitted.) Id., 102–103. By contrast, a contract is ambiguous if its language is susceptible to more than one reasonable interpretation. Id., 103. "[W]hen there are multiple writings regarding the same transaction, the writings should be considered together in construing the contract." (Internal quotation marks omitted.) *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, supra, 259 Conn. 671. "[When] two contracts are made at different times, but [when] the later is not intended to entirely supersede the first, but only to modify it in certain particulars, the two are to be construed as parts of one contract, the later superseding the earlier one wherever it is inconsistent." (Footnotes

omitted.) 17A Am. Jur. 2d 470, Contracts § 489 (2016); see also *Iowa Arboretum, Inc.* v. *Iowa 4-H Foundation*, 886 N.W.2d 695, 706 (Iowa 2016); *Prue* v. *Royer*, 193 Vt. 267, 283, 67 A.3d 895 (2013).

The term sheet modified the Developer Agreement, but its terms do not indicate that it is a substitute for either the Developer Agreement, the Direct Agreement, or the Builder Agreement. "A recognized test for whether a later agreement between the same parties to an earlier contract constitutes a substitute contract looks to the terms of the second contract. If it contains terms inconsistent with the former contract, so that the two cannot stand together it exhibits characteristics . . . indicating a substitute contract." (Internal quotation marks omitted.) *Alarmax Distributors, Inc.* v. *New Canaan Alarm Co.*, 141 Conn. App. 319, 331–32, 61 A.3d 1142 (2013); see *Riverside Coal Co.* v. *American Coal Co.*, 107 Conn. 40, 45, 139 A. 276 (1927); see also 2 Restatement (Second), Contracts § 279, comment (a), p. 375 (1981) ("A substituted contract is one that is itself accepted by the obligee in satisfaction of the original duty and thereby discharges it. A common type of substituted contract is one that contains a term that is inconsistent with a term of an earlier contract between the parties."). However, when a later modification does not supersede the primary contract but modifies only certain aspects of it, the later modification amends only those portions of the primary contract whenever the two are inconsistent. See 17A Am. Jur. 2d, supra, § 489, p. 470.

Here, the language of the term sheet itself makes clear an intent that certain provisions of the original Developer Agreement remain in place. In addition, paragraph 14 of the term sheet provides in relevant part that "[a]ll of the agreements between the city and [DoNo] (and [Centerplan], to the extent applicable) shall be amended to reflect the terms and conditions stated herein." It is therefore clear from the language

that the term sheet modifies the agreements referenced in it to the extent the term sheet specifically provides; it is not a substitute contract that completely supersedes any of the underlying agreements.

One such modification included in the term sheet was a change to the liquidated damages provision of the Developer Agreement. Paragraph 2 of the term sheet modified the Developer Agreement's provision for liquidated damages by adding the following language: "If the Substantial Completion Date is not attained, the city shall have the option to remove [Centerplan] . . . ."[17] The term sheet does not list, by number, the precise provision or provisions in the Developer Agreement this paragraph modifies. However, it is clear from the Developer Agreement that the liquidated damages provision is paragraph 7 (c) (1) (iii). Therefore, paragraph 2 of the term sheet modified paragraph 7 (c) (1) (iii) of the Developer Agreement, which, as explained previously, limited the city's remedy for Centerplan's failure to meet the substantial completion deadline to liquidated damages. As modified, in addition to liquidated damages, the city gained the right to remove Centerplan in the event Centerplan failed to meet the substantial completion deadline, a right the city did not have under the prior agreements.[18]

B

It is clear that the term sheet provides the city with the right to remove Centerplan without first terminating DoNo under the step-in procedure contained in the

[17] Paragraph 2 of the term sheet provides in relevant part: "If the Ballpark is delivered after the Substantial Completion Deadline and Liquidated Damages are triggered pursuant to the terms of the [Developer Agreement], the first day damages shall be $50,000"; thereafter, "damages shall accrue at a rate of $15,000 per day . . . ."

[18] Paragraph 2 (c) of the term sheet provides in relevant part: "If the Substantial Completion Date is not attained, the city shall have the option to remove [Centerplan] . . . ."

Direct Agreement if the substantial completion deadline is not attained. This does not answer, however, the question of whether Centerplan has a right to notice and an opportunity to cure under the term sheet. The term sheet is silent regarding whether the city's right to terminate is subject to any notice and cure requirements.

Although it is generally true that silence alone does not necessarily equate to ambiguity; see, e.g., 11 R. Lord, Williston on Contracts (4th Ed. 1999) § 30:4, pp. 47–51; the Appellate Court has held that silence or a lack of detail *may* amount to ambiguity. See *Stamford Wrecking Co.* v. *United Stone America, Inc.*, 99 Conn. App. 1, 11, 912 A.2d 1044, cert. denied, 281 Conn. 917, 917 A.2d 999 (2007); cf. *State* v. *Ramos*, 306 Conn. 125, 136, 49 A.3d 197 (2012) ("silence may render a statute ambiguous when the missing subject reasonably is necessary to effectuate the provision as written"). See generally *Salce* v. *Wolczek*, supra, 314 Conn. 686 (applying canons of statutory construction to interpret contract); *Karas* v. *Liberty Ins. Corp.*, 335 Conn. 62, 102–103, 228 A.3d 1012 (2019) (same). In *Stamford Wrecking Co.*, the Appellate Court considered whether a contract provision was ambiguous when it provided that the defendant "agrees to subcontract the abatement and demolition work to [the plaintiff] while retaining a certain portion of the work for its own forces pursuant to the [s]pecifications." (Internal quotation marks omitted.) *Stamford Wrecking Co.* v. *United Stone America, Inc.*, supra, 11. The court explained that "the agreement [was] silent regarding the precise amount of abatement and demolition work that was promised to the plaintiff and [the] overall percentage of work that would be allocated to each party," and that this lack of detail rendered the contract ambiguous. Id.

As in *Stamford Wrecking Co.*, the provision of the term sheet at issue in this case lacks key details. The term sheet provides that the city shall have the right

to "remove" Centerplan but does not establish any procedures for this removal—including whether any notice or cure period is required. Nor does it specify the precise nature of this right, including whether this right (1) imposes a new obligation on Centerplan by giving the city an unqualified right to terminate Centerplan while preserving DoNo's right to terminate Centerplan under the Builder Agreement (which would require Centerplan's ratification), or (2) is merely a conditional assignment to the city of DoNo's preexisting right to terminate Centerplan under the Builder Agreement and, thus, includes the accompanying notice and cure rights. We ultimately conclude that the term sheet is ambiguous as to whether the right to terminate is a newly created, unqualified right or an assignment of a preexisting right. Under either interpretation of the term sheet, however, Centerplan had some right to notice and an opportunity to cure: either an implied common-law right or a contractual right. As a result, for reasons we will explain in greater detail, we conclude that the trial court erroneously ruled that the term sheet did not, as a matter of law, require the city to provide Centerplan with notice and an opportunity to cure prior to termination.

The trial court interpreted the term sheet's silence regarding notice and the opportunity to cure as granting the city a new and unqualified right to terminate Centerplan and, thus, the notice and cure provision in the Builder Agreement did not control. This is one reasonable interpretation of the term sheet given its silence on this issue. This interpretation, however, provides the city with a right that did not exist under the prior agreements, namely, the right to terminate Centerplan for failing to meet the substantial completion deadline. It is axiomatic that, for the city to gain a new right over Centerplan, Centerplan had to be a party to the term sheet because, while a contract may provide benefits

to a third party, it cannot burden a third party that is a stranger to it. See, e.g., *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 578, 119 A.3d 570 (2015) ("[p]arties to a contract cannot thereby impose any liability on one who, under its terms, is a stranger to the contract, and, in any event, in order to bind a third person contractually, an expression of assent by such person is necessary" (internal quotation marks omitted)). Because Centerplan did not sign the term sheet and, thus, was not bound to adhere to it by the terms of any other contract, Centerplan can be bound by the term sheet only if it ratified the term sheet. See part III D of this opinion. Whether Centerplan ratified the term sheet is a question of fact that the jury did not decide in the present case because of the trial court's incorrect ruling. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 562, 698 A.2d 245 (1997).

Moreover, even if we assume that Centerplan somehow manifested assent to the term sheet, meaning that the Builder Agreement's notice and cure provision would not apply, the term sheet's silence regarding any notice and cure requirements does not mean that no such requirements exist. Our well established common law provides Centerplan with the right to notice and an opportunity to cure. Under our common law, when a contract is silent as to notice and cure rights, the right to cure is implied in every contract as a matter of law unless expressly waived. See *McClain* v. *Kimbrough Construction Co.*, 806 S.W.2d 194, 198 (Tenn. App. 1990), appeal denied, Tennessee Supreme Court (March 11, 1991); see also 5 P. Bruner & P. O'Connor, Construction Law (2014) § 18:15, p. 909. In the absence of specific language setting out a notice and cure period, the breaching party is generally entitled to notice and a *reasonable* time to cure the breach. See, e.g., *Fraunhofer-Gesellschaft zur Förderung der Angewandten Forschung E.V.* v. *Sirius XM Radio, Inc.*, 940 F.3d 1372,

1379 (Fed. Cir. 2019) ("it is a general rule of contract law that a party exercising the right to terminate the contract must give notice within a reasonable time"); see also 5 P. Bruner & P. O'Connor, supra, § 18:41, p. 1001; 13 J. Perillo, Corbin on Contracts (Rev. Ed. 2003) § 68.9, pp. 258–62. Thus, under our common law, silence in a contract regarding notice and cure rights does not create ambiguity. Rather, it supports a presumption in favor of common-law notice and cure rights, and, at the very least, this silence does not support a conclusion that the term sheet *unambiguously* divests Centerplan of its notice and cure rights.

Because the term sheet is silent as to Centerplan's right to notice and an opportunity to cure, we conclude that there was no express waiver of this common-law right. This is true even if we assume, arguendo, that Centerplan was a party to or ratified the term sheet. The plain language of the term sheet cannot reasonably be interpreted as reflecting an intent to eliminate Centerplan's common-law notice and cure rights. Thus, even if the trial court was correct that the term sheet granted the city a new, unqualified right to terminate Centerplan, it incorrectly concluded that this right was not subject to any notice and cure requirements.

Although neither party briefed the issue, there is another reasonable interpretation of paragraph 2 (c) of the term sheet, which we discuss to further demonstrate the ambiguity of the provision. It would be reasonable to interpret the right the city gained under the term sheet as a conditional assignment of DoNo's right to terminate Centerplan under the Builder Agreement.[19]

[19] "An assignment is a transfer of property or some other right from one person (the assignor) to another (the assignee), [that] confers a complete and present right in the subject matter to the assignee. . . . An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to rules of contract construction." (Citation omitted; internal quotation marks omitted.) *Liberty Transportation, Inc.* v. *Massachusetts Bay Ins. Co.*, 189 Conn. App. 595, 602, 208 A.3d 330 (2019).

Specifically, if the substantial completion deadline is not attained, the term sheet requires DoNo to assign its right to terminate Centerplan under the Builder Agreement to the city. If the term sheet assigned this right to the city, the city's right was only as broad and unqualified as DoNo's right was under the Builder Agreement. See, e.g., *Shoreline Communications, Inc.* v. *Norwich Taxi, LLC*, 70 Conn. App. 60, 72, 797 A.2d 1165 (2002) ("[a]n assignee has no greater rights or immunities than the assignor would have had if there had been no assignment"). Thus, upon Centerplan's failure to meet the substantial completion deadline, the city gained the right to terminate Centerplan under the Builder Agreement without first having to terminate DoNo under the Direct Agreement. If paragraph 2 (c) of the term sheet operates as a conditional assignment, the city would still be required to adhere to the notice and cure provisions of the Builder Agreement prior to terminating Centerplan. Under this interpretation of the term sheet, which would not require Centerplan to be a party to the agreement because the Builder Agreement did not require Centerplan's approval for DoNo to assign its rights under the Builder Agreement, Centerplan clearly and unambiguously maintains its right to notice and a seven day opportunity to cure as provided by the Builder Agreement.[20]

[20] Alternatively, the plaintiffs argue that the city violated Centerplan's contractual rights by not following the step-in procedure in the Direct Agreement. To the extent the plaintiffs argue that this provision of the Direct Agreement requires the city to first terminate DoNo before it can terminate Centerplan—regardless of the reason or the other contractual provisions—the clear language of this provision, as discussed, does not create such a requirement but, rather, sets forth only the procedure for how Centerplan and the city would interact if DoNo were terminated. Because paragraph 2 of the term sheet creates a mechanism by which the city gains the right to terminate Centerplan without first terminating DoNo, the Direct Agreement would not be triggered by the city's exercise of its right under paragraph 2.

This conclusion does not conflict with the language of the Direct Agreement providing that, until the city steps into the shoes of DoNo under the Builder Agreement, the city "shall have no direct rights under the [Builder Agreement] and shall not be considered nor is a party thereto." This provision

Both of these interpretations of the term sheet are reasonable, and we thus conclude that the term sheet is ambiguous as to whether paragraph 2 (c) grants the city a newly created right or requires DoNo to assign to the city its preexisting right to terminate Centerplan under the Builder Agreement. Regardless of this ambiguity, however, both interpretations of the term sheet entitle Centerplan to some form of notice and an opportunity to cure. Accordingly, the trial court improperly concluded, as a matter of law, that the city was not required to provide Centerplan with notice and an opportunity to cure prior to terminating Centerplan.

Nevertheless, the city argues that the term sheet clearly divests Centerplan of any right to notice and the opportunity to cure because, as the trial court stated, eliminating Centerplan's notice and cure period was necessary to preserve the basic bargain of the term sheet, which the trial court characterized as giving Centerplan two more months to complete the project in exchange for facing termination and higher liquidated damages if it did not meet this extended deadline. We disagree. Even with a notice and cure requirement (either under the common law or under the Builder Agreement), in exchange for granting Centerplan more time, the term sheet gave the city both (1) a right it did not have before unless it first terminated DoNo and stepped into its shoes, and (2) the right to higher liquidated damages. In addition, Centerplan was only entitled to either a seven day cure period (under the contract) or a "reasonable" time period (at common law).[21] Construing the

merely clarifies that the Direct Agreement does not grant the city any of DoNo's rights under the Builder Agreement until and unless the city terminates DoNo. It does not prevent DoNo from assigning its rights under the Builder Agreement to the city in a separate contract.

[21] We note that the city may still proceed with the theory it advanced at the first trial, which was that, even if Centerplan was entitled to a seven day notice and cure period, it would have been futile to give Centerplan the notice and cure period because it could not reach substantial completion by the end of any cure period. Our conclusions of law are limited to the interpretation of the parties' contracts.

term sheet as not removing Centerplan's right to notice and a cure period does not prevent the city from obtaining the benefit of its bargain. Accordingly, we conclude that the trial court incorrectly concluded that the term sheet unambiguously removed the notice and cure provision from the Builder Agreement. Rather, the term sheet unambiguously provides Centerplan with some form of a right to notice and an opportunity to cure.[22] However, the term sheet is ambiguous as to whether the right to notice and the opportunity to cure is the contracted-for right in the Builder Agreement or a common-law implied right.

C

Nevertheless, the city contends in the alternative that, even if the trial court improperly construed the term sheet, any error is harmless and no new trial is warranted. Specifically, the city contends that the trial court's error was harmless because Centerplan cannot establish that it could have cured its breach before the end of the seven day cure period. The city's argument is more appropriately categorized as futility, which concerns whether a party could have cured its breach, rather than harmlessness, which concerns whether a trial court's error requires reversal of the judgment. The issue is whether it was futile for the city to give Centerplan the required notice and cure period (regardless of the nature of the right) because Centerplan could not reach substantial completion by the end of any cure period. As we will discuss in more detail, however, the burden is on the city, not the plaintiffs, to prove futility.

[22] Although it is clear that the term sheet did not eliminate Centerplan's notice and cure rights, it is less clear what right, exactly, the term sheet did give to the city. During future proceedings, it may be necessary to determine whether the city's right to terminate Centerplan operates as a new and independent right, or whether it operates as an assignment of DoNo's existing right to terminate Centerplan.

Clearly, the trial court's incorrect ruling affected the trial. Because the trial court determined that the term sheet gave the city an unqualified right to terminate Centerplan, it, in essence, held that the term sheet overrode any provisions from the prior agreements that qualified this right to termination. As discussed, however, the city could not terminate Centerplan without first providing some form of notice and opportunity to cure. To hold as the trial court did that this assignment altered Centerplan's rights would be to make a new or different agreement than that entered into by the parties. See, e.g., *Collins* v. *Sears, Roebuck & Co.*, 164 Conn. 369, 374, 321 A.2d 444 (1973) ("[w]e assume no right to add a new term to a contract" (internal quotation marks omitted)). Thus, as a matter of law, Centerplan retained some right to notice and an opportunity to cure. The trial court's improper ruling prevented the parties from developing the record concerning—and the jury from considering—the factual issues of what type of notice and opportunity to cure was required, whether the city gave Centerplan the required notice and opportunity to cure and, if not, whether the city had a valid excuse for termination. Because the trial court's error prevented the parties from arguing key issues and removed questions of fact from the jury, a new trial is necessary. See *Cruz* v. *Visual Perceptions, LLC*, supra, 311 Conn. 106–108 (reversing judgment and remanding case for new trial when trial court failed to resolve ambiguity in parties' letter agreement by considering extrinsic evidence of parties' intent); see also *Chouinard* v. *Marjani*, 21 Conn. App. 572, 577, 575 A.2d 238 (1990) (new trial was required because "court's evidentiary ruling prevented the jury from considering relevant and material evidence affecting the ultimate issue" at trial).

The city's contention that the plaintiffs must demonstrate that they could have cured their breach to be

entitled to a new trial misses the mark. "Termination of a construction contract can be upheld *only if the terminating party sustains its burden of proof* that . . . the terminating party terminated the contract in strict compliance with contractually specified termination procedures . . . ." (Emphasis added; footnotes omitted.) 5 P. Bruner & P. O'Connor, supra, § 18:39, p. 999. The city, therefore, has the burden of proving that it properly terminated Centerplan. Improper termination is itself a material contract breach. See, e.g., *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 169, 117 A.3d 876 (failure to follow notice provision of termination clause invalidates termination and amounts to material breach of contract), cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015). Further, "in the face of a property owner's repudiation or material breach of a construction contract, the contractor properly may exercise its right to seek contract damages, including lost profits, even if it has not substantially completed its own performance under the contract." Id., 161–62, citing 13 Am. Jur. 2d 107–108, Building and Construction Contracts § 112 (2009). Until the trial court's error is corrected and the ambiguous termination procedures are interpreted using extrinsic evidence, if any, it is impossible to determine whether Centerplan was properly terminated. If the city repudiated or anticipatorily breached its contract by wrongfully terminating Centerplan, the city may no longer be entitled to liquidated damages, and Centerplan may be able to seek damages regardless of whether it cured its own breach, unless the city has a valid excuse from performance. See *Martin* v. *Kavanewsky*, 157 Conn. 514, 518–19, 255 A.2d 619 (1969); *McKenna* v. *Woods*, 21 Conn. App. 528, 532, 534, 574 A.2d 836 (1990).

Examples of such excuses include futility and the incurability of the breach. The city could claim that

it was not required to give Centerplan notice and an opportunity to cure because to do so would be futile. See, e.g., *Semac Electric Co.* v. *Skanska USA Building, Inc.*, 195 Conn. App. 695, 718, 226 A.3d 1095, cert. denied, 335 Conn. 944, 238 A.3d 17 (2020), and cert. denied, 335 Conn. 945, 238 A.3d 19 (2020); see also 15 R. Lord, Williston on Contracts (4th Ed. 1990) § 43:17, p. 2. Similarly, when breaches are truly incurable, a cure notice may be unnecessary. See 5 P. Bruner & P. O'Connor, supra, § 18:15, pp. 910–11. The burden falls on the city, however, to demonstrate that providing notice and an opportunity to cure would be futile or that Centerplan's breach was incurable. The burden is not the plaintiffs' to show that Centerplan could have cured within the governing cure period. Notably, the Appellate Court has been reluctant to entertain a futility defense when the contract provided a specific notice and cure period and the terminating party did not honor that cure period. See *Semac Electric Co.* v. *Skanska USA Building, Inc.*, supra, 718 ("[w]e decline to speculate that waiting the additional hours required under the contract would have been futile").

Because the trial court did not properly construe the agreements and did not present this issue to the jury, the parties, particularly the plaintiffs, were prevented from developing the record regarding—and the jury was prevented from deciding—not only whether proper notice and an opportunity to cure were provided, but also whether honoring the termination requirements would be futile or whether Centerplan's breach was incurable. "We often have stated that whether a contract has been breached is a question of fact . . . and that this court lacks the authority to make findings of facts or draw conclusions from primary facts found." (Citation omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 171. In the present case, the trial court determined,

before trial and as a matter of law, that the city could not have breached its contract with Centerplan by failing to give Centerplan notice of its default and an opportunity to cure the default. The trial court's ruling was premised on its incorrect construction of the term sheet, which the trial court concluded unambiguously eliminated Centerplan's notice and cure rights. As a result of this pretrial error, the jury never was tasked with deciding whether the city breached its contract by failing to give Centerplan the required notice and cure period before terminating the Builder Agreement. It may be tempting to wonder whether an additional seven days (or a reasonable time) would have made a significant difference in the plaintiffs' ability to finish the stadium on time. But we cannot make these determinations as a matter of law, and this court cannot find facts in the first instance. See, e.g., *Cruz* v. *Visual Perceptions, LLC*, supra, 311 Conn. 106. This question must be determined by the jury at a new trial on remand.

D

Because the issue of whether Centerplan ratified the term sheet is likely to arise on remand, as referenced in various portions of this opinion, we briefly address the trial court's conclusion that it did not matter that only DoNo signed the term sheet, and not Centerplan, because "[s]ection 8.1.10 of Centerplan's agreement [with DoNo] requires Centerplan to comply with the 'terms, conditions, obligations and requirements' of the developer's contract, and the term sheet amended the developer's contract." It is true that, when Centerplan entered into the Builder Agreement,[23] it agreed to adhere to certain terms of the Developer Agreement. Centerplan, however, did not agree to be bound by

[23] Although not a part of the trial court's reasoning, Centerplan also agreed to be bound by certain other provisions of the Developer Agreement pursuant to the terms of the Direct Agreement. The same reasoning applies to the Direct Agreement.

any future modifications to the terms of the Developer Agreement. In the absence of an expression of an intent by Centerplan to be bound by *future* modifications, we decline to conclude that § 8.1.10 applies not to just those terms of the Developer Agreement that were in place at the time Centerplan signed the Builder Agreement, but to those terms that came later in the term sheet.[24] See *Gilmore* v. *Knights of Columbus*, 77 Conn. 58, 62, 58 A. 223 (1904) (holding that, when parties expressly agree to be bound by future amendments to contract, "the courts are substantially agreed that a future amendment, if reasonable, binds the consenting member"). Thus, because the term sheet was executed only by DoNo and the city, Centerplan was not bound by its terms. See, e.g., *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 17 A.3d 40 (2011) ("[T]he obligation of contracts is limited to the parties making them, and . . . in order to bind a third person contractually, an expression of assent by such person is necessary. . . . In other words, [a] person who is not a party to a contract (i.e., is not named in the contract and has not executed it) is not bound by its terms." (Citation omitted; internal quotation marks omitted.)). Id., 797.

The city contends that, even if the trial court erred in ruling that § 8.1.10 of the Builder Agreement bound Centerplan to adhere to the term sheet, Centerplan remained bound by the term sheet because it knew of, and acquiesced in, its terms and accepted its benefits. In other words, the city argues that Centerplan ratified the term sheet. This argument, however, must be

[24] Even if § 8.1.10 of the Builder Agreement did bind Centerplan to the term sheet to some extent, that provision applies only to "terms, conditions, obligations and requirements *pertaining to the design and construction of the Project* . . . ." (Emphasis added.) The plaintiffs argue that notice and cure rights do not pertain to the design and construction of the project, and, therefore, the Builder Agreement does not bind Centerplan to the notice and cure provisions of the Developer Agreement or any modifications to those provisions caused by the term sheet. We agree.

addressed on remand only if the fact finder determines that paragraph 2 (c) of the term sheet grants the city a newly created right to terminate Centerplan for failing to meet the substantial completion deadline. See part III B of this opinion. If the fact finder determines that paragraph 2 (c) creates a conditional assignment to the city of DoNo's preexisting right under the Builder Agreement, ratification by Centerplan is not required for this provision to be enforceable. This is because an assignment of rights does not create any new obligations for Centerplan, and none of the prior agreements required Centerplan's permission for DoNo to assign its rights under the Builder Agreement. Cf. *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 268–69, 757 A.2d 526 (2000).

In the event the fact finder determines that paragraph 2 (c) of the term sheet grants the city a newly created right to terminate Centerplan for failing to meet the substantial completion deadline, however, we address this argument briefly. As explained in part III B of this opinion, under our interpretation of the term sheet, Centerplan would be subject to new obligations, thus requiring its consent. Because Centerplan did not sign the term sheet and was not bound by the term sheet under the terms of the Builder Agreement, it would have had to ratify the term sheet to consent to its requirements. See, e.g., *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 578 ("to bind a third person contractually, an expression of assent by such person is necessary" (internal quotation marks omitted)). Whether a party ratified an agreement is a question of fact. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, supra, 241 Conn. 562. This court is not permitted to make a finding of fact "unless the subordinate facts found make such a conclusion inevitable as a matter of law." (Internal quotation marks omitted.) *Reclaimant Corp.* v. *Deutsch*, 332 Conn, 590,

614, 211 A.3d 976 (2019). Because the trial court made no preliminary finding of fact regarding ratification, and, indeed, it could not, the parties did not have the opportunity to offer evidence on this issue. The record is therefore not adequate for this court to determine this issue. Thus, if the fact finder on remand determines that the term sheet grants the city a new, unqualified right to terminate Centerplan, even assuming there was proper notice and an opportunity to cure, as required under the common law, the fact finder also would have to determine whether Centerplan ratified the term sheet for the city to have properly terminated Centerplan.

In conclusion, we reiterate the following two conclusions of law. First, under the contracts, the city plainly and unambiguously maintained legal control of the architect and stadium design, from the signing of the original agreements in February, 2015, to the assignment of the Architect Agreement in May, 2015. The city also retained liability for the architect's errors during this time period. Second, from the assignment of the Architect Agreement in May, 2015, to January, 2016, when the term sheet was executed, the plaintiffs plainly and unambiguously had legal control of the architect and stadium design.

On remand, the fact finder must decide the following questions of fact, among others that are otherwise within the province of the jury. First, the fact finder must determine whether Centerplan ratified the term sheet. If the fact finder determines that Centerplan did in fact ratify the term sheet, the scope of trial as to Centerplan is limited to claims that arose after the execution of the term sheet in January, 2016. Second, the fact finder must determine the extent of legal control of the architect and stadium design from the time the term sheet was executed in January, 2016, until the city terminated its contractual relationship with Centerplan and DoNo in June, 2016. Third, the fact finder must

determine whether the parties intended that the term sheet grant the city, through its right to terminate Centerplan's contract, a newly created, unqualified right or an assignment of a preexisting right. Fourth, the fact finder must determine whether the city breached its contract by failing to provide Centerplan with the required notice and cure period before terminating the Builder Agreement.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

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## ERIC THOMAS KELSEY *v.* COMMISSIONER OF CORRECTION (SC 20553)

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

*Syllabus*

Pursuant to statute (§ 52-470 (d) (1) and (e)), when a habeas petitioner files a subsequent petition for a writ of habeas corpus more than two years after the date on which judgment on a prior habeas petition challenging the same conviction is deemed final, there is a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause, and the habeas court, upon the request of the Commissioner of Correction, shall issue an order to show cause why the subsequent petition should be permitted to proceed.

The petitioner, who had been convicted of felony murder and conspiracy to commit robbery in the first degree, filed a second petition for a writ of habeas corpus. The petitioner filed his second petition nearly five years after this court denied his petition for certification to appeal from the Appellate Court's judgment dismissing his appeal from the habeas court's denial of his first habeas petition. Because the second petition was filed outside of the two year time limit for successive petitions set forth in § 52-470 (d) (1), the habeas court issued an order to show cause and held an evidentiary hearing on the issue of whether the petition should be permitted to proceed. At the hearing, the petitioner testified that he had not been aware of the time limitation set forth in § 52-470 (d) (1) because he had been in and out of prison and did not always have access to law books or law libraries at certain correctional facilities

and while being held in administrative segregation. The habeas court dismissed the second habeas petition, concluding that the petitioner's proffered explanations as to why he had not been aware of the applicable time limitation did not constitute sufficient good cause to excuse his filing delay of nearly three years beyond the applicable time limitation. On the granting of certification, the petitioner appealed to the Appellate Court, which concluded that the habeas court's determination of whether a petitioner has satisfied the good cause standard is reviewed for an abuse of discretion and that the habeas court did not abuse its discretion in dismissing the petitioner's untimely second habeas petition. On the granting of certification, the petitioner appealed to this court. *Held*:

1. The Appellate Court correctly concluded that a habeas court's determination of whether a petitioner has established good cause to overcome the rebuttable presumption of unreasonable delay under § 52-470 (d) and (e) is reviewed on appeal for an abuse of discretion: because § 52-470 is silent and, therefore, ambiguous as to the proper standard of appellate review, this court considered the legislative history of the statute, including recent amendments thereto, which demonstrated that the legislature intended for habeas courts to exercise significant discretion in making determinations regarding good cause in order to further the goals of comprehensive habeas reform, including averting frivolous habeas petitions and appeals; moreover, the good cause analysis contemplated by § 52-470 (e) requires a habeas court to balance numerous factors, including whether external forces outside the petitioner's control had any bearing on the delay, whether and to what extent the petitioner or counsel bears personal responsibility for any excuse proffered for the untimely filing, whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by the evidence, and how long after the expiration of the filing deadline did the petitioner file the petition, and this court previously had held that, when a lower court's finding requires such a balancing of factors, many of which are factual in nature, such a finding is reversed on appeal only when there has been an abuse of discretion.
2. The Appellate Court correctly determined that the habeas court did not abuse its discretion in finding that the petitioner had failed to establish good cause for his untimely filing of his second habeas petition: although the legislative history of recent amendments to § 52-470 demonstrated that the legislature had contemplated a petitioner's lack of knowledge of the law or of a change in the law as being relevant to establishing good cause, the legislature did not intend for such a lack of knowledge, standing alone, to establish that a petitioner has met his or her burden of establishing good cause; in the present case, the petitioner failed to demonstrate that his conditions of confinement had any bearing on the delay insofar as they caused his lack of awareness of the statutory deadline, as the petitioner testified that, in the ten months leading up

to the two year deadline for filing his second petition, he was housed in general population at a correctional facility at which he had access to a resource center that contained various legal resources and law books, including the General Statutes, it was reasonable for the court to consider the fact that more than two years had elapsed since the filing deadline, and those considerations were not outweighed by any of the other factors that the habeas court could have considered in assessing good cause; accordingly, the Appellate Court properly affirmed the judgment dismissing the petitioner's habeas petition.

Argued November 17, 2021—officially released May 24, 2022

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Prescott*, *Suarez* and *DiPentima*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Naomi T. Fetterman*, assigned counsel, for the appellant (petitioner).

*Laurie N. Feldman*, deputy assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

ROBINSON, C. J. The principal issue in this certified appeal requires us to consider the appropriate appellate standard by which to review a habeas court's determination pursuant to General Statutes § 52-470 (d) and (e)[1]

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2014 . . . .

"(e) In a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the

that a petitioner failed to rebut the statutory presumption that a successive petition for a writ of habeas corpus filed beyond statutorily prescribed time limits is the result of unreasonable delay, which requires the court to dismiss the petition. The petitioner, Eric Thomas Kelsey, appeals, upon our grant of his petition for certification,[2]

respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

[2] We originally granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly determine that 'abuse of discretion' is the appropriate standard of review for dismissals of habeas petitions pursuant to . . . § 52-470?" And (2) "Did the Appellate Court correctly determine that the petitioner had failed to establish good cause necessary to overcome the rebuttable presumption of unreasonable delay as set forth in § 52-470?" *Kelsey* v. *Commissioner of Correction*, 336 Conn. 912, 244 A.3d 562 (2021).

Subsequently, the respondent, the Commissioner of Correction, moved for modification of the certified questions. We granted that motion and modified the certified questions as follows: (1) "Did the Appellate Court correctly determine that 'abuse of discretion' is the appropriate standard of review of a habeas court's dismissal of a successive habeas petition following its determination that the petitioner had not demonstrated good cause for the untimely filing pursuant to . . . § 52-470?" And (2) "Did the Appellate Court correctly determine that the habeas court did not err in finding that the petitioner had failed to establish good cause necessary to overcome the rebuttable presumption of unreasonable delay as set forth in § 52-470?" *Kelsey* v. *Commissioner of Correction*, 336 Conn. 941, 250 A.3d 41 (2021).

We acknowledge the argument made by the respondent in his brief that, although this court granted the respondent's motion to modify the certified questions, our modification to the first certified question did not render it a proper statement of the issues. The respondent argues that the certified question should reflect the Appellate Court's review of the habeas court's good cause determination, rather than its review of the habeas court's dismissal of the petition. The respondent proposes the following, alternative certified question: "Did the Appellate Court correctly determine that 'abuse of discretion' is the appropriate standard of review of a habeas court's

from the judgment of the Appellate Court affirming the judgment of the habeas court, which dismissed his second petition for a writ of habeas corpus following its determination that the petitioner had failed to establish good cause for the delayed filing of that second petition. See *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 43–44, 244 A.3d 171 (2020). On appeal, the petitioner claims that the Appellate Court improperly (1) reviewed the habeas court's dismissal of his second petition pursuant to § 52-470 (e) under the abuse of discretion standard, and (2) concluded that the habeas court correctly determined that the petitioner had failed to establish good cause for the untimely filing of his second petition. We disagree with both claims and, accordingly, affirm the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history, aptly set forth by the Appellate Court in its decision. "In December, 2003, a jury [found] the petitioner [guilty] of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (3) and felony murder in violation of General Statutes § 53a-54c. See *State* v. *Kelsey*, 93 Conn. App. 408, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). The [trial] court sentenced the petitioner to a total effective term of forty years of incarceration. [The Appellate Court] affirmed the judgment of conviction on direct appeal, rejecting the petitioner's claims that the trial court improperly had admitted into evidence certain out-of-court statements and had denied his motion for a mistrial based on the state's failure to preserve and produce exculpatory evidence. Id., 410, 416. [This court] denied

determination as to whether a petitioner has satisfied the good cause standard of . . . § 52-470?" However, we decline to further modify the first certified question, as it accurately reflects the conclusion of the Appellate Court, and any additional modification would have no bearing on our decision in this appeal.

certification to appeal [from the Appellate Court's] decision.

"After exhausting his direct appeal, in August, 2007, the petitioner filed his first petition for a writ of habeas corpus challenging his conviction. Following a trial on the merits, the habeas court denied the petition. [The Appellate Court] dismissed the petitioner's appeal from the judgment of the habeas court by memorandum decision; *Kelsey* v. *Commissioner of Correction*, 136 Conn. App. 904, 44 A.3d 224 (2012); and [this court] thereafter denied [his petition for] certification to appeal from the judgment of [the Appellate Court on July 11, 2012]. *Kelsey* v. *Commissioner of Correction*, 305 Conn. 923, 47 A.3d 883 (2012).

"Nearly five years later, on March 22, 2017, the petitioner filed the underlying second petition for a writ of habeas corpus that is the subject of the present [certified] appeal. The petitioner raised seven claims not raised in his earlier petition. On May 9, 2017, the respondent, the Commissioner of Correction, filed a request with the habeas court pursuant to § 52-470 (e) for an order directing the petitioner to appear and show cause why his second petition should be permitted to proceed in light of the fact that the petitioner had filed it well outside the two year time limit for successive petitions set forth in § 52-470 (d) (1). . . . The habeas court, *Oliver*, *J.*, initially declined to rule on the respondent's request for an order to show cause, concluding that the request was premature and that the court lacked discretion to act on the respondent's request because the pleadings in the case were not yet closed. See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 714, 189 A.3d 578 (2018).

"After the habeas court denied the respondent's motion for reconsideration, the Chief Justice granted the respondent's request to file an interlocutory appeal from the

order of the habeas court pursuant to General Statutes § 52-265a. [This court] rejected the habeas court's reliance on § 52-470 (b) (1) as its basis for not acting on the respondent's request for an order to show cause and concluded that 'the habeas court's decision to take no action on the respondent's motion was predicated on its mistaken belief that it lacked discretion to act' and that '[i]t is well established that when a court has discretion, it is improper for the court to fail to exercise it.' Id., 726. [This court] reversed the habeas court's decision and remanded the case to the habeas court for further proceedings consistent with its opinion. Id.

"In accordance with [this court's] remand order, the habeas court, *Newson, J.*, issued an order to show cause and conducted an evidentiary hearing. The only evidence presented at the hearing was the testimony of the petitioner. The respondent chose not to cross-examine the petitioner or to present any other evidence at the show cause hearing. The court also heard legal arguments from both sides.

"Thereafter, on March 20, 2019, the habeas court . . . dismiss[ed] the petitioner's second habeas petition. In its decision, the habeas court first set forth the relevant provisions of § 52-470 and quoted [the Appellate Court's] statement in *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 532, 197 A.3d 1034 (2018), appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020), that good cause is 'defined as a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.' The habeas court determined that the petitioner's proffered excuse failed to establish good cause under the statute, stating: '[T]he petitioner had until July 12, 2014, to file his next habeas petition challenging this conviction, but he did not file it until nearly three years beyond that date. The petitioner's claim for delay was that he was sometimes in and out of prison and did not always have access to law books and the law

libraries at times when he was held in higher security facilities. He also attempts to offer the excuse that he was not aware of § 52-470. Neither of these is sufficient "good cause" to excuse the petitioner's delay of nearly three years beyond the appropriate filing deadline for this matter.' In support of its analysis, the habeas court, citing *State* v. *Surette*, 90 Conn. App. 177, 182, 876 A.2d 582 (2005), noted parenthetically that 'ignorance of the law excuses no one.' On the basis of its determination that the petitioner lacked good cause for the delay in filing the successive petition, the [habeas] court dismissed the petition." (Citation omitted; footnotes omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 24–27.

The petitioner, on the granting of certification, appealed from the judgment of dismissal to the Appellate Court, which determined that (1) a habeas court's determination of whether a petitioner has satisfied the good cause standard is reversible only for an abuse of discretion; id., 36; and (2) the petitioner failed to demonstrate that the habeas court abused its discretion by dismissing the petitioner's untimely successive petition. Id., 43. Accordingly, the Appellate Court affirmed the judgment of the habeas court. Id., 44. This certified appeal followed. See footnote 2 of this opinion.

On appeal to this court, the petitioner claims that the Appellate Court incorrectly concluded that (1) appellate review of whether a habeas court properly dismissed a petition for a writ of habeas corpus under § 52-470 (d) and (e) is for abuse of discretion, and (2) the petitioner had not established the good cause necessary to overcome the rebuttable presumption of unreasonable delay. We address each claim in turn.

I

We first address the petitioner's claim that, in reviewing the habeas court's determination regarding good

cause for abuse of discretion, the Appellate Court improperly disregarded the long-standing jurisprudence articulated in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), and *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 941 A.2d 248 (2008), namely, that conclusions reached by a habeas court in a decision to dismiss a habeas petition are matters of law subject to plenary review. The petitioner argues that, despite the Appellate Court's attempt to differentiate dismissals pursuant to § 52-470 from the preliminary dismissals at issue in *Gilchrist*, plenary review applies irrespective of the basis for the habeas court's dismissal. In response, the respondent argues that *Gilchrist* and *Johnson* are inapposite because the grounds for dismissal in those cases presented pure questions of law and that reviewing a good cause determination only for abuse of the court's discretion is consistent with the legislature's intent in enacting § 52-470 and the broader purposes of the habeas process. We agree with the respondent and conclude that a habeas court's determination of whether a petitioner has satisfied the good cause standard under § 52-470 (d) and (e) is reviewed on appeal for abuse of discretion.

Whether the Appellate Court applied the proper standard of review to the habeas court's dismissal of the petition following its determination that the petitioner failed to establish good cause, as required by § 52-470 (e), presents an issue of statutory construction, which is a question of law over which we exercise plenary review. See, e.g., *People for the Ethical Treatment of Animals, Inc.* v. *Freedom of Information Commission*, 321 Conn. 805, 815–16, 139 A.3d 585 (2016) (determining standard of review applicable to General Statutes § 1-210 (b) (19) presented question of statutory interpretation, over which our review is plenary). This court follows "the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes to ascertain and

give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 696, 258 A.3d 1268 (2021).

As required by § 1-2z, we begin with the text of § 52-470.[3] Section 52-470 (d) provides in relevant part that, "[i]n the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after . . . October 1, 2014 . . . ." Section 52-470 (e) provides in relevant part that, "[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ." See footnote 1 of this opinion (complete relevant text of § 52-470 (d) and (e)).

The statute is silent as to the standard of appellate review applicable to the good cause determination by a habeas court. Silence renders a statute ambiguous when the missing subject reasonably is necessary to effectuate the provision as written, and the missing subject renders the statute susceptible to more than one plausible interpretation. See, e.g., *State* v. *Ramos*, 306 Conn. 125, 136–37, 49 A.3d 197 (2012); see also *Stuart* v. *Stuart*, 297 Conn. 26, 37, 996 A.2d 259 (2010) (silence as to

[3] Although the habeas court, in its memorandum of decision, cited the filing deadline imposed by § 52-470 (d) (1), the respondent correctly observes that the filing deadline applicable in the present case is governed by § 52-470 (d) (2). Specifically, the statute indicates that the applicable deadline is the later of the three enumerated deadlines. Subdivision (1) of § 52-470 (d) imposes a deadline of "[t]wo years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review," which would result in a successive petition filing deadline in July, 2014. In contrast, § 52-470 (d) (2) imposes a filing deadline of October 1, 2014. As the later date is October 1, 2014, § 52-470 (d) (2) applies in the present case. This error is not, however, determinative of the good cause or standard of review issues before us in this certified appeal.

standard of proof rendered statute ambiguous because there was "more than one plausible interpretation of its meaning"). When silence renders a statutory provision ambiguous as to the issue at hand, "our analysis is not limited by . . . § 1-2z . . . . In addition to the words of the statute itself, we look 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." (Citation omitted; internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008).

Beginning with the legislative history, we observe that, in 2012, the legislature amended § 52-470 with the goal of enacting comprehensive habeas reform. *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 566–67, 153 A.3d 1233 (2017). The amendments were "intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals. . . . [Moreover] the reforms were the product of collaboration and compromise by representatives from the various stakeholders in the habeas process, including the Division of Criminal Justice, the Office of the Chief Public Defender, the criminal defense bar, and the Judicial Branch." (Citations omitted.) Id., 567. The legislative history, including the testimony before the Judiciary Committee,[4] demonstrates that § 52-470 was intended to grant habeas courts "a lot of discretion" in weeding out nonmeritorious habeas claims. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 15, 2012 Sess., p. 4785, remarks of Chief State's Attorney Kevin T. Kane.

[4] "[I]t is well established that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by legislation." (Internal quotation marks omitted.) *Boardwalk Realty Associates, LLC* v. *M & S Gateway Associates, LLC*, 340 Conn. 115, 131–32, 263 A.3d 87 (2021).

Further, as the Appellate Court correctly observed, our prior resolution of the interlocutory appeal in the present case also heavily emphasized "the discretion that the legislature granted habeas courts to achieve the goals of habeas corpus reform . . . ." *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 31. In discussing the habeas court's obligation under § 52-470 (e) to give the petitioner a "meaningful opportunity" to investigate the delay in filing a successive petition, we stated that the "lack of specific statutory contours as to the required 'meaningful opportunity' suggests that the legislature intended for the court to exercise its discretion in determining, considering the particular circumstances of the case, what procedures should be provided to the petitioner in order to provide him with a meaningful opportunity, consistent with the requirements of due process, to rebut the statutory presumption." *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 723. Thus, we agree with the Appellate Court's subsequent conclusion that "the absence of a detailed statutory definition of the good cause standard [indicates] that the legislature intended the habeas court to exercise significant discretion in making determinations regarding 'good cause.' " *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 31.

We also agree with the respondent that the authorities the petitioner relies on in support of his claim are inapposite. Although the petitioner correctly observes that *Gilchrist* broadly stated that "[w]hether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary"; *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 553; the present case is distinguishable with regard to the level of discretion exercised by the habeas court in deciding whether good cause exists. As the Appellate Court stated, "a habeas court's determination of whether a petitioner has satisfied the good cause

standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony." *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 35–36. In contrast, *Gilchrist* presented a pure question of law, namely, whether the dismissal of a habeas petition under Practice Book § 23-29[5] can precede the habeas court's determination to issue the writ under Practice Book § 23-24.[6] See *Gilchrist* v. *Commissioner of Correction*, supra, 553. Resolving this question required the court to interpret the language of the rules of practice, a task that is a well established subject of plenary review. See, e.g., *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010). Further, as the respondent argues, the underlying grounds for dismissal enumerated in Practice Book §§ 23-24 and 23-29—e.g., lack of jurisdiction, res judicata, mootness, and ripeness—present pure questions of law. See, e.g., *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 373, 260 A.3d 1187 (2021) (mootness implicates court's subject matter jurisdiction and, thus, is question of law); *Great Plains Lending, LLC* v. *Dept.*

[5] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

[6] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

*of Banking*, 339 Conn. 112, 120, 259 A.3d 1128 (2021) (determination regarding trial court's subject matter jurisdiction is question of law); *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 359, 258 A.3d 71 (2021) (issues regarding justiciability, namely, ripeness, raise question of law); *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010) (applicability of res judicata and collateral estoppel presents question of law); see also footnotes 5 and 6 of this opinion.

Finally, the petitioner argues that good cause determinations made by a habeas court are comparable to a habeas court's determination that a claim has been procedurally defaulted, which is subject to plenary review, and, thus, that good cause determinations should also receive plenary review on appeal. Specifically, the petitioner argues that, similar to establishing good cause under § 52-470, the standard for establishing the cause required to overcome procedural default is equally vague and also requires that the petitioner be heard as to the reason for noncompliance. In response, the respondent contends that the existence of good cause for purposes of excusing late filings under § 52-470 (e) is a broader and more fact dependent concept than is the "cause" considered in the context of procedural default. The respondent argues that what constitutes cause for a procedural default is only a narrow subset of what can constitute good cause under § 52-470 (e). We agree with the respondent.

By way of background, "a petitioner who raises a constitutional claim for the first time in a habeas proceeding must show: (1) cause for the procedural default, i.e., for the failure to raise the claim previously; and (2) prejudice resulting from the alleged constitutional violation. In the absence of such a showing, a court will not reach the merits of the claim." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 331 Conn. 546, 553, 206 A.3d 176 (2019). "A respon-

dent seeking to raise an affirmative defense of procedural default must file a return to the habeas petition responding to the allegations of the petitioner and alleg[ing] any facts in support of any claim of procedural default . . . . Only after the respondent raises the defense of procedural default in accordance with [Practice Book] § 23-30 (b) does the burden shift to the petitioner to allege and prove that the default is excused." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 175–76, 982 A.2d 620 (2009). "[T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule." (Internal quotation marks omitted.) Id., 191. For example, a showing that the factual or legal basis for a claim was not reasonably available to counsel would constitute an objective external factor. See, e.g., *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 20, 272 A.3d 169 (2022).

In contrast to "cause" for procedural default, the Appellate Court correctly observed in the present case that "factors directly related to the good cause determination [under § 52-470 (e)] include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented."

*Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 34–35. This good cause analysis requires habeas courts to balance numerous factors, whereas the cause determination for overcoming a procedural default typically turns only on whether the petitioner has demonstrated that an objective factor external to the defense impeded compliance with the procedural rule.[7] See *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 191.

In discussing § 52-470, we have described "[t]he habeas court's exercise of its discretion to manage [cases as] the best tool to . . . balance the principles of judicial economy and due process." (Citation omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 726. Generally, when a finding requires the balancing of several factors, many of which require factual determinations, as the Appellate Court properly identified in the present case, this court has held that such conclusions are reversed only for an abuse of discretion. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 461, 904 A.2d 137 (2006) ("A trial court exercising its discretion in determining whether to grant a motion for permissive intervention balances 'several factors [including] . . . the timeliness of the intervention, the proposed intervenor's interest in the controversy, the adequacy of representation of such interests by other parties, the delay in the proceedings or other prejudice to the existing parties the intervention may cause, and the necessity for or value of the intervention in resolving

[7] Habeas courts do not entirely lack discretion when assessing the existence of cause in the procedural default context. See, e.g., *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 559 (referencing "the habeas court's equitable discretion with respect to procedurally defaulted claims" (internal quotation marks omitted)). Nevertheless, the factors considered in the cause determination to overcome a procedural default do not require the same degree of discretion necessary to make a good cause determination under § 52-470 (e), as emphasized by the statute's legislative history and this court's prior discussion of the statute.

the controversy [before the court]. . . . [A] ruling on a motion for permissive intervention would be erroneous only in the rare case [in which] such factors weigh so heavily against the ruling that it would amount to an abuse of the trial court's discretion.' "); *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 307, 852 A.2d 703 (2004) ("In determining whether to admit evidence of a conviction, the court shall consider: (1) the extent of the prejudice likely to arise; (2) the significance of the particular crime in indicating untruthfulness; and (3) the remoteness in time of the conviction. . . . 'Moreover, [i]n evaluating the separate ingredients to be weighed in the balancing process, there is no way to quantify them in mathematical terms.' . . . Therefore, '[t]he trial court has wide discretion in this balancing determination and every reasonable presumption should be given in favor of the correctness of the court's ruling . . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done.' " (Citations omitted.)). Accordingly, we conclude that a habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. "Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Citation omitted; internal quotations marks omitted.) *State* v. *Davis*, 298 Conn. 1, 11, 1 A.3d 76 (2010).

## II

Having articulated the proper standard of review, we now turn to the petitioner's claim that the Appellate Court incorrectly concluded that the habeas court properly exercised its discretion in finding that he had failed to establish the good cause necessary to overcome the rebuttable presumption of unreasonable delay, as set

forth in § 52-470 (d) and (e). The petitioner argues that, in addition to his prior habeas counsel's failure to inform him of any statutory filing deadlines, his status as a self-represented party when he filed this petition caused the delay in filing insofar as his conditions of confinement had caused him to be unaware of the deadline set by the 2012 amendments to § 52-470. In response, the respondent argues that the unambiguous meaning of good cause instructs that ignorance of the law excuses no one and that the petitioner's conditions of confinement were insufficient to establish good cause for the delayed filing. We conclude that the habeas court did not abuse its discretion in determining that the petitioner had failed to establish good cause for the untimely filing of the second petition.

To determine whether the trial court abused its discretion in concluding that the petitioner had failed to establish good cause, we first must discuss the meaning of the term "good cause." Neither party challenges the definition of good cause applied by the Appellate Court in this case,[8] which properly stated "that to rebut successfully the presumption of unreasonable delay in § 52-

[8] Indeed, we read the respondent's argument as supportive of the Appellate Court's definition of good cause. The respondent argues that the statutory silence as to the definition of good cause can be resolved according to the well settled principles of ejusdem generis. See, e.g., *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 140, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019) (canon of ejusdem generis "applies when a statute sets forth a general category of persons or things and then enumerates specific examples thereof," and "the general category [is construed to encompass] only things similar in nature to the specific examples that follow"). This is consistent with the Appellate Court's conclusion that, "[b]y indicating that good cause for filing an untimely petition could be met by proffering new legally significant evidence that could not have been discovered with due diligence, the legislature signaled its intent that a good cause determination pursuant to § 52-470 (e) must emanate from a situation that lies outside of the control of the petitioner or of habeas counsel, acting with reasonable diligence." *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 33–34.

470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 34. Thus, we will assess whether the habeas court abused its discretion in determining that the petitioner failed to demonstrate that something outside of his control, or the control of habeas counsel, had caused or contributed to the delay in the filing of his second petition.

As we previously stated, the Appellate Court set forth several factors to aid in determining whether a petitioner has satisfied this definition of good cause, namely, "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition." Id., 34–35. Although neither party argued for an alternative definition of good cause, the petitioner did argue that the legislative history demonstrates that a petitioner's lack of knowledge of the applicable statutory deadline should be an additional factor considered in the good cause inquiry. In response, the respondent argues that consulting the legislative history is inappropriate under § 1-2z due to the lack of ambiguity in the statutory definition of good cause. As the general definition of good cause is undisputed, this inquiry is more accurately framed as determining which factors habeas courts may consider in concluding whether a petitioner has satisfied the definition of good cause. Because § 52-470 is silent on that matter, and because that silence leaves the statute susceptible to numerous plausible interpreta-

tions as to its application, our principles of statutory interpretation instruct that consulting the legislative history on this point is appropriate. See, e.g., *State* v. *Ramos*, supra, 306 Conn. 136–37; *Stuart* v. *Stuart*, supra, 297 Conn. 37; *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 407.

In enumerating the four nonexhaustive factors related to the good cause analysis, the Appellate Court consulted both textual and extratextual sources for guidance. See *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 33–35. It did not, however, consult the legislative history. Accordingly, we turn to the legislative history to assess the petitioner's argument as to additional factors relevant to the good cause determination.

During debate on the 2012 amendments to § 52-470, Representative Arthur J. O'Neill asked, "[w]hat would [a petitioner] have to prove to rebut the presumption of untimeliness?" 55 H.R. Proc., Pt. 5, 2012 Sess., p. 1598. In response, Representative Gerald M. Fox III stated: "[T]he way I would envision a petitioner meeting the rebuttable presumption requirement would be, if for some reason that petitioner had no knowledge that the Second Circuit . . . had determined that one of our laws was unconstitutional, and as a result, the time were to lapse, I think that that may be an example of when a petitioner would be able to rebut the presumption." Id., pp. 1598–99. Later in that discussion, Representative David K. Labriola asked whether one of the main purposes of the bill was to address issues regarding the delay of habeas petitions and petitioners' abuse of the petition to delay the process. Id., p. 1602. Representative Fox responded in the affirmative, stating that "every[one] involved . . . felt that resources could be better spent and better used [toward] those claims where the outcome . . . could potentially be in question." Id. Further, although § 52-470 distinguishes nonmeritorious petitions, which are addressed in subsections

(a) and (b) of the statute, from untimely petitions, which are addressed in subsections (c) through (f) of the statute, the legislative history demonstrates that preserving a petitioner's ability to pursue meritorious claims remained a prevailing goal of the 2012 amendments. See, e.g., Conn. Joint Standing Committee Hearings, supra, p. 4798, remarks of Chief State's Attorney Kane ("I think everybody recognizes that . . . it's a problem that needs to be dealt with and needs to be dealt with fairly without preventing people from . . . being able to raise legitimate claims. And . . . it is a financial concern, but it's an important thing for justice . . . .").

With this context in mind, although we agree with the petitioner that the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause.[9] As with any excuse

[9] Contrary to the respondent's arguments on this point, we also conclude that, in addition to the factors discussed by the Appellate Court, the habeas court may also include in its good cause analysis whether a petition is wholly frivolous on its face. It is consistent with the legislative intent of § 52-470 that the good cause determination can be, in part, guided by the merits of the petition. Based on the extensive legislative discussion in support of relieving the dockets of the habeas courts to allow for consideration of meritorious petitions, and this court's statement, unspecific to a particular subdivision of the statute, that "the new provisions of § 52-470 'are intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals' "; *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 715; we cannot agree with the respondent that subsections (c) through (f) of § 52-470 are entirely separate in purpose and operation from subsections (a) and (b) of the statute. Further, throughout the hearings on the 2012 amendments, the filing deadlines were distinguished from strict statutes of limitations. See, e.g., Conn. Joint Standing Committee Hearings, supra, p. 4852, remarks of Chief Public Defender Susan O. Storey (describing "the presumption of delay instead of a strict statute of limitations"). The respondent's position that the merits can have no bearing on the good cause determination is antithetical to the purpose of the statute to ensure that the habeas courts preserve resources to promote the effective administration of justice.

for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge. In this case, the petitioner's lack of knowledge of the statutory amendments apparently attributable to his conditions of confinement could have certainly been considered in the habeas court's good cause determination.

Accordingly, we now turn to the habeas court's determination in the present case. Based on its memorandum of decision, the habeas court premised its good cause determination on the length of the delay and the evidence in support of the petitioner's argument that his conditions of confinement caused his lack of awareness of the statutory deadline. Although the legislative history demonstrates that a lack of knowledge of changes in the law may well amount to good cause in a particular case, the facts testified to by the petitioner nevertheless do not support his claim in that respect. The petitioner testified that, at the relevant times, he did have access to the assistance of attorneys, albeit not for this particular matter. Prior to December, 2013, the petitioner was incarcerated in facilities that either did not have law libraries or that did not allow him access to them. Significantly, however, the petitioner testified that he had access to legal resources while housed in general population at MacDougall-Walker Correctional Institution (MacDougall) from December, 2013, through October 1, 2014, which is the date when the statutory deadline for a timely filing of a successive habeas petition expired. See footnote 3 of this opinion. He testified that the resource center at MacDougall had "law books, a lot of federal law books. *They have* [*the*] *General Statutes*. They have some books." (Emphasis added.) Finally,

when asked to summarize his explanation for the delay in filing the second petition, the petitioner stated that he was housed in and out of administrative segregation due to a disciplinary problem.

The habeas court's memorandum of decision suggests that, in exercising its discretion, the court considered whether external forces outside the control of the petitioner had any bearing on the delay and how long after the expiration of the filing deadline the petitioner filed the second petition to be controlling in the present case. Considering the testimony in the record, we conclude that the habeas court did not abuse its discretion because the record indicates that, for the periods that the petitioner was out of administrative segregation in the ten months leading up to the filing deadline in this case, the petitioner had access to a resource center that included the General Statutes.[10] Moreover, it also was reasonable for the habeas court to consider in its good cause analysis that the petitioner had filed his second petition not shortly after the filing deadline but more than two years after that deadline lapsed. Even in light of the remaining factors a habeas court can consider in its good cause determination, none outweighs the factors considered by the habeas court to the point that it was unreasonable in determining that the petitioner failed to establish that something outside of his control had caused or contributed to the delay. We conclude,

[10] Although there was no testimony for the habeas court to consider as to how long the petitioner remained in general population after his initial placement in December, 2013, or whether the version of the General Statutes in the McDougall resource center was current, § 52-470 (e) places the burden on the petitioner to produce the evidence necessary to demonstrate good cause for the delay. We note that there is no evidence to indicate that the petitioner spent a significant amount of time in administrative segregation without access to the resource center. There is also no testimony indicating that the revision to which the petitioner had access was out of date, and, thus, it was reasonable for the habeas court to conclude that the petitioner did not demonstrate that his conditions of confinement established good cause sufficient to excuse his filing delay.

therefore, that the habeas court did not abuse its discretion in determining that the petitioner had failed to demonstrate good cause for the delay in filing the second habeas petition, and the court properly dismissed the petition in accordance with that determination pursuant to § 52-470 (d) and (e). Accordingly, the Appellate Court properly affirmed the judgment dismissing the habeas petition.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* KEVIN MYERS
## (SC 20563)

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

*Syllabus*

Pursuant to statute (§ 54-91g), when sentencing a child whose case has been transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court and the child has been convicted of a class A or B felony pursuant to such transfer, the sentencing court is required to consider certain factors, including the defendant's age at the time of the offense and the hallmark features of adolescence.

Pursuant further to statute (§ 54-125a (f) (1)), a person convicted of a crime or crimes committed while such person was under eighteen years of age and serving a sentence for that crime or crimes of fifty years of imprisonment or less shall be eligible for parole after serving 60 percent of the sentence or twelve years, whichever is greater.

The defendant, who, in two separate cases, had been convicted of numerous crimes that he committed when he was fifteen years old, appealed from the trial court's denial in part and dismissal in part of his motions to correct an illegal sentence. In 2009, the defendant was sentenced in the first case to a total effective sentence of eighteen years of imprisonment, followed by twenty-two years of special parole. In 2011, the defendant entered a guilty plea in the second case and received a sentence of fourteen years of imprisonment, followed by six years of special parole, to run concurrently with the sentence that he already was serving in

connection with the 2009 case. In light of the United States Supreme Court's decision in *Miller* v. *Alabama* (567 U.S 460) and its progeny, as well as legislation (P.A. 15-84) enacted in response thereto concerning sentencing procedures for juvenile offenders, the defendant filed one motion to correct an illegal sentence in each criminal case. He claimed that the trial court had failed to consider the hallmark features of adolescence as mitigating factors in sentencing him, in violation of *Miller* and its progeny, and in violation of § 54-91g, and sought a resentencing at which such factors would be considered. The defendant also claimed that he was being denied a meaningful opportunity for parole because, when the Board of Pardons and Paroles calculated his parole eligibility date pursuant to § 54-125a (f) (1), it did so on the basis of his fourteen year sentence, rather than on the basis of either his eighteen year sentence or the total time served under both sentences, which, due to the structure of his concurrent sentences, resulted in his parole eligibility date in 2023 rather than in 2019. The defendant contended that the board's incorrect calculation preventing him from receiving any practical benefit under § 54-125a (f) (1) was contrary to legislative intent, did not reflect the terms of his plea agreement, in violation of his right to due process, and violated his right to equal protection under the law. The trial court dismissed the defendant's claim that he was entitled to resentencing pursuant to *Miller* and its progeny, his claim that he was entitled to resentencing under § 54-91g, his claim that he was denied a meaningful opportunity for parole under § 54-125a (f) (1), and his equal protection claim. The court denied the defendant's claim that his sentences as imposed violated the understanding of his plea agreement, in violation of his right to due process, concluding that there was no agreement with respect to when the defendant would be eligible for parole. On the defendant's appeal from the denial of his motions to correct an illegal sentence, *held* that the form of the trial court's judgment was improper insofar as that court should have denied, rather than dismissed, the defendant's claims that he was entitled to be resentenced on the basis of *Miller* and its progeny, and § 54-91g, and insofar as it should have dismissed, rather than denied, the defendant's claim that his parole eligibility date did not reflect the terms of his plea agreement, in violation of his right to due process: because the defendant's claims that he was entitled, pursuant to *Miller* and its progeny, and § 54-91g, to be resentenced at a hearing at which the sentencing court must consider the mitigating factors of youth plausibly challenged the defendant's sentence, the trial court had subject matter jurisdiction to address them, but the defendant's *Miller* claim failed on the merits because the defendant was not sentenced to life imprisonment or its functional equivalent and because he was eligible for parole, rendering *Miller* inapplicable to him, and his claim under § 54-91g failed in light of this court's prior

conclusion that the legislature did not intend for the section of P.A. 15-84 codifying § 54-91g to apply retroactively; moreover, the defendant's claims that his parole eligibility date violated § 54-125a (f) (1) and his rights to due process and equal protection were jurisdictionally defective insofar as they did not challenge the defendant's sentences or the manner in which the sentencing court imposed his sentences but, instead, arose from an action, namely, the calculation of his parole eligibility date, that he concedes was undertaken by the board; furthermore, it was undisputed that the board was the state actor tasked by the relevant state regulation (§ 54-125a-3 (b)) with determining the defendant's earliest parole eligibility date, and, although the record did not reveal how the board interpreted and applied the relevant statutes in doing so, the defendant's claims regarding his parole eligibility date challenged the board's act of interpreting and applying the relevant statutes, and the proper forum for the defendant to raise those claims, following exhaustion of any administrative remedies, is in a habeas proceeding; additionally, the defendant will be eligible for parole regardless of which of his sentences the board bases its calculation on, just not as soon as he would prefer, and the mere fact that the board's interpretation of the applicable statutes yielded a later parole eligibility date than another interpretation could have yielded does not, in and of itself, implicate the legality of the defendant's sentences for purposes of the trial court's jurisdiction over his motions to correct an illegal sentence.

Argued December 16, 2021—officially released May 24, 2022

*Procedural History*

Substitute information, in the first case, charging the defendant with two counts each of the crimes of sexual assault in the first degree and kidnapping in the first degree, and substitute information, in the second case, charging the defendant with the crimes of sexual assault in the first degree and burglary in the second degree, brought to the Superior Court in the judicial district of Hartford, where the first case was tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty of one count of sexual assault in the first degree and two counts of kidnapping in the first degree; thereafter, the second case was tried to the jury before *Schuman*, *J.*; subsequently, the court declared a mistrial as to the charge of sexual assault in the first degree, and the defendant was presented to the court, *Alexander*, *J.*,

on a plea of guilty to one count of sexual assault in the first degree; judgment of guilty in accordance with the plea; thereafter, the court, *Alexander*, *J.*, dismissed in part and denied in part the defendant's motions to correct an illegal sentence, and the defendant appealed. *Improper form of judgment; affirmed in part; vacated in part; judgment directed in part.*

*Tamar R. Birckhead*, for the appellant (defendant).

*Jonathan M. Sousa*, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Robin D. Krawczyk*, senior assistant state's attorney, and *Jennifer F. Miller*, former assistant state's attorney, for the appellee (state).

*Opinion*

ROBINSON, C. J. The principal issue in this appeal is whether a motion to correct an illegal sentence is a jurisdictionally proper vehicle by which to challenge a parole eligibility date, as calculated by the Board of Pardons and Paroles (board), in light of the sentences, as pronounced by the court. The defendant, Kevin Myers, was convicted in two separate criminal cases for several offenses that he committed in 2007, when he was fifteen years old. He now appeals[1] from the trial court's dismissal in part and denial in part of his two motions to correct an illegal sentence, one filed in each of his two cases. On appeal, the defendant claims that the trial court incorrectly concluded that it lacked jurisdiction over the claims in his motions to correct and that (1) he was entitled to resentencing in both cases because the sentencing court failed to consider his youth as a mitigating factor, in violation of *Miller* v. *Alabama*, 567 U.S. 460, 476–77, 132 S. Ct. 2455, 183 L. Ed. 2d 407

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

(2012), and General Statutes § 54-91g,[2] (2) the structure of his two sentences deprived him of a meaningful opportunity for parole because it resulted in a later parole eligibility date than he otherwise would have been entitled to under General Statutes § 54-125a (f) (1),[3] and (3) his parole eligibility date violated his right to equal protection under the fourteenth amendment to the United States constitution and article first, § 20, of the Connect-

[2] General Statutes § 54-91g provides in relevant part: "(a) If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall:

"(1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and

"(2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

* * *

"(c) Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a. . . ."

[3] General Statutes § 54-125a (f) (1) provides: "Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions."

icut constitution. The defendant further contends that the trial court improperly denied his claim that his parole eligibility date, as calculated by the board, violated the terms of his plea agreement, in violation of his right to due process under the fourteenth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. We affirm in part the judgment of the trial court.[4]

The record reveals the following relevant facts and procedural history. On April 4, 2007, when he was fifteen years old, the defendant sexually assaulted a woman in her East Hartford apartment. Several months later, on July 8, 2007, the defendant, who was still fifteen years old, returned to the same apartment building, abducted two women, and sexually assaulted one of them. See *State* v. *Myers*, 129 Conn. App. 499, 501–503, 21 A.3d 499, cert. denied, 302 Conn. 918, 27 A.3d 370 (2011). On that same night, a police officer arrested the defendant, who matched the description of the suspect, when the officer observed the defendant running across a street in the same neighborhood where the attack had occurred. Id., 503.

The state prosecuted the defendant for the April 4 and July 8, 2007 incidents in two separate cases in the judicial district of Hartford, each with its own docket

[4] Specifically, we conclude that the trial court should have denied, rather than dismissed, the defendant's claims that he is entitled to resentencing pursuant to *Miller* and its progeny, and pursuant to § 54-91g, and that the court should have dismissed, rather than denied, the defendant's claim that his parole eligibility date as calculated by the board violated the terms of his plea agreement. Therefore, the form of the trial court's judgment is improper with respect to those claims. Accordingly, as we will indicate in the rescript of this opinion, we vacate the judgment of the trial court with respect to those claims and remand the case to the trial court with direction to deny the defendant's claims relying on *Miller* and its progeny, and § 54-91g, and to dismiss the defendant's claim that his parole eligibility date violated his plea agreement. We affirm the judgment of the trial court in all other respects.

number. The prosecution for the July 8, 2007 incident (July 8 prosecution) proceeded first. In 2009, under docket number CR-07-0211928-T, following a jury trial, the defendant was convicted of one count of sexual assault in the first degree in violation of General Statutes (Rev. to 2007) § 53a-70 (a) (1) and two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A). Id., 501. On April 29, 2009, the court sentenced the defendant, with respect to the July 8 prosecution, to a total effective sentence of eighteen years of imprisonment, followed by twenty-two years of special parole.[5]

The prosecution for the April 4, 2007 incident (April 4 prosecution) went to trial in October, 2011, under docket number CR-07-0212494-T. In the April 4 prosecution, the state charged the defendant with sexual assault in the first degree in violation of General Statutes (Rev. to 2007) § 53a-70 (a) (1) and burglary in the second degree, in violation of General Statutes (Rev. to 2007) § 53a-102 (a) (2). The jury found the defendant not guilty

[5] The judgment of conviction in the July 8 prosecution reflects the jury's verdict finding the defendant not guilty on the first charged count in the information, namely, sexual assault in the first degree. With respect to the charges on which he was convicted in the July 8 prosecution, the sentencing court sentenced the defendant as follows: on count two, sexual assault in the first degree, eight years of incarceration, followed by twelve years of special parole; on count three, kidnapping in the first degree, ten years of incarceration, followed by fifteen years of special parole, both to run consecutively to count two; and, on count four, kidnapping in the first degree, ten years of incarceration, followed by fifteen years of special parole, both to run concurrent to counts two and three.

In 2015, the defendant filed a motion to correct an illegal sentence with respect to the July 8 prosecution, claiming that the periods of fifteen years of special parole for each of the kidnapping counts exceeded the statutory maximum. The trial court granted the motion and reduced his period of special parole to ten years for each of the kidnapping counts. Because the special parole periods for the kidnapping counts ran concurrently with each other, but consecutive to the special parole period for the sexual assault count, the defendant was ultimately sentenced to a total of twenty-two years of special parole.

of burglary in the second degree but was unable to reach a verdict on the sexual assault count, leading the trial court to declare a mistrial as to that count. Subsequently, on December 8, 2011, the defendant pleaded guilty in the April 4 prosecution under the *Alford*[6] doctrine to onecount of sexual assault in the first degree. Pursuant to the court's offer during plea negotiations, the defendant was sentenced to fourteen years of imprisonment, followed by six years of special parole. The court ordered the sentence in the April 4 prosecution to run concurrently with the eighteen year sentence the defendant already was serving for his conviction from the July 8 prosecution. The court explained to the defendant, however, that, because he already was serving a sentence in connection with the July 8 prosecution, he was not entitled to presentence confinement credit toward his fourteen year sentence in the April 4 prosecution.[7] As a result of the approximately four year gap between his convictions and sentences in the two separate cases, the defendant's eighteen year sentence in the July 8 prosecution, which commenced in July, 2007, will end in July, 2025, whereas his fourteen year sentence in the April 4 prosecution, which commenced in December, 2011, will end several months later, in November, 2025.[8]

Constitutional and statutory changes to juvenile sentencing laws subsequent to the defendant's sentencing in connection with the April 4 prosecution prompted him to file the motions to correct an illegal sentence that are

[6] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[7] The trial court did, however, grant the defendant presentence confinement credit for the fourteen year sentence in the April 4 prosecution for the time period between the entry of his plea on December 8, 2011, and his sentencing on January 6, 2012.

[8] The record does not reveal the number of days of presentence confinement credited toward the defendant's sentence in the July 8 prosecution. During the January 17, 2019 hearing on the motions to correct that are at issue in this appeal, the defendant represented to the trial court that his sentence in the July 8 prosecution commenced on July 23, 2007.

at issue in this appeal. In order to provide background for the defendant's claims, we summarize the relevant constitutional and statutory changes to juvenile sentencing laws that occurred subsequent to the defendant's convictions.

In 2012, in *Miller* v. *Alabama*, supra, 567 U.S. 460, the United States Supreme Court held that the eighth amendment to the United States constitution bars sentencing offenders who were under eighteen years old when they committed their offenses to a sentence of mandatory life imprisonment without the possibility of parole. See id., 470. The Supreme Court held that, prior to sentencing a juvenile offender to life without the possibility of parole, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id., 480. Our subsequent decision in *State* v. *Riley*, 315 Conn. 637, 641, 110 A.3d 1205 (2015), cert. denied, 577 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016), concluded that the eighth amendment requires a sentencing court to consider the *Miller* factors before exercising its discretion to impose a sentence on a juvenile offender that is the "functional equivalent" of life without the possibility of parole.

The United States Supreme Court addressed the retroactive effect of *Miller* in *Montgomery* v. *Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), in which the court concluded that, although *Miller* applies retroactively, that "retroactive effect . . . does not require [s]tates to relitigate sentences, let alone convictions, in every case [in which] a juvenile offender received mandatory life without parole. A [s]tate may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id., 212.

In 2015, our legislature responded to the United States Supreme Court's decision in *Miller* by enacting §§ 1 and

2 of No. 15-84 of the 2015 Public Acts (P.A. 15-84), which are codified at §§ 54-125a (f) and 54-91g, respectively. Public Act 15-84 exceeds the constitutional floor established by *Miller*, making changes that affect a broader range of juvenile offenders than just those facing life sentences or the functional equivalent thereof. Section 1 of P.A. 15-84, codified at § 54-125a (f), established new, more favorable parole eligibility rules for juvenile offenders who are "incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015 . . . ." See footnote 3 of this opinion. Section 2 of P.A. 15-84, codified at § 54-91g, requires a sentencing court, when a child has been convicted following transfer to the regular criminal docket, to consider the *Miller* factors when sentencing the child for a class A or B felony. See footnote 2 of this opinion.

Relying on these constitutional and statutory changes to juvenile sentencing laws, the defendant claimed in his motions to correct that, in both of his criminal cases, the sentencing court had failed to consider the hallmark features of adolescence as mitigating factors, in violation of *Miller* and its progeny, and § 54-91g. He sought a resentencing at which the court would consider the *Miller* factors.

The defendant also claimed that his parole eligibility date in the July 8 prosecution had been altered by the imposition of the fourteen year sentence in the April 4 prosecution, thus depriving him of a meaningful opportunity for parole, as intended by the legislature in § 54-125a (f) (1). The defendant relied on § 54-125a (f) (1) (A), which, because he was serving a sentence of more than ten years but less than fifty years, entitled him to "be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater . . . ." He claimed that, rather than calculating his new parole eligi-

bility date pursuant to § 54-125a (f) (1) on the basis of either his eighteen year sentence in the July 8 prosecution, or on the basis of the total time served under both cases, the board had improperly relied solely on his fourteen year sentence in the April 4 prosecution, thus resulting in a later parole eligibility date than he was entitled to pursuant to § 54-125a (f) (1).

Specifically, the defendant contended that the board improperly calculated his parole eligibility date to be December 2, 2023.[9] He claimed that, if the board had calculated his parole eligibility date on the basis of his total time served for the two convictions, he would be eligible for parole more than four years earlier, in July, 2019. The defendant contended that the board's incorrect calculation of his parole eligibility date prevented him from receiving any practical benefit under § 54-125a (f) (1), contrary to the legislative intent underlying the statute, did not reflect the terms of his plea agreement, in violation of his right to due process, and violated his right to equal protection under the law. He claimed that he was entitled to be resentenced in a manner that would allow him to be eligible for an earlier parole date. In the alternative, the defendant requested that the trial court either adjust his sentence in the April 4 prosecution, lengthening the term to eighteen years but changing the commencement of the sentence to coincide roughly with that of the sentence in the July 8 prosecution, or order the board to base its calculation of his parole eligibility

[9] The state did not challenge the defendant's representation regarding the board's alleged calculation of his parole eligibility date. It is also undisputed that, as of the date of oral argument before this court, the defendant had not yet received a parole hearing.

The particular parole eligibility date provided to the defendant by the board has no bearing on the resolution of the jurisdictional questions presented in this appeal. As we explain in this opinion, the dispositive factor, for purposes of the trial court's jurisdiction over the defendant's motions to correct, is that the board, rather than the sentencing court, calculates the parole eligibility dates of inmates.

date on his eighteen year sentence in the July 8 prosecution.

The trial court dismissed the defendant's claim that he was entitled to resentencing pursuant to both *Miller* and its progeny, and § 54-91g. As to the defendant's *Miller* claim, the trial court concluded that *Miller* and its progeny were inapplicable because the defendant had not been sentenced to life without parole or its functional equivalent. With respect to the defendant's statutory claim, the court relied on this court's decision in *State* v. *Delgado*, 323 Conn. 801, 814, 151 A.3d 345 (2016), which held that the legislature did not intend § 54-91g to apply retroactively. The court also dismissed the defendant's claim that he was denied a meaningful opportunity for parole, noting that he was "eligible for parole, just not when he would prefer . . . to be." The court then denied the defendant's claim that his sentences as imposed violated the understanding of the plea agreement, finding that there "was no agreement or understanding with respect to when the defendant would be eligible for parole." The court dismissed his equal protection claim on the basis that it was not within the scope of a motion to correct an illegal sentence. Finally, the court dismissed the defendant's claim that the sentence frustrated the purpose of the plea bargain. The court explained that the doctrine of frustration of purpose is a civil one and declined to extend it to this context.[10] This appeal followed.

Before we address the defendant's specific claims in this appeal, we consider the legal principles governing a trial court's jurisdiction over a motion to correct an illegal

[10] On appeal, although the defendant argues that the doctrine of frustration of purpose lends support to his arguments in support of his claim that his parole eligibility date violated the terms of his plea agreement, he does not challenge the court's dismissal of his claim that his sentence frustrated the purpose of the plea bargain on the basis that Connecticut courts have not extended that doctrine to the criminal context. Accordingly, we need not consider that issue further.

sentence. "A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner. . . . Practice Book § 43-22[11] codifies this common-law rule. . . . Therefore, we must decide whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 . . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction . . . ." (Citations omitted; footnote in original; internal quotation marks omitted.) *State* v. *McCleese*, 333 Conn. 378, 386, 215 A.3d 1154 (2019). We have emphasized, however, that "[t]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." *State* v. *Evans*, 329 Conn. 770, 784, 189 A.3d 1184 (2018), cert. denied, U.S , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019); see *State* v. *Ward*, 341 Conn. 142, 152–58, 266 A.3d 807 (2021) (surveying case law discussing concept of colorable claim in context of motion to correct illegal sentence). In examining whether a claim is colorable, therefore, "the jurisdictional inquiry is guided by the plausibility that the defendant's claim is a challenge to his sentence, rather than its ultimate legal correctness." (Internal quotation marks omitted.) *State* v. *Evans*, supra, 784.

"[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence

[11] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Internal quotation marks omitted.) Id., 779. We have emphasized that, in order to invoke the jurisdiction of the trial court, a challenge to the legality of a sentence must challenge the sentencing proceeding itself. Id.

We first address the defendant's claim that the trial court improperly dismissed his claims, pursuant to *Miller* and its progeny, and § 54-91g, that he was entitled to resentencing because, in both cases, the sentencing court failed to consider the mitigating factors of youth. Because both of these claims plausibly challenge the defendant's sentence, we conclude that the trial court had subject matter jurisdiction to address them. See id., 784. As we will explain, however, the defendant's claims have no merit. Accordingly, we conclude that the trial court should have denied rather than dismissed these claims.

Relying on *Miller*, the defendant contends that, because he was denied a meaningful opportunity for parole pursuant to § 54-125a (f) (1), he was not provided a remedy for the alleged *Miller* violations that occurred during his sentencing proceedings in both cases. Therefore, he argues that he is entitled to be resentenced, at which sentencing proceeding the court must consider the mitigating factors of youth. We disagree. As the state aptly responds, *Miller* simply does not apply to the defendant because he was not sentenced to life imprisonment or its functional equivalent and because he was eligible for parole. See *Miller* v. *Alabama*, supra, 567 U.S. 480; see also *State* v. *Delgado*, supra, 323 Conn. 811 ("*Miller*

simply does not apply when a juvenile's sentence provides an opportunity for parole; that is, a sentencing court has no constitutionally founded obligation to consider any specific youth related factors under such circumstances").

Relying on § 54-91g, the defendant claims that the trial court incorrectly concluded that the statute does not apply retroactively under the facts of the present case. He argues that this court's conclusion in *Delgado*—that § 54-91g does not apply retroactively—applies only to subdivisions (1) and (2) of § 54-91g (a), and that no court has yet concluded that subsection (c) of § 54-91g, on which the defendant relies on appeal, applies only prospectively. Section 54-91g (c) provides: "Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a." The defendant claims that, because § 54-91g (c) references "parole," and because he was denied parole eligibility pursuant to § 54-125a (f) (1), he has a right, pursuant to § 54-91g (c), to be resentenced on the basis that the sentencing courts in both cases failed to comply with § 54-91g (a) (1) and (2). The state responds that *neither* § 54-91g, in its entirety, nor § 54-125a (f) (1) applies retroactively.

As the defendant concedes in his brief, we resolved this question in *State* v. *Delgado*, supra, 323 Conn. 814–15, in which we concluded that the legislature did not intend P.A. 15-84, § 2, as codified at § 54-91g, to apply retroactively. Our analysis in that case applied to P.A. 15-84, § 2, in its entirety, which necessarily included the language later codified at § 54-91g (c). See id., 814 (observing that, contrary to other sections of P.A. 15-84, "P.A. 15-84, § 2, provides it is '[e]ffective October

1, 2015,' indicating that the legislature did not intend for this section to apply retroactively").

The defendant's remaining claims in this appeal, all of which at their core challenge the board's determination of his parole eligibility date, share a jurisdictional defect. Rather than challenging the sentences or the manner in which the sentencing court imposed his sentences, the defendant's claims arise from an action that he concedes was undertaken by the board. That is, the defendant contends that his parole eligibility date, as determined by the board, deprived him of a meaningful opportunity for parole, in violation of § 54-125a (f) (1). Therefore, he claims that the trial court incorrectly concluded that his parole eligibility date violated the terms of his plea agreement, in violation of his right to due process under the fourteenth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution,[12] and violated his right to equal protection under the fourteenth amendment to

[12] In support of his claim that his parole eligibility date violated his plea agreement, the defendant argues that the order of the sentencing court in the April 4 prosecution that the two sentences were to run concurrently reflects an intent by the parties that the sentence in the July 8 prosecution would be the controlling sentence for parole eligibility purposes. He further claims that the trial court violated his right to due process by concluding that it lacked jurisdiction to determine whether his sentence in the April 4 prosecution, by negatively impacting his parole eligibility, prevented the state from keeping its plea promises. He also argues that any ambiguity to this effect in the plea agreement should be construed to his benefit. In response, the state observes that the sentencing court in the April 4 prosecution made it clear that, although the two sentences would run concurrently, the defendant would receive no presentence confinement credit toward the fourteen year sentence in the April 4 prosecution for the approximately four years he already had served in connection with his sentence in the July 8 prosecution. The state argues that, because the sentence for the April 4 prosecution did not begin until four years after the sentence in the July 8 prosecution commenced, the sentence in the April 4 prosecution was the governing sentence for purposes of parole eligibility. The state further points out that the defendant was not sentenced pursuant to a plea agreement with the state but, rather, pursuant to a court offer over the state's objection. The state, therefore, was not a party to any plea agreement.

the United States constitution and article first, § 20, of the Connecticut constitution.[13]

The key fact that deprived the trial court of jurisdiction over all of the defendant's claims asserting that he was entitled to an earlier parole eligibility date is that the board, not a sentencing court, calculates a defendant's parole eligibility date. In calculating the defendant's parole eligibility date, the board acted in accordance with § 54-125a-3 (b) of the Regulations of Connecticut State Agencies, which provides in relevant part: "The Board . . . shall make a determination of an inmate's earliest parole eligibility date. The Board, in making such determination, shall obtain, on a weekly basis, a list of all inmates sentenced within the previous week. A criminal history of the inmate, will be obtained which may include, but shall not be limited to, a State Police criminal records check, out of state criminal records check, police reports, previous parole and probation reports, and any other information that the Board deems relevant. Criminal justice data systems will be queried for information regarding the length of sentence for each specific charge. The Chairman of the Board . . . shall convene a panel of two or more parole board members to review the information compiled. The panel will determine whether the inmate must serve 50 [percent] or 85 [percent] of his or her sentence before becoming eligible for Parole.

[13] In support of his claim that his parole eligibility date violates his right to equal protection, the defendant contends that, unlike other juvenile offenders who are similarly situated, he was not afforded parole eligibility consistent with state law or an opportunity for parole consistent with the parties' plea agreement. As examples of juvenile offenders similarly situated to him, the defendant points to juvenile offenders sentenced to concurrent sentences in a single case, as opposed to multiple cases. Those juvenile offenders, he argues, would be entitled to parole eligibility upon serving 60 percent of their total effective sentence or after twelve years, whichever is greater. The state responds that the trial court properly rejected the defendant's equal protection claim because it targets an action of the board in calculating the defendant's parole eligibility date, not an action of the sentencing court.

The inmate and the Department of Correction will then be notified of the Board's determination."

The mere fact that the defendant has cast his claims as challenging his sentence structure does not alter our conclusion that, in these motions to correct, the defendant is in actuality challenging an action of the board. Accordingly, because the claims do not plausibly challenge his sentence, the trial court lacked jurisdiction over them. See *State* v. *Evans*, supra, 329 Conn. 784. Specifically, the defendant's claims challenging his parole eligibility date call into question *the board's* interpretation and application of the relevant statutes. Because the defendant's sentences were imposed in two separate cases and ordered to run concurrently, the defendant's parole eligibility date is governed by General Statutes §§ 53a-38 (b) (1) and 54-125a (f) (1) (A), which, together, provide the values for the parole eligibility calculation.[14]

The record in the present case does not reveal how the board interpreted and applied §§ 53a-38 (b) (1) and 54-125a (f) (1) (A) to calculate the defendant's parole eligibility date.[15] Nor does the record reveal when or

[14] As was discussed at oral argument before this court, we note that, under the facts of the present case, § 53a-38 (b) establishes the length of the defendant's sentence for purposes of calculating his parole eligibility date, providing in relevant part: "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced. Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run . . . ." The resulting sentence is then multiplied by 60 percent pursuant to § 54-125a (f) (1) (A). See footnote 3 of this opinion. If the resulting value is greater than twelve years, that value is used to calculate the parole eligibility date. Otherwise, the defendant will be eligible for parole twelve years after his sentence commenced. If, however, the defendant would be eligible for parole at an earlier date under subsections (a) through (e) of § 54-125a, he is entitled to that earlier parole eligibility date. See General Statutes § 54-125a (f) (1); see also footnote 3 of this opinion.

[15] We take no position on whether the board properly interpreted and applied the relevant statutory provisions to the defendant. See footnote 14 of this opinion. The trial court's lack of subject matter jurisdiction over

whether the board informed the defendant of his parole eligibility date. See footnote 9 of this opinion. It is undisputed, however, that the board is the state actor that would interpret those statutes and apply them to the defendant. See Regs., Conn. State Agencies § 54-125a-3 (b). Notwithstanding the defendant's attempts to cast his claims as challenging the legality of his sentences or his sentence structure, his dispute is with the board's interpretation of the applicable statutes—whatever that interpretation may be. The defendant consistently has advocated for either of two particular interpretations of the applicable statutes. He has argued that they should be read to require *the board* to calculate his parole eligibility date either on the basis of his total time served under both sentences, or on the basis of his eighteen year sentence, which he claims is the sentence that "has the longest term to run" for purposes of § 53a-38 (b) (1). The proper forum for the defendant to raise these claims, following exhaustion of any administrative remedies, is in a habeas proceeding.

At oral argument before this court, the defendant's counsel relied on our recent decision in *State* v. *Coltherst*, 341 Conn. 97, 266 A.3d 838 (2021), in support of the defendant's argument that jurisdiction lies over his claims challenging his parole eligibility date. Given the stark contrast between the facts of *Coltherst* and those of the present case, a comparison of the two cases provides further illustration of the nature of the jurisdictional defect suffered by all of the defendant's challenges to his parole eligibility date. Specifically, the defendant argues that we should conclude that, when a juvenile is sentenced in multiple criminal cases to sentences that are ordered to run concurrently, § 54-125a (f) (1) requires the board to use the "total effective

the defendant's motions to correct similarly deprives us of subject matter jurisdiction over these claims on appeal. See, e.g., *Lewis* v. *Rosen*, 149 Conn. 734, 735, 181 A.2d 592 (1962).

sentence"—the total time served under the multiple dockets—as the basis for calculating the juvenile's parole eligibility.

Our decision in *Coltherst* provides an example of when such a claim implicates the legality of the sentences, rather than solely challenging an action of the board. In *Coltherst*, the defendant, who was convicted in two separate criminal cases for crimes he committed when he was under eighteen years of age, filed a motion to correct an illegal sentence in the trial court. See *State* v. *Coltherst*, supra, 341 Conn. 100, 105, 108–109. The defendant in *Coltherst* was resentenced in one case to a total effective sentence of eighty years of imprisonment. Id., 106. The trial court ordered that sentence to run consecutively to the sentence in the other case, a total effective sentence of eighty-five years of imprisonment. Id., 106–107. Following oral argument before this court, we ordered the parties to submit supplemental briefs addressing, inter alia, whether "the defendant [is] eligible for parole when he received two distinct total effective sentences of [eighty-five] years and [eighty] years, respectively, to run consecutively, and, if so, when . . . he [is] eligible for parole [in connection with] each case . . . ." (Internal quotation marks omitted.) Id., 101.

The difference between the present case and *Coltherst* is significant for purposes of jurisdiction over a motion to correct an illegal sentence. In *Coltherst*, we determined that the record was unclear regarding whether the board would ultimately calculate the defendant's parole eligibility on the basis of each of the definite sentences independently. See id., 110–12. If the board did so, we explained, "the defendant's only opportunity for parole would be 30 years after he began serving the 80 year sentence in [one case], 115 years after he began serving the [85 year] sentence [in the other case]. He would die long before becoming eligible for parole, rendering the intended remedy of parole eligibility

meaningless—*his sentence would effectively be one without the opportunity for parole*. That interpretation would flout every recent juvenile sentencing decision of both this court and the United States Supreme Court and, therefore, would also be inconsistent with the intent of the legislature in § 54-125a (f) (1)." (Emphasis added.) Id., 111. Accordingly, if the applicable statutes, §§ 53a-38 (b) (2) and 54-125a (f) (1), required the board to calculate the defendant's parole eligibility date on the basis of each definite sentence independently, he would have been denied the opportunity for parole. That conclusion would call into question the legality of the defendant's consecutive sentences as pronounced by the trial court. Consistent with *State* v. *Evans*, supra, 329 Conn. 784, therefore, because the issue plausibly could be understood to challenge the sentence itself, the court had subject matter jurisdiction over that question in the motion to correct an illegal sentence.

By contrast, in the present case, as the trial court observed, the defendant will be eligible for parole under either interpretation of the sentences that he received, just not as soon as he would prefer. The defendant has never claimed that his sentences in the two cases constitutes the functional equivalent of a sentence of life without the possibility of parole. If the board, as the defendant suggested before the trial court, has interpreted §§ 53a-38 (b) (1) and 54-125a (f) (1) (A) to yield a parole eligibility date of December 2, 2023, the defendant will have served approximately sixteen years of imprisonment when he becomes eligible for parole. The mere fact that the board's interpretation of the applicable statutes has yielded a later parole eligibility date than another interpretation could have yielded does not, by itself, implicate the legality of the defendant's sentences for purposes of the court's jurisdiction over the motions to correct an illegal sentence.

The form of the judgment is improper insofar as the trial court denied the defendant's claim that his new parole eligibility date violated the terms of his plea agreement, in violation of his right to due process, and insofar as that court dismissed the defendant's claim that he was entitled to resentencing on the basis of *Miller*, its progeny, and § 54-91g, that portion of the judgment relating to the trial court's disposition of those claims is vacated, and the case is remanded with direction to render judgment dismissing the defendant's due process claim regarding his new parole eligibility date and denying the defendant's claim that he was entitled to resentencing; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

# ORDERS

# CONNECTICUT REPORTS

# VOL. 343

STATE OF CONNECTICUT *v.* GEORGE SILER

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 171 (AC 43351), is denied.

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

*C. Robert Satti, Jr.*, supervisory assistant state's attorney, in opposition.

Decided June 1, 2021

STATE OF CONNECTICUT *v.* MARK CUSSON

The defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 130 (AC 43352), is denied.

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

*Norman A. Pattis* and *Kevin M. Smith*, in support of the petition.

*James A. Killen*, senior assistant state's attorney, in opposition.

Decided May 10, 2022

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MIRIAM MERCADO *v.* HUMBERTO CASTRO-CRUZ

The defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 907 (AC 43752), is denied.

*Humberto Castro-Cruz*, self-represented, in support of the petition.

Decided May 10, 2022

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MTGLQ INVESTORS, L.P. *v.* GEORGE S. LAKNER

The defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 901 (AC 44017), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the trial court's decision to grant a motion for a protective order in favor of the plaintiff, thereby resulting in the denial of document discovery sought by the defendant related to the plaintiff's mortgage file that was the subject of this foreclosure action?"

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

*Thomas P. Willcutts*, in support of the petition.

*Jeffrey M. Knickerbocker*, in opposition.

Decided May 10, 2022

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NOUBOUKPO GASSESSE *v.* UNIVERSITY OF CONNECTICUT

The plaintiff's petition for certification to appeal from the Appellate Court, 210 Conn. App. 908 (AC 44633), is denied.

*Nouboukpo Gassesse*, self-represented, in support of the petition.

*Darren P. Cunningham*, assistant attorney general, in opposition.

Decided May 10, 2022

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TAJAY H. *v.* COMMISSIONER OF CORRECTION

The petitioner Tajay H.'s petition for certification to appeal from the Appellate Court, 211 Conn. App. 102 (AC 44198), is denied.

*Mary Boehlert*, assigned counsel, in support of the petition.

*Timothy J. Sugrue*, assistant state's attorney, in opposition.

Decided May 10, 2022

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SCOTT L. FENSTERMAKER *v.* STEPHEN FENSTERMAKER ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 211 Conn. App. 901 (AC 44577), is denied.

*Scott L. Fenstermaker*, self-represented, in support of the petition.

*Lawrence F. Reilly*, in opposition.

Decided May 10, 2022

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J. K. *v.* M. G.

The defendant's petition for certification to appeal from the Appellate Court (AC 45101) is dismissed.

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

*Anthony L. Cenatiempo*, in support of the petition.

*Alexander Copp* and *Rachel A. Pencu*, in opposition.

Decided May 10, 2022

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V. V. *v.* E. V.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 45190) is denied.

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

*V. V.*, self-represented, in support of the petition.

Decided May 10, 2022

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*antidiscrimination statute (§ 46a-58 (a)), and violation of Title VII of Civil Rights Act of 1964, as amended by Title VII of Civil Rights Act of 1991 (42 U.S.C. § 2000e et seq.), as predicate for claim under § 46a-58 (a); whether trial court properly sustained in part and reversed in part Judicial Branch's administrative appeal from decision of defendant Commission on Human Rights and Opportunities awarding named defendant back pay, interest, and emotional distress damages in connection with named defendant's claim that branch discriminated against her on basis of gender; whether trial court incorrectly concluded that commission was authorized to award emotional distress damages and attorney's fees in employment discrimination action under general antidiscrimination statute (§ 46a-58 (a)) and that statute's civil remedies provision (§ 46a-86 (c)); whether commission exceeded its authority under federal law by adjudicating Title VII claim; claim that state law precludes commission from awarding damages for Title VII violations under §§ 46a-58 (a) and 46a-86 (c); whether trial court incorrectly concluded that state waived its sovereign immunity with respect to recovery of prejudgment and postjudgment interest on awards under § 46a-86; whether trial court incorrectly concluded that commission should have precluded named defendant from recovering emotional distress damages as sanction for purported violations of human rights referee's discovery orders; whether trial court improperly admitted certain testimony that went beyond mere garden-variety emotional distress; whether trial court improperly vacated injunction requiring plaintiff to give named defendant option of returning to original work location, after she was transferred to other locations in retaliation for lodging harassment complaint.*

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*trial court improperly applied ordinary listener standard in considering context of real estate salesperson's statements in determining if they conveyed any preference, limitation, or discrimination based on lawful source of income; whether real estate broker was vicariously liable for statements of real estate salesperson pursuant to statute (§ 20-312a); whether owners of property were vicariously liable for statements of real estate salesperson.*

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*incorrectly determined defendant's parole eligibility date by basing its calculations on his shorter sentence, which resulted in later eligibility date; claim that board's incorrect parole eligibility calculation violated defendant's rights to due process and equal protection; whether trial court properly denied claim that board's calculation of parole eligibility date violated defendant's right to due process; improper form of judgment.*

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# CONNECTICUT APPELLATE REPORTS

# Vol. 212

**CASES ARGUED AND DETERMINED**

IN THE

## APPELLATE COURT

OF THE

## STATE OF CONNECTICUT

# IN RE RABIA K.*
## (AC 45012)

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

*Syllabus*

The respondent mother, whose minor child, R, was adjudicated neglected and committed to the custody and care of the petitioner, the Commissioner of Children and Families, appealed to this court from the trial court's judgment, claiming that the court improperly found that R had been neglected, and that the Department of Children and Families had made reasonable efforts to prevent R's removal. After the mother had filed the present appeal, counsel for R filed a motion to revoke commitment in the trial court on the basis that R had returned home to the mother, who had moved to Massachusetts, and no longer wanted to be in the petitioner's custody. The trial court thereafter granted the motion to revoke commitment and closed the case, returning R to the care and custody of the mother. Subsequently, the petitioner moved to dismiss this appeal as moot, claiming that this court could not afford the mother any practical relief in light of the trial court's order revoking commitment of R. In her opposition, the mother acknowledged that the second issue on appeal, R's commitment to the petitioner, had been rendered moot but claimed that the first issue, the adjudication of neglect, was not moot because the mother could experience collateral consequences in

* 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.

Massachusetts as a result thereof, as the adjudication of neglect could be used against her in a future child protection proceeding in Massachusetts to establish a pattern of repeated parental neglect. The petitioner responded that there was no reasonable possibility that prejudicial consequences would occur for the mother as a result thereof because R no longer lived in Connecticut, would soon reach the age of majority, and the juvenile court would lose jurisdiction over her at that time. *Held* that the respondent mother's appeal was dismissed as moot, there being no practical relief that this court could afford the mother on the issue of adjudication of neglect given that the underlying case had been closed and R had been returned to the care and custody of her mother; moreover, vacatur of the trial court's judgment was appropriate in order to avoid the possibility, however remote, of collateral consequences to the mother in Massachusetts, the adjudication of neglect was adverse to the mother, the mother did not cause the appeal to be moot through any voluntary action, and she was prevented from challenging the court's adjudication of neglect as a result of the trial court's granting the motion to revoke commitment.

Considered April 18—officially released May 16, 2022**

*Procedural History*

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Windham, Child Protection Session at Willimantic, and tried to the court, *Carbonneau, J.*; judgment adjudicating the minor child neglected and committing the minor child to the custody of the petitioner, from which the respondent mother appealed to this court. *Appeal dismissed*; *judgment vacated.*

*Matthew C. Eagan*, filed a brief for the appellant (respondent mother).

*Jillian N. Hira*, assistant attorney general, *William Tong*, attorney general, and *Evan M. O'Roark*, assistant attorney general, filed a brief for the appellee (petitioner).

** May 16, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Opinion*

PER CURIAM. In this neglect proceeding, the respondent mother, Michelle K., appeals from the judgment of the trial court adjudicating Rabia K., the respondent's minor daughter, neglected and committing her to the care and custody of the petitioner, the Commissioner of Children and Families.[1] On appeal, the respondent claims that the court improperly found that (1) Rabia had been neglected and (2) the Department of Children and Families (department) made reasonable efforts to prevent Rabia's removal.

After this appeal was ready for argument, Rabia's attorney filed in the trial court a motion to revoke commitment, representing that Rabia had returned home to the respondent in Massachusetts and no longer wanted to be in the custody of the petitioner. After a hearing, the court granted the motion to revoke commitment and closed the case. The petitioner did not oppose the motion and, thereafter, moved to dismiss this appeal as moot, arguing that this court is unable to grant the respondent any practical relief in light of the trial court's order revoking commitment of Rabia. The respondent opposed the motion to dismiss, and this court, sua sponte, ordered the parties to file supplemental memoranda giving reasons, if any, why we should not dismiss this appeal as moot and exercise the remedy of vacatur as to the trial court's judgment adjudicating Rabia neglected so as to avoid any possible collateral consequences as a result of the appeal being rendered moot. After considering the motion to dismiss and opposition thereto, as well as the parties' supplemental memoranda, we conclude that the respondent's claims are moot and that vacatur is appropriate.

[1] The respondent father, Ali K., also was named in the neglect petition and appeared in the trial court, but he did not file an appeal. We therefore refer in this opinion to the respondent mother as the respondent.

The record discloses the following relevant facts, as found by the court, and procedural history. Rabia's family moved from Massachusetts to Connecticut in 2016. On July 1, 2020, Rabia, who was fifteen years old, walked into the Willimantic Police Department and reported that her family had abused her for years. She informed the police officers that she did not recall attending public school and that she had not seen a doctor since she was eleven years old. After being alerted by the Willimantic Police Department, the petitioner filed a neglect petition on July 30, 2020, alleging that Rabia was being denied proper care and allowed to live under conditions injurious to her well-being. In May, 2021, the respondent was evicted from her residence in Willimantic and moved to Massachusetts, where she previously had resided.

On May 13, 2021, the court, *Chaplin*, *J.*, granted the petitioner's motion for an order of temporary custody and issued an ex parte order vesting temporary custody of Rabia in the petitioner. The court, *Carbonneau*, *J.*, held a consolidated hearing on the motion for an order of temporary custody and the neglect petition over the course of several days, beginning on August 9, 2021. On August 30, 2021, the last day of the hearing, the court issued its oral decision, adjudicating Rabia neglected and committing her to the care and custody of the petitioner. The court stated: "When a fifteen year old walks alone into a police station and makes allegations of physical abuse, educational . . . medical, and emotional neglect, there is a serious problem. Again, I'm not accusing the parents of anything at this point; that's beside the point. Either the girl is suffering terrible abuse at the hands of her family, or she is making false or exaggerated accusations that implicate her mental health. Either way, these are conditions and circumstances injurious to her health, both physical and mental." The court also vacated the order of temporary

custody. This appeal followed, challenging both the finding of neglect and the commitment of Rabia to the petitioner.

On March 2, 2022, the court, *Chaplin*, *J.*, granted Rabia's motion to revoke commitment and closed the case, returning Rabia to the care and custody of the respondent. The petitioner subsequently moved to dismiss this appeal as moot. In her opposition to the motion to dismiss, the respondent acknowledged that the second issue on appeal, Rabia's commitment to the petitioner, had been rendered moot but claimed that the first issue, the finding of neglect, is not moot because she will face collateral consequences in Massachusetts as a result of the court's adjudicating Rabia neglected.[2]

"Mootness is an exception to the general rule that jurisdiction, once acquired, is not lost by the occurrence of subsequent events." *In re Alba P.-V.*, 135 Conn. App. 744, 747, 42 A.3d 393, cert. denied, 305 Conn. 917, 46 A.3d 170 (2012). "Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule

[2] It is well established that "[a]n adjudication of neglect relates to the status of the child and is not necessarily premised on parental fault. A finding that the child is neglected is different from finding who is responsible for the child's condition of neglect. . . . [T]he adjudication of neglect is not a judgment that runs against a person or persons so named in the petition; [*i*]*t is not directed against them as parents*, but rather is a finding that the children are neglected . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Zamora S.*, 123 Conn. App. 103, 108–109, 998 A.2d 1279 (2010). At the same time, however, this court has explained that, "[a]lthough a court is not required to determine who was responsible for the neglect in adjudicating neglect of a child; see General Statutes § 46b-129; that is not to say that a court's subordinate factual findings cannot clearly identify who is responsible." *Matthew C.* v. *Commissioner of Children & Families*, 188 Conn. App. 687, 711, 205 A.3d 688 (2019).

In the present case, the respondent argues that the court found that she was at fault when it stated that she was "either unwilling or unable to provide the level of care that [Rabia] clearly needed . . . ." We agree that the court found the respondent responsible for the neglect of Rabia.

that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . .

"[D]espite developments during the pendency of an appeal that would otherwise render a claim moot, the court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . [T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture . . . but need not demonstrate that these consequences are more probable than not. . . . Whe[n] there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Citations omitted; internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 298–99, 898 A.2d 768 (2006).

Because the underlying case has been closed and Rabia has been returned to the care and custody of the respondent, an actual controversy no longer exists. See *In re Kiara R.*, 129 Conn. App. 604, 610, 21 A.3d 883 (2011) (appeal rendered moot after minor child returned

to respondent mother's care and custody). The respondent, however, contends that the appeal is not moot because there is a reasonable possibility that an adjudication of neglect could be used against her in a future child protection proceeding in Massachusetts. Specifically, she argues that the adjudication of neglect may be used against her in Massachusetts to establish a pattern of repeated parental neglect. Therefore, according to the respondent, "if the neglect adjudication were reversed, the respondent . . . would be able to argue that the state would be precluded from raising such an adjudication—and the facts used to support it—in any subsequent child protection case." The petitioner, noting that Rabia will turn eighteen years old in October of this year, responds that "there is no reasonable possibility that prejudicial collateral consequences will occur for [the respondent] as a result of the neglect adjudication . . . given that Rabia no longer lives in Connecticut and will soon reach the age of majority." The petitioner further notes that the juvenile court will lose jurisdiction over her at that time.

We are not persuaded that the respondent has established that there is a reasonable possibility that the underlying adjudication of neglect will result in prejudicial collateral consequences to her. Specifically, the respondent fails to address why there is a reasonable possibility that a future child protection proceeding would be initiated in Massachusetts in light of Rabia's age. Although an appellant is not required to establish that these consequences are more probable than not, there must be "more than mere conjecture . . . ." (Internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, supra, 278 Conn. 299. Nevertheless, under the unique circumstances of the present case, we conclude that vacatur is appropriate in order to avoid the possibility—however remote—of collateral consequences for the respondent in Massachusetts.

"Vacatur is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. . . . In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." (Internal quotation marks omitted.) *In re Yassell B.*, 208 Conn. App. 816, 823, 267 A.3d 816 (2021), cert. denied, 340 Conn. 922, 268 A.3d 77 (2022).

In the present case, the judgment adjudicating Rabia neglected was adverse to the respondent. As a result of the court's granting Rabia's motion to revoke commitment, which we have concluded rendered the respondent's appeal moot, the respondent, through no fault of her own, has been prevented from challenging the court's adjudication of neglect. Neither the respondent nor the petitioner opposes vacatur under these circumstances. Accordingly, we dismiss this appeal as moot and vacate the judgment of the court. See *Savin Gasoline Properties, LLC* v. *Commission on City Plan of Norwich*, 208 Conn. App. 513, 515, 262 A.3d 1027 (2021) (dismissing appeal and granting appellant's motion for vacatur of court's judgment because appeal became moot through no fault of appellant).

The appeal is dismissed and the judgment is vacated.

# IN RE MARCQUAN C.*
## (AC 45087)

Moll, Clark and DiPentima, Js.

*Syllabus*

The respondent mother appealed to this court from the trial court's judgment denying her motion to revoke the commitment of her minor child to the custody and care of the petitioner, the Commissioner of Children and Families. The mother claimed that the court erred in finding that cause for commitment continued to exist. *Held* that the trial court's determination that the mother did not meet her burden to prove that cause for commitment no longer existed was legally correct and factually supported; there was sufficient evidence in the record to support the court's conclusion, including the testimony of the petitioner's two witnesses that the mother had not adequately addressed her issues relating to her ability to collaborate effectively with the Department of Children and Families and to parent the minor child in a manner that would afford him both physical and emotional safety.

Argued April 4—officially released May 18, 2022**

*Procedural History*

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child uncared for, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the court, *Conway, J.*, adjudicated the child uncared for and ordered protective supervision with custody vested in the respondent mother; thereafter, the court, *Conway, J.*, extended the period of protective supervision and sustained an order of temporary custody vesting custody of the minor child with the respondent father; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, vacated the order of temporary custody and ordered shared custody

* 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.

** May 18, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

and guardianship of the child between the respondent parents with primary physical custody vesting in the respondent father; thereafter, the court, *Hon. Richard E. Burke*, judge trial referee, sustained an order of temporary custody vesting custody of the minor child in the petitioner; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, granted the motion filed by the petitioner to open and modify the dispositive order of protective supervision, and committed the child to the custody of the petitioner; thereafter, the court, *Conway, J.*, denied the respondent mother's motion to revoke commitment, and the respondent mother appealed to this court, *Bright, C. J.*, and *Prescott* and *Suarez, Js.*, which dismissed the appeal; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, denied the respondent mother's motion to revoke commitment, and the respondent mother appealed to this court. *Affirmed.*

*David B. Rozwaski*, assigned counsel, for the appellant (respondent mother).

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

*Opinion*

DiPENTIMA, J. The respondent mother, Monica C., appeals from the judgment of the trial court denying her motion to revoke the commitment of her minor child, Marcquan C., to the custody of the petitioner, the Commissioner of Children and Families (commissioner).[1] On appeal, the respondent contends that the court erred in

[1] The mother, Monica C., is hereinafter referred to as the respondent. The father, Mark B., although also a respondent in the underlying proceedings, is not participating in this appeal and for clarity is hereinafter referred to as the father.

The attorney for the minor child has submitted a statement, pursuant to Practice Book § 79a-6 (c), adopting the commissioner's brief on appeal.

finding that cause for commitment continued to exist. We affirm the judgment of the trial court.

The following facts, which are either undisputed or were found by the court, and procedural history are relevant to our resolution of this appeal. Marcquan C. is the twelve year old child of the respondent and the father. On September 6, 2016, the Department of Children and Families (department) received its first referral concerning Marcquan from the Emergency Mobile Psychiatric Services (EMPS).[2] EMPS had responded to Marcquan's school after receiving a report that Marcquan, who was five years old at the time, was exhibiting destructive behaviors and was attempting to run out of the school building. Marcquan also made concerning statements about bringing a knife to school and about being fearful of returning home because his mother beats him with a belt. EMPS then contacted the respondent, but she refused to go to the school. The respondent told EMPS to contact the department to take Marcquan because she did not want nor did she have time to deal with his behaviors. The commissioner did not take custody of Marcquan at that time and he remained in the care and custody of the respondent. EMPS recommended that the respondent engage Marcquan in mental health treatment at the Yale Child Study Center. Marcquan was subsequently enrolled in therapy at the Yale Child Study Center where he saw an outpatient clinician on a weekly basis.

In November, 2016, the department received its second referral concerning Marcquan. According to the referral from Marcquan's school, Marcquan continued to exhibit out of control behavior and had wrapped a cord around his neck.

[2] EMPS is a community based emergency service intended to provide children and families with immediate access to in-person care when a child is experiencing an emotional or behavioral crisis. EMPS is funded by the department.

On January 13, 2017, the commissioner filed a petition with the Superior Court alleging that Marcquan was being neglected. On May 16, 2017, the neglect petition was orally amended to allege only that Marcquan was uncared for. That same day, the court adjudicated Marcquan uncared for. The court ordered that Marcquan remain in the care and custody of the respondent under protective supervision for a period of six months. On October 12, 2017, the order of protective supervision was extended for an additional six months. The commissioner filed a motion to modify the order from protective supervision to commitment on December 20, 2017. The parties agreed, however, that Marcquan would remain in the respondent's care provided that she (1) permit the department access to her home, (2) sign releases, and (3) cooperate with the department in securing a male mentor for Marcquan.

On February 5, 2018, Marcquan appeared in school with a swollen eye and lines resembling belt marks on his temple. The respondent admitted to disciplining Marcquan by "beating" him on the buttocks with a belt. The respondent theorized that while doing so, she might have inadvertently struck him on the head with the belt. According to Marcquan, this was not an isolated incident. Marcquan expressed concern that one day the respondent would get so mad that she might shoot him.

On February 7, 2018, the department filed an affidavit seeking permission to place Marcquan in an out-of-home placement. The affidavit alleged that the respondent had "exerted excessive physical discipline on [Marcquan]," that she was "unable to control her impulses," and that she had "unaddressed mental health issues." That same day, the court vested temporary custody of Marcquan with his father. On April 11, 2018, with the parties' consent, the court vacated the order of temporary custody. The court ordered that the father and the respondent share custody and guardianship of Marcquan, with the

father having primary physical residence. Protective supervision remained in place until August 11, 2018.

Nevertheless, on July 10, 2018, at an in-court review hearing, the father reported that he could no longer care for Marcquan due to Marcquan's out of control behavior. As a result, the department invoked a ninety-six hour hold of Marcquan. On July 12, 2018, the court concluded that Marcquan was "in immediate physical danger from [his] surroundings," "[a]s a result of said conditions, [his] safety [was] endangered and immediate removal from such surroundings [was] necessary to ensure [his] safety," and "continuation in the home [was] contrary to [his] welfare." The court therefore vested temporary care and custody of Marcquan with the commissioner. The court also set forth specific steps to facilitate reunification between the respondent and Marcquan.[3]

[3] The specific steps set forth by the court on July 12, 2018, instructed the respondent: (1) to keep all appointments set by or with the department and to cooperate with home visits by the department or Marcquan's attorney; (2) to inform the department of her and Marcquan's location at all times; (3) to take part in counseling and to make progress toward identified treatment goals; (4) to submit to random drug testing; (5) to refrain from the use of illegal drugs and the abuse of alcohol or medicine; (6) to cooperate with service providers; (7) to cooperate with court-ordered evaluations or testing; (8) to sign releases allowing the department to communicate with service providers to check on attendance, cooperation, and progress towards identified goals; (9) to sign releases allowing Marcquan's attorney to review her medical, psychological, psychiatric, and educational records; (10) to maintain adequate housing and legal income; (11) to notify the department concerning any changes in the makeup of her household to make sure that the change would not hurt the health and safety of Marcquan; (12) to cooperate with any restraining or protective order or safety plan approved by the department to avoid domestic violence incidents; (13) to attend and complete an appropriate domestic violence program; (14) to not get involved with the criminal justice system and to follow any conditions of probation or parole; (15) to visit Marcquan as often as the department permitted; (16) to inform the department of any person she would like the department to investigate and to consider as a placement resource for Marcquan; and (17) to tell the department the names and addresses of the grandparents of Marcquan.

On July 17, 2018, the commissioner filed a motion to open and modify the order of protective supervision and to modify the disposition to an order of commitment. In support of the motion, the commissioner incorporated, by reference, an affidavit prepared by a department social worker dated July 12, 2018. The affidavit provided that Marcquan's father had informed the court that he could no longer care for Marcquan and that the respondent was admitted to a local hospital under observation and thus was also unable to care for Marcquan. According to the affidavit, there were no other known potential family resources for Marcquan. The affidavit concluded that Marcquan had "no responsible caretaker to provide for his needs and immediate removal from such surroundings [was] necessary to ensure the child's safety."

A hearing was held on July 27, 2018, and the court granted the commissioner's motion to modify the order of protective supervision and committed Marcquan to the care and custody of the commissioner. Since that time, Marcquan has remained committed to the care and custody of the commissioner, and the father has had no further involvement with the department. Marcquan was placed in nonrelative foster care until September 4, 2019, when he was placed with his godmother.

On September 30, 2019, the respondent filed her first motion to revoke commitment of Marcquan to the care and custody of the commissioner. Before the court held a hearing on the motion to revoke commitment, the commissioner filed a motion, on October 19, 2019, seeking a psychological evaluation of both Marcquan and the respondent. The court held a hearing on the commissioner's motion for psychological evaluation on October 29, 2019. The court subsequently denied the motion based on its belief that issuing a court-ordered psychological evaluation would be futile due to the respondent's refusal to cooperate.

The court held a hearing on the respondent's first motion to revoke commitment on November 25, 2019, and December 18, 2019. On December 26, 2019, the court, *Conway*, *J.*, issued a memorandum of decision. The court found that, although the respondent participated in supervised visits with her son, she continued to make inappropriate comments and to engage in inappropriate conversations in Marcquan's presence. Additionally, she failed to develop skills or a working knowledge of positive and effective forms of discipline. The court also found that the respondent struggled to collaborate effectively with social workers from the department, noting that, by September, 2019, the case had been assigned to the department's sixth social worker. The court further determined that any benefits the respondent had derived from her weekly counseling sessions were not "carrying over" to her reunification efforts with Marcquan or her ability to properly care for him. The court found that there had been no discernable improvement regarding the respondent's ability to conform her behavior so as to make it in Marcquan's best interest to return to her care. The court explained that without a credible psychological evaluation, it was impossible to understand or predict how the respondent would react to and with others, including Marcquan. The court further explained that "past and present reality has stalled Marcquan's return to [the respondent's] care and has undoubtedly negatively impacted Marcquan's fragile well-being." The court thus reconsidered its prior denial of the commissioner's motion for a psychological evaluation and ordered the respondent to participate in a court-ordered psychological evaluation.

On the basis of the record before it, the court denied the first motion to revoke commitment on the ground that the respondent failed to establish that cause for commitment no longer existed. The court explained that the respondent "has to understand that until she

demonstrates an ability to collaboratively and effectively interact with [the department] and service providers and she demonstrates a sustained ability to parent Marcquan in a manner which affords him both physical and emotional safety, reunification is highly unlikely. While no guarantee, her participation in a court-ordered evaluation and her sustained and effective follow through with treatment recommendations may potentially be the key to a reinvigorated reunification process."

The respondent then appealed from the court's order requiring her to participate in a psychological evaluation. This court dismissed the respondent's appeal, concluding that the order for a psychological evaluation was not part of the court's judgment denying the respondent's motion to revoke commitment and was not otherwise an appealable final judgment. See *In re Marcquan C.*, 202 Conn. App. 520, 523, 246 A.3d 41, cert. denied, 336 Conn. 924, 246 A.3d 492 (2021). A court-ordered psychological evaluation never occurred. Rather, the respondent arranged her own psychological evaluation with Ralph Balducci, a psychologist.

On April 26, 2021, the respondent filed her second motion to revoke commitment, which is the subject of the present appeal. The court held a hearing on the motion on July 1, 2021. At the beginning of the hearing, the court granted the commissioner's motion for judicial notice concerning prior hearings. The respondent called Balducci as a witness before testifying herself. The commissioner called Lucy Hernandez, Marcquan's therapist, and Andre Turner, a social worker previously assigned to the case, to testify.

In a memorandum of decision dated September 21, 2021, the court, *Hon. Richard E. Burke*, judge trial referee, concluded that grounds for commitment continued to exist and, therefore, denied the respondent's motion to revoke commitment. The court incorporated

by reference the memorandum of decision, dated December 26, 2019, denying the respondent's first motion to revoke commitment. The court also made the following additional findings of fact: "The respondent mother stated that she gets 'triggered' by [the department]. At one visit to the [department] offices on May 7, [2021] she was asked by security to take out her identification from her wallet to show it. The respondent mother thought that seeing it through the plastic opening in her wallet should be sufficient. Security did not agree and the respondent mother got 'triggered.' In addition to using racially charged language, the respondent mother told the [department] social worker that she would have him 'touched,' which he stated was a serious threat of harm. This took place in the presence of Marcquan. In the prior memorandum of decision denying [the respondent's] motion to revoke, [the court] stated that: 'The respondent mother has to understand that until she demonstrates an ability to collaboratively and effectively interact with [the department] and service providers and she demonstrates a sustained ability to parent Marcquan in a manner which affords him both physical and emotional safety, reunification is highly unlikely.' . . . Without question, [the respondent] has been unwilling or unable to collaborate with [the department]. Her behavior has gone far beyond a lack of collaboration." The court therefore concluded that grounds for commitment continued to exist and denied the respondent's second motion to revoke commitment. This appeal followed.[4]

We begin by setting forth the legal principles and standard of review that govern our analysis of the respondent's claim on appeal. "A motion to revoke commitment is governed by [General Statutes] § 46b-129 (m) and Practice Book § 35a-14A. Section 46b-129 (m)

[4] The respondent appeals only from the judgment of the trial court denying her second motion to revoke commitment.

provides: 'The commissioner, a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. No such motion shall be filed more often than once every six months.' " *In re Zoey H.*, 183 Conn. App. 327, 344, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018).

"Pursuant to § 46b-129 (j) (2), a trial court, prior to awarding custody of [a] child to the department pursuant to an order of commitment . . . must both find and adjudicate the child on one of three [statutorily defined] grounds: uncared for, neglected or [abused]. . . . Adjudication on any of these grounds requires factual support, and [t]he trial court's determination thereafter as to whether to maintain or revoke the commitment is largely premised on that prior adjudication. . . . Accordingly, [t]he court, in determining whether cause for commitment no longer exists . . . look[s] to the original cause for commitment to see whether the conduct or circumstances that resulted in commitment continue to exist." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Santiago G.*, 318 Conn. 449, 470, 121 A.3d 708 (2015).

Practice Book § 35a-14A provides in relevant part: "Where a child or youth is committed to the custody of the [c]ommissioner . . . the commissioner, a parent or the child's attorney may file a motion seeking revocation of commitment. The judicial authority may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth. Whether to revoke the commitment is a dispositional question, based on the prior adjudication, and the judicial authority shall determine whether to revoke the commitment upon a fair preponderance of the evidence. The party seeking revocation of commitment has the

burden of proof that no cause for commitment exists. If the burden is met, the party opposing the revocation has the burden of proof that revocation would not be in the best interests of the child. . . .''

''Pursuant to § 46b-129 (m) and Practice Book § 35a-14A, the moving party bears the burden of proving that a cause for commitment no longer exists; if he or she is successful, the court then must determine whether revocation of commitment is in the best interest of the child.'' *In re Zoey H.*, supra, 183 Conn. App. 344–45.

''Our Supreme Court has held that a natural parent, whose child has been committed to the custody of a third party, is entitled to a hearing to demonstrate that no cause for commitment still exists. . . . The initial burden is placed on the [person] applying for the revocation of commitment to allege and prove that cause for commitment no longer exists. . . . If the party challenging the commitment meets that initial burden, the commitment to the third party may then be modified if such change is in the best interest of the child. . . . The burden falls on the persons vested with guardianship to prove that it would not be in the best interests of the child to be returned to his or her natural parents.'' (Internal quotation marks omitted.) Id., 350–51.

''On appeal, our function is to determine whether the trial court's conclusion was legally correct and factually supported. We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses. . . . The determinations reached by the trial court . . . will be disturbed only if [any challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous.'' (Internal quotation marks omitted.) *In re Brooklyn O.*, 196 Conn. App. 543, 548, 230 A.3d 895 (2020). In the present

appeal, the respondent does not challenge any specific factual finding made by the trial court. As a result, we review the record to determine whether the trial court's conclusion was legally correct and factually supported.

The respondent claims that the trial court erred in denying her second motion to revoke commitment.[5] Specifically, the respondent contends that "the trial court in its decision essentially found that cause for commitment continued to exist because of the respondent's inability to effectively work with [the department]." In her view, the trial court only referenced "one specific instance as a factual basis to support this finding which was the [department] office visit."[6] We conclude that there was sufficient evidence in the record to support the court's conclusion that cause for commitment still existed.

[5] Although the respondent argues that the court erred in denying her second motion to revoke commitment, she concedes that revocation would not necessarily be in the child's best interests at this time because the commissioner has not properly engaged the respondent and her child with appropriate services. The respondent requests that this court reverse the judgment of the trial court denying her second motion to revoke commitment, "remand the case back to the trial court with instructions to stay the decision on the motion to revoke, and order the parties to fully cooperate with a court-ordered psychological evaluation to include the respondent, the minor child, and if appropriate, an interactional between the respondent and child, and to follow the recommendations of the evaluator, and then to hear additional evidence on the outcome of the implementation of the recommendation before issuing a final ruling." We reject the respondent's particular request for relief because we affirm the judgment of the trial court.

[6] The respondent also argues, in the alternative, that "it was not clearly demonstrated that it was in the best interest of the child to deny the motion to revoke when appropriate services to facilitate reunification were not implemented." We note, however, that the party seeking revocation of commitment has the burden to prove that no cause for commitment exists. Only if the movant satisfies that burden does the burden shift to the party opposing the revocation to show that revocation would not be in the best interests of the child. See *In re Zoey H.*, supra, 183 Conn. App. 344. We need not address this argument because we affirm the court's conclusion that the respondent failed to satisfy her burden of proving that no cause for commitment continued to exist.

At the hearing on the respondent's second motion to revoke commitment, the court heard testimony from Lucy Hernandez, Marcquan's therapist. Hernandez testified that Marcquan was very quiet and withdrawn, but, depending on his placement, his mood would change. Hernandez explained that Marcquan was diagnosed with dysthymia, a depressive order, the symptoms of which include a depressed mood, irritability, anger, low self-esteem, and appearing withdrawn. When asked whether Marcquan's symptoms were ever exacerbated or aggravated after interaction with the respondent, Hernandez testified: "I clinically believe that there are some impacts of his behavior and his mood. I think a lot of it has to do with frustration and irritability that he has described in sessions of whether it be feeling stuck in between, but also [split] amongst individuals." Hernandez also testified that Marcquan generally became more withdrawn after his visits with the respondent. According to Hernandez, Marcquan has stated that he was not interested in engaging in family therapy because he would not want the respondent to hurt Hernandez' feelings. Hernandez testified that Marcquan needs a nurturing, structured environment.

The court also heard the testimony of Andre Turner, a social worker employed by the department who previously had been assigned to the case in May, 2020, but then subsequently was removed from the case due to threats made by the respondent. According to Turner, the commissioner's main concern regarding the respondent was her history of physically and verbally abusing Marcquan. Turner testified that the respondent had not participated in a court-ordered psychological evaluation, despite Judge Conway's order to do so.[7] When

[7] In its memorandum of decision, the court found that the respondent credibly argued that, at some point, the department did not cooperate with the court-ordered psychological evaluation as it related to the child-parent relationship.

asked about the lack of visitation between the respondent and Marcquan, Turner testified that Marcquan did not want any in-person visits with the respondent because of the respondent's history of negative behavior. Turner further testified that during one in-person visit in May, 2021, after the respondent arrived at the department office, an incident occurred between the respondent and a security guard. According to Turner, the security guard advised the respondent that she was required to show him her identification, and the respondent showed it to him through her clear wallet. Turner testified that the security guard then asked the respondent to take her identification out of the wallet, at which point the respondent started to become disagreeable. Turner averred that he advised the respondent that if she was unable to follow the security guidelines, then he would not be able to facilitate the visit. According to Turner, the respondent then began to scream at him, called him names, made racist and derogatory remarks, and threatened him. Marcquan witnessed the entire incident and began crying. Turner also testified that the respondent had a history of making inappropriate statements in the presence of Marcquan, and that he was not the first social worker to whom the respondent had made derogatory comments. Finally, when asked whether the respondent had accomplished some of the court-ordered specific steps, Turner testified "no."

On the basis of our review of the record, we conclude that the court's determination that the respondent did not meet her burden to prove that cause for commitment no longer existed was legally correct and factually supported. The testimony of the commissioner's two witnesses provided sufficient evidence from which the court could have found that cause for commitment continued to exist. Specifically, the testimony supported the court's conclusion that the respondent had not adequately addressed her (1) issues relating to her ability

to collaborate effectively with the department, and (2) ability to parent Marcquan in a manner that would afford him both physical and emotional safety.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

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## BOARD OF EDUCATION OF THE CITY OF WATERBURY *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
## (AC 44570)

Cradle, Clark and DiPentima, Js.

*Syllabus*

The plaintiff employer appealed to the trial court from the decision of the defendant Commission on Human Rights and Opportunities sustaining a disability discrimination complaint filed by the defendant employee, L, and awarding L, inter alia, back pay and emotional distress damages. L, who is hearing impaired, was hired by the plaintiff in 2012 and assigned to a secretarial position in its education personnel department. She worked directly for the human resources assistant, M, and performed many of the same tasks as him and covered his duties when he was absent from the office. As a result of her hearing impairment, L tended to speak loudly, and, on occasion, coworkers had raised concerns to

[8] The respondent also argues that she "did demonstrate that she continued to be engaged in ongoing therapy and that contrary to . . . Turner's testimony that [she] had not addressed the concerns regarding her anger issues and its impact on parenting, [she] offered expert testimony to the contrary." However, "we repeatedly have held that [i]n a [proceeding] tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . Where there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.) *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 513, 167 A.3d 1112, cert. denied, 327 Conn. 973, 174 A.3d 192 (2017); see also *In re Brooklyn O.*, supra, 196 Conn. App. 548 ("[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses" (internal quotation marks omitted)).

T, the department's interim director, about the volume of her voice. In addition, S, who worked in the civil service personnel department, had inquired whether there was something wrong with L and had told M that he thought that L was loud and unprofessional. In 2014, M informed L that he intended to retire the following year. M encouraged L to apply for his position, began teaching her any duties of the position that she was not already performing, and strongly supported her candidacy. In August, 2015, the position was posted online, and L submitted an application. L met the qualifications listed in the posting. Two weeks later, S had the job posting removed and revised because he felt that he had a vested interest in assuring that the position was filled correctly. S interviewed prospective candidates for the position. Six candidates were interviewed for the position and two, P and J, were hired. L was not granted an interview because S concluded that she did not satisfy the revised minimum requirement of four years of human resources experience set forth in the revised job posting. After M retired, L became the interim human resources assistant until P's employment commenced. In her complaint, L claimed that the plaintiff had discriminated against her on the basis of her physical disability by failing to interview and promote her. Following a hearing, the commission's human rights referee concluded that the plaintiff had unlawfully discriminated against L on the basis of her disability in violation of statute ((Rev. to 2015) § 46a-60 (a) (1)) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), and awarded L back pay and emotional distress damages. The plaintiff appealed to the trial court, which dismissed the appeal and affirmed the commission's decision, concluding, inter alia, that the award of back pay was supported by substantial evidence and that the referee did not abuse her discretion in awarding emotional distress damages. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on its claim that the trial court improperly affirmed the commission's award of back pay because the award was not supported by substantial evidence: contrary to the plaintiff's contention, the referee's decision clearly indicated that the award of back pay was predicated on a finding that L would have been promoted to the human resources assistant position if not for the plaintiff's unlawful discrimination; moreover, the referee's conclusion that, in the absence of the unlawful discrimination, L would have been interviewed for and promoted to that position was supported by substantial evidence, as there was evidence that L had worked for the plaintiff for more than three years under M's supervision and guidance, M encouraged L to apply for his position, began training her on any duties she did not already perform, and participated in the candidate interviews, both T and M thought that L was more than qualified for the position because she already had experience performing the precise duties required, and L held one of the preferred undergraduate degrees specified in the original job posting and had established relationships with personnel

throughout the plaintiff's school district; furthermore, there was no merit to the plaintiff's contention that the referee improperly marshaled the evidence in favor of finding that L would have been chosen for the position because L placed only seventh on a civil service examination list, as the referee properly found that being placed on that list meant that the candidate was qualified for the position, and, although it was possible that L may not have been selected for the position, the referee properly resolved any uncertainty in favor of L in light of the remedial aims underlying the state's antidiscrimination laws.

2. This court declined to review the plaintiff's claim that the award of emotional distress damages was improper because the commission is not authorized to award compensatory damages pursuant to statute (§ 46a-58) in employment discrimination cases that fall within the scope of § 46a-60, as that claim was not raised before the commission or the trial court and, therefore, was not preserved for appellate review; moreover, this court declined the plaintiff's request to review its unpreserved claim pursuant to our supervisory authority over the administration of justice in light of our Supreme Court's recent decision in *Connecticut Judicial Branch* v. *Gilbert* (343 Conn. 90) because, having reviewed that decision, this court was not persuaded that the exercise of such authority was warranted.

Argued February 7—officially released May 24, 2022

*Procedural History*

Appeal from the decision of the human rights referee of the named defendant sustaining a complaint of disability discrimination filed by the defendant Cynthia Leonard against the plaintiff and awarding certain damages, brought to the Superior Court in the judicial district of New Britain, where the court, *Klau*, *J.*, rendered judgment dismissing the appeal and affirming the decision of the referee, from which the plaintiff appealed to this court. *Affirmed.*

*Daniel J. Foster*, corporation counsel, for the appellant (plaintiff).

*Michael E. Roberts*, human rights attorney, for the appellee (named defendant).

*Opinion*

CLARK, J. The plaintiff, the Board of Education of the City of Waterbury, appeals from the judgment of

the trial court dismissing its administrative appeal and affirming the decision of the named defendant, the Commission on Human Rights and Opportunities (commission), which concluded that the plaintiff had discriminated against the defendant Cynthia Leonard on the basis of her physical disability by failing to interview and promote her. On appeal, the plaintiff claims that (1) the trial court improperly affirmed the commission's award of back pay because the award was not supported by substantial evidence and (2) the commission exceeded its statutory authority in awarding compensatory damages. We disagree with the plaintiff's first claim and decline to review the second claim because it is unpreserved. We, accordingly, affirm the judgment of the trial court.

The following facts, as found by the commission's presiding human rights referee (referee), and procedural history are relevant to this appeal. Leonard was hired by the plaintiff in 2012 and was assigned to a secretarial position in the education personnel department, which served as the human resources department for the Waterbury school district.[1] She worked directly for the human resources assistant, James Murray, until his retirement in 2015. Murray and Leonard were the only two employees in the education personnel department that supported the grant funded administrative and teaching positions within the school district. Leonard performed many of the same tasks as Murray and covered Murray's duties when he was absent from the office.

Leonard has a hearing impairment as a result of injuries she sustained in a motor vehicle crash in 1992. Consequently, she tends to speak loudly, particularly when

[1] The city of Waterbury has two separate and distinct human resources departments. The education personnel department supports the administrators and teachers within the city's school district. The civil service personnel department supports all of the city's civil service employees.

speaking on the telephone. Her colleagues on occasion had raised concerns to Shuana Tucker, the education personnel department's interim director, about the volume of Leonard's voice. Leonard's hearing impairment was generally known throughout the education personnel department and by others, including Scott Morgan, a human resources generalist, who worked for Waterbury's civil service personnel department. See footnote 1 of this opinion. Morgan had inquired if there was something wrong with Leonard because she was very loud and had told Murray that he thought that Leonard was loud and unprofessional.

In fall of 2014, Murray informed Leonard that he intended to retire in September, 2015. Murray encouraged Leonard to apply for his position, began teaching her the particular duties of the job that she was not already performing, and strongly supported her candidacy for human resources assistant. Murray had trained Leonard and thought she was an asset to the office. Tucker shared Murray's opinion of Leonard and both thought she was more than qualified for the position because she already was performing many of the duties and responsibilities required. On August 1, 2015, the job vacancy was posted online, and Leonard subsequently applied for the position.

The original job posting stated that applicants must have three years of human resources experience and that a bachelor's degree in human resources, business administration, or other related area was preferred. Leonard met those qualifications because she had worked for the plaintiff in its human resources department for more than three years, possessed a bachelor's degree in business administration, held a certificate in human resource management, and was working toward a master's degree in education. On her application, Leonard also noted that she had existing relationships with the schools, principals, and other staff that the education

personnel department supported and that she already was performing the job requirements of the position. Leonard also passed the required civil service examination, ranking seventh on the list of candidates.

On or about August 14, 2015, Morgan learned that the vacant position had been posted online. Morgan felt that he had a " 'vested interest' " in assuring that the position was filled " 'correctly' " and instructed an employee to remove the job posting for the purpose of revising it. Morgan revised the posting to state that applicants were required to have four years of human resources experience and a bachelor's degree from an accredited university, no longer indicating a preference for applicants who possessed a human resources or business administration degree. According to Tucker, Morgan removed the posting without her department's authorization and did not follow standard practices when he revised the job requirements without the approval of the plaintiff's personnel committee.

Tucker had taken intermittent leave to care for a family member in August and early September, 2015. Morgan covered Tucker's duties while she was away from the office, including interviewing prospective candidates for the human resources assistant position. Leonard was not granted an interview because Morgan had concluded that she did not satisfy the revised minimum qualifications, which required applicants to have four years of human resources experience. Morgan and Murray interviewed six candidates and subsequently hired Anne Phelan and Jaclyn Planas.[2] Neither Phelan nor Planas possessed a bachelor's degree in human resources or business administration and neither of them had Leonard's experience supporting grant funded positions

[2] In the fall of 2015, the education personnel department was restructured to implement the recommendations of a consulting firm that had conducted a staffing review of the department. As a result of that analysis, the department sought to reduce its administrative staff and also to increase the number of human resources professionals by hiring two individuals to replace Murray.

within the school district. After Murray retired in September, 2015, Leonard became the interim human resources assistant until mid-November, 2015, when Phelan's employment began.

On January 12, 2016, Leonard filed a complaint with the commission, alleging that the plaintiff had violated General Statutes (Rev. to 2015) § 46a-60 (a) (1),[3] as well as General Statutes § 46a-58 (a),[4] due to a deprivation of her rights under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2012) (ADA), and Title VII of the Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2012).[5] The commission investigated Leonard's complaint and, upon finding reasonable cause that a discriminatory employment practice had occurred and that efforts to conciliate had failed, held a hearing pursuant to General Statutes § 46a-84. The two day hearing commenced on October 16, 2018. The referee issued a memorandum of decision on October 3, 2019, concluding

[3] General Statutes (Rev. to 2015) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (1) For an employer, by the employer or employer's agent . . . to refuse to hire or employ . . . any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . physical disability . . . ."

Hereinafter, all references to § 46a-60 in this opinion are to the 2015 revision of the statute.

[4] General Statutes § 46a-58 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . physical disability . . . ."

Section 46a-58 (a) was the subject of amendment after the filing of Leonard's complaint. See Public Acts 2017, No. 17-127, § 2. Because none of the changes is relevant to this appeal, for simplicity, we refer to the current revision of the statute.

[5] Leonard also alleged that the plaintiff violated § 46a-60 (a) (4), which provides that it is a discriminatory practice for an employer to discriminate against an employee for filing a complaint. It appears from the record that the commission and Leonard abandoned this claim.

that the plaintiff had unlawfully discriminated against Leonard, in violation of the ADA and § 46a-60 (a) (1), on the basis of her disability by failing to interview and promote her. The referee awarded Leonard $118,353.06 in back pay, as well as prejudgment and postjudgment interest, and $35,000 in emotional distress damages.

The plaintiff appealed to the trial court from the referee's decision, claiming, inter alia, that the referee improperly awarded Leonard back pay because there was no evidence to support Leonard's claim that she suffered a compensable injury. More specifically, the plaintiff argued that there was no evidence establishing that Leonard would have been selected for the position if she had been granted an interview, and, therefore, the back pay award was unduly speculative. Additionally, the plaintiff contended that the emotional distress damages awarded to Leonard were excessive under the facts of this case. The trial court dismissed the appeal and affirmed the decision, concluding that the referee's decision to award Leonard back pay was supported by substantial evidence and that the referee did not abuse her discretion in awarding Leonard emotional distress damages.[6] This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff claims that the trial court improperly affirmed the commission's award of back pay to Leonard because it is based on speculation and is not supported by the evidentiary record. The plaintiff argues that there was no evidence or findings made by the referee to support the referee's conclusion that Leonard would have been selected for the position had

[6] The plaintiff also challenged the referee's factual findings and conclusion that the plaintiff intentionally had discriminated against Leonard on the basis of her physical disability. Those issues were not raised on appeal to this court.

she been interviewed, and, as a result, she was not entitled to receive a back pay award. The commission counters that the court correctly determined that the substantial evidence in the record supported the referee's conclusion that Leonard would have been promoted in the absence of the plaintiff's discriminatory action of not interviewing Leonard for the position. We agree with the commission.

We first set forth the standard of review and legal principles that guide our resolution of the plaintiff's claim. "There is no absolute right of appeal to the courts from a decision of an administrative agency. . . . The [Uniform Administrative Procedure Act (UAPA)] grants the Superior Court jurisdiction over appeals of agency decisions only in certain limited and well delineated circumstances. . . . Judicial review of an administrative decision is governed by General Statutes § 4-183 (a) of the UAPA, which provides that [a] person who has exhausted all administrative remedies . . . and who is aggrieved by a final decision may appeal to the [S]uperior [C]ourt . . . ." (Internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 442, 870 A.2d 448 (2005).

"Review of an appeal taken from the order of an administrative agency such as the [commission] is limited to determining whether the agency's findings are supported by substantial and competent evidence and whether the agency's decision exceeds its statutory authority or constitutes an abuse of discretion." *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 477, 559 A.2d 1120 (1989). "[E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of the witnesses and to

the agency's right to believe or disbelieve the evidence presented by any witness . . . ." (Citation omitted; internal quotation marks omitted.) *Slootskin* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 452, 458, 806 A.2d 87, cert. denied, 262 Conn. 910, 810 A.2d 275 (2002). "As with any administrative appeal, our role is not to reexamine the evidence presented to the [commission] or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions." (Internal quotation marks omitted.) *Lawrence* v. *Dept. of Energy & Environmental Protection*, 178 Conn. App. 615, 638, 176 A.3d 608 (2017). "If the decision of the agency is reasonably supported by the evidence in the record, it must be sustained." (Internal quotation marks omitted.) *Slootskin* v. *Commission on Human Rights & Opportunities*, supra, 459.

When a discriminatory employment practice has been established, the commission's referee must "construct a remedy for discrimination that will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 694, 855 A.2d 212 (2004). The referee is vested with "broad discretion to award . . . back pay or other appropriate remedies specifically tailored to the particular discriminatory practices at issue." (Internal quotation marks omitted.) *Thames Talent, Ltd.* v. *Commission on Human Rights & Opportunities*, 265 Conn. 127, 136, 827 A.2d 659 (2003). This is so because the overriding remedial purpose of our antidiscrimination statutes is "to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination." (Internal quotation marks omitted.) Id.

As an initial matter, we address the plaintiff's contention that the back pay award must be vacated because

the referee never made explicit findings that Leonard would have been selected for the position if she had been granted an interview. The referee, however, determined that "Morgan's failure to interview *and hire* [Leonard] was motivated by discriminatory animus." (Emphasis added.) The referee noted in her decision that there was "persuasive evidence that [Leonard] was qualified for the . . . position" and found that the two employees who were ultimately hired did not have the bachelor's degrees preferred under the original job posting nor a human resources certificate. Moreover, the referee found that Leonard not only had performed all of the functions of the position but she also was the interim human resources assistant for nearly three months after Murray retired. Thus, the referee's decision makes clear that the back pay award was predicated on a finding that Leonard would have been promoted if not for the discriminatory act.

After thoroughly reviewing the record, we agree with the court that the referee's conclusion that, in the absence of the unlawful discrimination, Leonard would have been interviewed for *and* promoted to the human resources assistant position is supported by substantial evidence, and, therefore, the back pay award was appropriate. The referee reasonably concluded that, had Morgan not revised the minimum job qualifications for the position, Leonard likely would have been one of the two candidates selected to replace Murray. The referee found that Leonard had worked for the plaintiff for more than three years under the supervision and guidance of Murray, whose position was being filled. Murray encouraged Leonard to apply for his position, began training her on any duties she did not already perform, and participated in the candidate interviews. Both Murray and Tucker felt that Leonard was more than qualified for the position because she already had experience

performing the precise duties required. Moreover, Leonard holds one of the preferred undergraduate degrees specified in the original job posting and had established relationships with personnel throughout the school district.

The plaintiff contends that the referee improperly marshaled the evidence in favor of finding that Leonard was the obvious choice for the position because Leonard placed only seventh on the civil service examination list. The referee, however, found that being placed on the civil service examination list meant that the candidate was qualified for the position. The evidence supports this finding. Furthermore, there was substantial evidence in the record from which the referee could have concluded that, in the absence of the plaintiff's unlawful discrimination against her, Leonard would have been interviewed and hired for the position, notwithstanding her performance on the civil service examination. Although it is possible that Leonard may not have been selected if she had been granted an interview, the referee's decision to award back pay was not unduly speculative. See, e.g., *National Labor Relations Board* v. *Ferguson Electric Co.*, 242 F.3d 426, 431 (2d Cir. 2001) ("[m]ere [u]ncertainty . . . does not render a back pay award speculative, since [a] back pay award is only an approximation, necessitated by the employer's wrongful conduct" (internal quotation marks omitted)). In light of the remedial aims underlying our antidiscrimination laws and the substantial evidence in the record to support the referee's conclusion that Leonard would have been promoted in the absence of the discriminatory employment practice, the referee properly resolved any uncertainty in the present appeal in favor of Leonard. See, e.g., *Equal Employment Opportunity Commission* v. *Joint Apprenticeship Committee*, 164 F.3d 89, 100 (2d Cir. 1998).

We conclude that the referee's findings were supported by substantial evidence and the commission therefore did not abuse its discretion in awarding Leonard back pay. Consequently, the trial court properly dismissed the plaintiff's administrative appeal and affirmed the commission's decision with respect to this claim.

II

We next turn to the plaintiff's second claim. On appeal to the trial court, the plaintiff asserted that the commission's award of emotional distress damages was excessive when compared to the commission's prior decisions and under the facts of the present case. On appeal to this court, however, the plaintiff has abandoned that claim and, instead, argues that the award of emotional distress damages was improper because the commission is not statutorily authorized to award compensatory damages pursuant to § 46a-58 in employment discrimination cases that fall within the scope of § 46a-60. We decline to address the merits of this claim because it is unpreserved.

As a general matter, "[t]his court will not review issues of law that are raised for the first time on appeal." (Internal quotation marks omitted.) *Matto* v. *Dermatopathology Associates of New York*, 55 Conn. App. 592, 596, 739 A.2d 1284 (1999); see also Practice Book § 60-5 (reviewing court not bound to consider claim unless it was distinctly raised at trial). "Our rules of practice concerning unraised claims also apply to appeals from administrative proceedings. . . . A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the [agency]." (Citations omitted; internal quotation marks omitted.) *Bristol Board of Education* v. *State Board of Labor Relations*, 166 Conn. App. 287, 300, 142 A.3d 304 (2016). The failure

to raise a claim at the time of the administrative hearing ordinarily precludes our review of that issue on appeal. See *Berka* v. *Middletown*, 205 Conn. App. 213, 218, 257 A.3d 384, cert. denied, 337 Conn. 910, 253 A.3d 44, cert. denied, U.S. , 142 S. Ct. 351, 211 L. Ed. 2d 186 (2021). But see *Burnham* v. *Administrator, Unemployment Compensation Act*, 184 Conn. 317, 322–23, 439 A.2d 1008 (1981).

Although the plaintiff participated fully in the administrative hearing and the commission requested that Leonard be awarded emotional distress damages, it did not claim in its posthearing brief that the commission exceeded its authority in awarding Leonard compensatory damages. The plaintiff similarly did not raise this claim on appeal to the trial court.[7] As a result, neither the referee nor the trial court addressed this claim.

On appeal to this court, the plaintiff acknowledges that this claim was not preserved. Nevertheless, it invites us to review its claim pursuant to our supervisory authority over the administration of justice; see, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 150–52, 84 A.3d 840 (2014); if a similar legal issue is resolved in an appeal from *Connecticut Judicial Branch* v. *Gilbert*, Superior Court, judicial district of New Britain, Docket No. CV-18-6048927-S (October 15, 2019), which was pending in our Supreme Court at the time the instant appeal was briefed and argued in this court. Our Supreme Court has since issued its decision in that case. See *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, A.3d (2022). We have reviewed that decision and are not

[7] In its appeal to the trial court from the commission's decision, the plaintiff summarily alleged as a ground for sustaining its appeal that the commission erroneously awarded emotional distress damages because that award is not authorized by statute. Nonetheless, the plaintiff did not address this claim in its brief or at oral argument before the trial court.

persuaded that it warrants an exercise of our supervisory authority over the plaintiff's unpreserved claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* HERMAN K.*
## (AC 44317)

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

*Syllabus*

Convicted, following a jury trial, of the crimes of assault in the first degree causing serious physical injury and carrying a dangerous weapon in connection with a stabbing incident, the defendant appealed to this court, claiming that the trial court judge, because of the appearance of partiality, was required to recuse himself at the defendant's sentencing hearing pursuant to the applicable rule of practice (§ 1-22) and the applicable rule (rule 2.11) of the Code of Judicial Conduct. Prior to trial, the defendant rejected a judge's plea offer of twelve years of incarceration, execution suspended after five years, and a period of probation. A separate judge thereafter presided over the defendant's trial, at which the jury returned a guilty verdict. When the defendant appeared for his sentencing, the judge brought to the attention of both the prosecution and the defense that he would strike a reference in the presentence investigation report to the rejected plea offer previously made to the defendant. The defendant moved for a mistrial and a new trial, which the court denied and interpreted as a motion to recuse the judicial authority. The court denied the defendant's motion for recusal, reasoning, inter alia, that it had no participation in any pretrial plea offers and, therefore, there was no violation of the rule set forth in *State* v. *Niblack* (220 Conn. 270), which held that a judge who participates in pretrial plea negotiations is disqualified from further proceedings if the offer is not accepted. The judge sentenced the defendant to twenty years of incarceration, suspended after twelve years, and three years of probation. On the defendant's appeal, *held* that the trial court did not abuse its discretion in denying the defendant's motion for recusal:

* 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.

the defendant, as the moving party, failed to meet his burden in demonstrating that recusal was warranted, as there was nothing in the record to establish that a reasonable person would question the judge's impartiality, the judge did not participate nor have any involvement in plea negotiations or plea offers in the defendant's case and was not responsible for the improper reference to the plea offer in the presentence investigation report and, once he learned of such improper reference, he alerted both defense and the prosecutor, struck the reference thereto, and stated on the record that it would have no effect on the imposed sentence and that he had made no effort to confirm whether the alleged plea offer had been made; moreover, after attending the lengthy trial, the sentencing judge properly considered facts from the evidence relating to the seriousness of the crime and the resulting near-death injuries to the victim to determine the defendant's length of sentence and, although the sentencing judge considered other factors such as the defendant's remorse, his criminal history, and his age, the judge ultimately concluded that a lenient sentence was not warranted for his crimes; furthermore, the defendant's claim that the reference to the plea offer in the presentence investigation report created a floor that the judge might have felt an obligation to exceed was unavailing as courts are obligated to set aside irrelevant matter in performing their duties and courts are presumed to consider only properly admitted evidence when rendering a decision and, therefore, such a presumption applied equally to an improper mention of a rejected plea offer in a presentence investigation report provided to the judge.

Argued January 31—officially released May 24, 2022

*Procedural History*

Substitute information charging the defendant with the crimes of assault in the first degree and carrying a dangerous weapon, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Vitale*, *J.*; verdict of guilty; thereafter, the court, *Vitale*, *J.*, denied the defendant's motion to disqualify the judicial authority; subsequently, the court, *Vitale*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

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

*Melissa E. Patterson*, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Seth R. Garbarsky*, senior assistant state's attorney, for the appellee (state).

*Opinion*

FLYNN, J. Before this court is the defendant's appeal from the judgment of conviction, rendered following a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and carrying a dangerous weapon in violation of General Statutes § 53-206 (a). On appeal, the defendant claims that the trial court, *Vitale*, *J.*,[1] improperly denied the defendant's motion for disqualification at his sentencing hearing based upon what he contends was the appearance of partiality.[2] We disagree and affirm the judgment of the trial court.

We conclude that the court did not abuse its discretion in denying the defendant's motion for recusal. The court denied the defendant's motion for a mistrial, ruling that it was untimely in light of the rules of practice. The court also ruled that his retrial was unwarranted because of a probation officer's presentence report's mention of a rejected plea offer because it would have no bearing or impact on the sentence imposed. Judge Vitale then treated the motion as a motion to recuse and denied that relief.

The following facts reasonably could have been found by the jury. In May, 2018, the defendant had a fight with another man at a twenty-four hour convenience store

[1] Where necessary, we refer to Judge Vitale by name, but when our intent is clear that it is he who is acting, we use the term court interchangeably.

[2] The defendant also claimed on appeal that his right to confrontation under the sixth amendment to the United States constitution was violated by the hearsay testimony of a DNA analyst, but this claim was withdrawn by defense counsel at oral argument before this court.

in New Haven. The victim in this case, who is the defendant's nephew, was present at the time, but did not intervene on the defendant's behalf in that fight. Thereafter, on the night of June 16, 2018, the victim was hanging around the convenience store after 2 a.m. A red truck drove by and later returned and parked in the convenience store lot. The defendant exited the truck and, without warning, stabbed the victim in the back. When the victim abruptly turned around to confront his attacker, whom he quickly realized was his uncle, the victim was stabbed in the arm by him. The victim, who was bleeding profusely, ran 1360 feet and collapsed on the street. He was taken to a hospital by ambulance where he was treated by surgeons for injuries to his lung, diaphragm, spleen, and large intestine, as well as for a fractured rib, blood loss, and pooling of blood in his lung. The victim sustained life-threatening injuries.

The defendant was arrested and charged with assault in the first degree causing serious physical injury in violation of § 53a-59 (a) (1) and carrying a dangerous weapon in violation of § 53-206 (a). Subsequent to his arrest and prior to trial, a Superior Court pretrial proceeding was held before Judge Patrick Clifford at which the defendant rejected a plea offer of twelve years of incarceration, execution suspended after five years, and a period of probation.[3] In November, 2019, the defendant went to trial before a jury. On November 15, 2019, the jury returned verdicts of guilty on both counts. The court then deferred the imposition of sentence pending the filing of the required presentence investigation report by the Office of Adult Probation.

The following procedural history occurred postverdict. On January 30, 2020, the presentence investigation

[3] The actual time to be served was incorrectly stated in the presentence investigation report from the Office of Adult Probation as eight years of incarceration instead of the five years offered.

report had been completed and the defendant appeared in court for sentencing. At that time, Judge Vitale noted that he would strike from that report a reference to the plea offer made to the defendant by Judge Clifford. Judge Vitale termed the report's single reference to a rejected pretrial plea offer "inappropriate" and stated it would have "absolutely no impact or bearing on the . . . sentence to be imposed . . . ." The judge also indicated on the record that he had no involvement in any plea negotiations and lacked knowledge about whether any occurred. Defense counsel then stated that she would file a motion for mistrial and a new trial. That motion was denied by the court on March 10, 2020. The court then interpreted the motion for mistrial and a new trial as a motion for recusal and denied that motion to recuse.

The court, in denying the motion, stated that the reference to a pretrial plea offer before another judge should not have been included in the probation officer's presentence investigation report. It noted that the reference did not result from any impropriety on the part of the court or either counsel. The court noted that it had ordered the improper reference struck and redacted from the report. The court also stated that it had no participation in any pretrial plea offers, so that there was no violation of the rule set forth in *State* v. *Niblack*, 220 Conn. 270, 280, 596 A.2d 407 (1991). In *Niblack*, our Supreme Court held that a judge who participates in pretrial plea negotiations is disqualified from further proceedings if the offer is not accepted. Id.

At sentencing, Judge Vitale heard from the prosecutor, the defendant's trial counsel, the defendant's daughter and sister, and the defendant himself and evaluated the presentence investigation report except for the portion he ordered struck. Judge Vitale recounted that he had presided over several days of trial and heard the testimony of numerous witnesses who described the

stabbing by the defendant of his nephew in his back and arm, the damage to various parts of the victim's body, and the medical attention and sequela with which the victim now lives as a result of the vicious assault to which the defendant subjected him.

The court then proceeded to sentence the defendant. The court first reviewed the details of the defendant plunging a large knife into the victim's back without warning and then slashing the victim's arm as the victim attempted to defend himself. The court then described the victim running for his life for approximately 1300 feet, bleeding profusely in a bloody trail, which was later discovered by the police. After being transported to the hospital, the victim underwent several hours of surgery to deal with damage to his lung, diaphragm, large intestine, and a rib fracture, which caused the victim to be hospitalized for a significant period of time. The court found that the crime showed "a cold and cunning premeditation," which resulted in long-lasting injuries from which the victim nearly died. The court then reviewed the victim's attitude, who was seeking significant punishment, as reported by the victim's advocate. The court also reviewed the defendant's background, including his physical and mental health history, sparse work record, and his record of eleven prior convictions, ten of which were misdemeanors, and three prior violations of probation. The court also considered common goals of sentencing, including rehabilitation, punishment, deterrence, and protection of the public. Judge Vitale then sentenced the defendant to twenty years of incarceration, the execution of which was to be suspended after service of twelve years, followed by three years of probation on the charge of assault in the first degree. On the charge of carrying a dangerous weapon, the defendant was sentenced to one year of incarceration to be served concurrently with the sentence of assault. The defendant's total effective sentence was

twenty years of incarceration, suspended after twelve years, five years of which was a minimum mandatory term, and three years of probation.

On appeal, the defendant claims that when the court learned, from reading the presentence investigation report, of a prior plea offer of twelve years of incarceration suspended after eight years that the state had made to the defendant, it became obligated to recuse itself, not because of actual bias, but because there was an appearance of partiality. In order to preserve the integrity of the judicial sentencing process, he claims that a new sentence before a different judge is required.[4]

The defendant further argues that "[a] reasonable person might believe [that] the court felt an obligation to sentence [the] defendant to something higher than what was offered given the appraisal of the case by a fellow judge" and that "a reasonable person could believe this was simply something [the court] could not easily ignore." The defendant also argues that the disclosure of the terms of a pretrial plea offer resulting from a pretrial hearing before Judge Clifford created an "anchoring effect." The defendant defines the anchoring effect, to wit, as "a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.' " According to the defendant, if the court had not been exposed to the reference to a plea offer made by another judge prior to trial, the court would have been more likely to have imposed a less lengthy sentence.

The state argues that the court properly declined to recuse itself. It notes that the court (1) brought the

[4] Citing *State* v. *Milner*, 325 Conn. 1, 5, 155 A.3d 730 (2017), the defendant asserts that his claim is reviewable because the court treated his motion as a motion to disqualify. We agree with the defendant that the claim as to recusal was preserved and is reviewable.

probation officer's mistaken reference to a rejected plea offer to the parties' attention and ordered it struck from the presentence investigation report, (2) had no involvement in any plea negotiations, nor any conversations with the pretrial judge who supervises pretrial offers, nor had reviewed any other judge's advice, nor had the court discussed any pretrial offers with either counsel, and (3) indicated it had no personal stake in the matter and had no resentment toward the defendant, and that he would not consider the reference he had ordered struck. The state also argues that the court appropriately focused on proper factors when it imposed sentence on the defendant.

Both the state and the defendant contend that appellate review of the denial of a motion for disqualification of a judge is governed by an abuse of discretion standard. See *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017); *State* v. *Canales*, 281 Conn. 572, 593, 916 A.2d 767 (2007). The state further points out that *State* v. *Lane*, 206 Conn. App. 1, 8, 258 A.3d 1283, cert. denied, 338 Conn. 913, 259 A.3d 654 (2021), requires a reviewing court utilizing the abuse of discretion standard to "indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.)

For reasons that follow, we first observe that we disagree with the defendant's claim that the "concerns" expressed in *State* v. *D'Antonio*, 274 Conn. 658, 681–83, 698, 877 A.2d 696, 712 (2005), are relevant to Judge Vitale's role in this case.[5] *D'Antonio* is neither factually

[5] The defendant asserts that by learning there were negotiations and that an offer of twelve years suspended after eight years was made, the court was informed that a fellow judge felt that twelve years was an appropriate sentence and that eight years should be served. He further claims that a reasonable person might believe that the court then felt an obligation to sentence the defendant to something higher and that a reasonable person might not view the court as a neutral party.

similar to the present case nor are its requirements of the extraordinary level of plain error appellate review necessary or appropriate.

Unlike the present case, the "concerns" expressed in *D'Antonio* were related to whether there was "judicial vindictiveness" present on the part of a trial judge who had participated in unsuccessful plea negotiations and then, without objection, presided over the trial of the same defendant's charges. See id., 690–91. In reviewing and reversing the Appellate Court, our Supreme Court concluded that these concerns were not realized. Id., 698. Unlike this case, however, where Judge Vitale had not engaged in plea negotiations, *D'Antonio*, instead, involved a case in which the sentencing judge had made a pretrial offer that was not accepted and then presided over the trial of two charges against the defendant, and then sentenced him. See id., 663–66. It was from that dual role that the "concerns" in *D'Antonio* arose.

In *D'Antonio*, our Supreme Court reviewed the purposes of the procedural rule endorsed in *State* v. *Niblack*, supra, 220 Conn. 280, which provides that, "a trial court may participate in the negotiation of a plea agreement between the state and the defendant, so long as a different judge presides at trial and sentencing if the negotiations are unsuccessful . . . ." *State* v. *D'Antonio*, supra, 274 Conn. 660–61.

The court explained that "judicial participation in plea negotiations is likely to impair the trial court's impartiality. The judge who suggests or encourages a particular plea bargain may feel a personal stake in the agreement (and in the quick disposition of the case made possible by the bargain) and may therefore resent the defendant who rejects his advice. . . . As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems

to become an advocate for the resolution he has suggested to the defendant." (Internal quotation marks omitted.) Id., 676.

Additionally, however, the court "conclude[d] that establishing a violation of the *Niblack* rule does not, therefore, excuse the defendant [who claims review under the plain error doctrine] from demonstrat[ing] that the failure to grant relief will result in manifest injustice. . . . Rather, the defendant must demonstrate on appeal that the record in the case actually implicates the dangers of judicial participation in plea negotiations . . . ." (Citation omitted; internal quotation marks omitted.) Id., 681. Our Supreme Court "look[ed] beyond the fact of the *Niblack* violation and review[ed] the record as a whole for evidence of actual or apparent prejudice to the defendant." Id. "[I]n addition to judicial participation in unsuccessful plea negotiations followed by a harsher sentence than initially was offered," our Supreme Court looked to: "(1) whether the trial judge initiated the plea discussions with the defendant . . . (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing." (Internal quotation marks omitted.) Id., 682.

Ultimately, our Supreme Court in *State* v. *D'Antonio*, supra, 274 Conn. 658, overruled earlier Appellate Court reversals under the plain error doctrine in *State* v. *D'Antonio*, 79 Conn. App. 683, 691, 830 A.2d 1187 (2003), rev'd, 274 Conn. 658, 877 A.2d 696 (2005), and *State* v.

*D'Antonio*, 79 Conn. App. 696, 830 A.2d 1196 (2003), rev'd, 274 Conn. 658, 877 A.2d 696 (2005), ruling that the violation of the *Niblack* rule, although improper, did not constitute plain error where the record showed that the trial judge presided over proceedings in a fair and evenhanded manner, no reference was made at sentencing of the rejection of the prior plea offer, and sentence was imposed in an appropriate manner only on grounds involved in proceedings heard at trial. *State* v. *D'Antonio*, supra, 274 Conn. 690–91, 697–98. Our Supreme Court concluded that the "concerns of judicial vindictiveness" contemplated by the *Niblack* rule were not realized and, therefore, the Appellate Court improperly reversed the judgment of the trial court. Id., 698.

In the present case, the disparity between the plea offer and ultimate sentence imposed by Judge Vitale is the only thread in common between the proceedings before Judge Vitale, who had no involvement in plea bargaining, and the factors *D'Antonio* considered pertinent in determining whether judicial participation in unsuccessful plea negotiations mandates reversal under the plain error doctrine.[6] Not only is there no evidence that Judge Vitale in any way participated in plea negotiations in the defendant's case, the defendant makes no claim that any of the factors relevant to establishing whether either the actual or apparent form of prejudice are present, although he does emphasize that the sentence imposed by Judge Vitale after trial exceeded the sentence offered in the plea negotiations prior to trial before another judge. In sum, the concerns about "judicial vindictiveness" expressed in both *Niblack* and *D'Antonio* are not present here.[7] *State* v. *D'Antonio*,

[6] Unlike *D'Antonio*, the defendant was able to obtain review without resort to the plain error doctrine and facing its heightened burden of proving "manifest injustice" because Judge Vitale took the initiative to treat the defendant's motion as a motion to recuse, which was then preserved for appellate review. See *State* v. *D'Antonio*, supra, 274 Conn. 669.

[7] As a further example of the lack of vindictiveness, after Judge Vitale denied the defendant's motion for a new trial as inappropriate and untimely,

supra, 274 Conn. 698. Specifically, Judge Vitale never initiated plea discussions, did not participate in plea negotiations, and nothing in the record suggests that Judge Vitale departed from his role as an impartial arbiter, that the sentence to be imposed would hinge on the defendant's exercise of his right to trial, or that the length of the sentence to be imposed would be influenced because the defendant exercised his constitutional right to trial. Additionally, there are facts set out by Judge Vitale from the trial evidence relating to the seriousness of the crime and resulting near-death injuries, which explain the length of the sentence Judge Vitale imposed.

We next consider the defendant's argument that the sentencing court used the wrong standard applicable to claims of actual partiality rather than the appearance of it judged by whether a reasonable person might have questioned the court's impartiality in resolving the defendant's motion. In *State* v. *Milner*, supra, 325 Conn. 12–13, our Supreme Court held that where the record shows (as it does here) that the court, in reviewing a motion to recuse, had reviewed rule 2.11 of the Code of Judicial Conduct,[8] which covers both claims of actual bias and the appearance of partiality, it is fair to assume that the trial court reflected on the appropriate standard for both and rendered a conclusion consistent with its application of an objective inquiry.

Judge Vitale honored the defendant's rights and heard arguments regarding recusal, even though the defendant had filed no such motion or supporting affidavit. See Practice Book § 1-23. These actions further show a lack of any of the "concerns of judicial vindictiveness contemplated by the *Niblack* rule . . . ." *State* v. *D'Antonio*, supra, 274 Conn. 698.

[8] Rule 2.11 of the Code of Judicial Conduct provides in relevant part: "(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . ."

The defendant concedes that the court had no actual bias. In applying Practice Book § 1-22 (a)[9] and rule 2.11 of the Code of Judicial Conduct governing recusal of a judge, however, the reasonableness standard is an objective one. "Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances." *State* v. *Lane*, supra, 206 Conn. App. 9. When examining such circumstances, it must be restated that the abuse of discretion standard "requires us to indulge every reasonable presumption in favor of the correctness of the [trial] court's determination." (Internal quotation marks omitted.) Id., 8. Therefore, because our law presumes and expects that a duly appointed judge, consistent with his oath of office, will perform his duties impartially, the burden rests with the party moving for recusal to show that it is warranted. See *State* v. *Milner*, supra, 325 Conn. 12.

The following circumstances in the present case are pertinent. Judge Vitale never participated in plea negotiations, although another judge did. The defendant has not shown that Judge Vitale had any role or involvement in plea offers in connection with his case, nor was Judge Vitale responsible for the mistake of a probation officer who included mention of a rejected plea offer in his presentence report to the court. When Judge Vitale learned of this improper mention, he brought it to the attention of both the prosecution and defense, ordered it struck and redacted, and stated on the record it would have no effect on the sentence to be imposed. Moreover, as was true of the trial judge in *State* v. *Milner*, supra, 325 Conn. 12, Judge Vitale stated that he had reviewed

[9] Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ."

Practice Book § 1-22, rule 2.11 of the Code of Judicial Conduct, and the relevant case law in ruling on the defendant's motion. In addition, he set forth additional facts relevant to the objective inquiry of whether an appearance of bias might exist, including that he made no effort to confirm whether the alleged pretrial offer had been made. In short, there is nothing in the record to establish that Judge Vitale failed to consider whether his impartiality might reasonably be questioned under the objective standard. See *State* v. *Milner*, supra, 13 ("[w]e do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary" (internal quotation marks omitted)). Accordingly, we reject the defendant's claim that Judge Vitale applied the incorrect legal standard.

Nevertheless, the defendant briefs several reasons why, although there was no actual bias, the judge's impartiality might reasonably be questioned. First, the defendant argues that the reference in the presentence report to a pretrial sentence offer created, in effect, a floor that Judge Vitale, in sentencing, might have felt an "obligation" to exceed. We disagree. Whatever prior offer was made at a pretrial hearing before another judge, Judge Vitale made clear that he had been unaware of it and that it would have no impact whatsoever on the sentence he imposed. Instead, he based his sentence on proper considerations. He had sat through a lengthy trial where there were days of evidence about the defendant's brutal, unprovoked attack causing hospitalization and extensive medical treatment necessary to save the victim's life, which he referenced at sentencing. All of that evidence, which the court heard, pertained to matters for the sentencing court to take into account when considering the need for punishment, deterrence and protection of the public.

Second, despite the defendant's claim to the contrary, courts and sometimes even jurors are obligated and expected to set aside irrelevant matter in the performance of their duties to which they did not cause themselves to be subjected. See *State* v. *Roy D. L.*, 339 Conn. 820, 842, 262 A.3d 712 (2021). In *State* v. *Roy D. L.*, supra, 842, which involved an appeal from a bench trial, our Supreme Court reiterated the long held presumption that whenever "the court, act[s] as the trier of fact, [it] consider[s] only properly admitted evidence when it render[s] its decision." In that case, the court also noted that trial judges are less likely to be influenced by improper remarks made by counsel during a bench trial. See id., 843–44. These same presumptions apply equally to an improper mention of a rejected plea offer in a presentence investigation report given to the judge.

Third, the defendant urges that he was remorseful, had a criminal record consisting of mostly misdemeanors, and was fifty-five years old. The court considered all of those things, but found other factors, including the defendant's "cold and cunning premeditation" and the life-threatening injuries inflicted, and concluded a lenient sentence was not warranted for his crimes.

Finally, we do not place any significance on the defendant's reliance on the fact that both the sentence imposed and the purported prior plea offer involved a figure of twelve years.

On the basis of the foregoing, we determine that Judge Vitale did not abuse his discretion in denying the defendant's motion for recusal. We conclude that from all of the circumstances a reasonable person would not question the judge's impartiality. We thus conclude that there was no appearance of partiality to warrant disqualification of Judge Vitale, the trial judge at sentencing, based on a probation officer's single mistaken reference in the presentence investigation report to a rejected

plea offer, particularly when it was Judge Vitale who brought the officer's mistake to the parties' attention and took immediate steps to deal with it fairly.

The judgment is affirmed.

In this opinion the other judges concurred.

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## CATHIE PISHAL *v.* VICTOR PISHAL
## (AC 43613)

Prescott, Suarez and Bishop, Js.

*Syllabus*

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion to modify his alimony obligation. In his motion, the defendant alleged that his alimony obligation should be terminated on the basis of the plaintiff's cohabitation with a third party, or that his alimony obligation should be modified on the basis of a substantial change in his financial circumstances, as his current income was less than his income at the time of the dissolution as a result of his recent loss of employment. The court denied the defendant's motion in an oral ruling at the conclusion of a hearing on that motion. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly relied on a certain rule of practice (§ 15-8), which applied to civil actions and not to family matters, in denying his motion to modify his alimony obligation: the defendant failed to demonstrate that the trial court, in fact, relied on Practice Book § 15-8, as the plaintiff did not make a motion for judgment of dismissal under § 15-8 and the court did not dismiss the defendant's motion or refer to § 15-8 in its decision; moreover, the court's statement that the defendant had not proven a prima facie case of either cohabitation or a substantial change in circumstances reasonably could be interpreted to mean that, in its role as fact finder, the court had evaluated the totality of the evidence and did not find the relevant factual issues in the defendant's favor.
2. This court declined to review the defendant's remaining claims, namely, that the trial court improperly weighed the evidence and abused its discretion in declining to terminate or to modify the defendant's alimony obligation, the defendant having failed to provide an adequate record for review as required pursuant to the applicable rule of practice (§ 61-10): the record did not contain a proper statement of the court's decision, as the court did not file a memorandum of decision setting forth its reasoning in denying the motion and the defendant did not take steps

to obtain a transcribed copy of the decision signed by the trial court; moreover, although the record included the certified transcript, this court could not identify in the transcript the trial court's factual or legal bases for denying the defendant's motion, and the defendant failed to seek an articulation of the court's oral decision.

Argued January 10—officially released May 24, 2022

*Procedural History*

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Turner*, *J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Gould*, *J.*, denied the defendant's motion to modify alimony, and the defendant appealed to this court. *Affirmed.*

*Leslie I. Jennings-Lax*, with whom was *Marissa B. Hernandez*, for the appellant (defendant).

*Christine M. Gonillo*, for the appellee (plaintiff).

*Opinion*

PER CURIAM. In this postdissolution action, the defendant, Victor Pishal, appeals from the judgment of the trial court denying his motion to modify his alimony payments to the plaintiff, Cathie Pishal. The defendant claims that (1) the court improperly relied on Practice Book § 15-8, which applies to civil actions and not family matters, in concluding that he did not establish a prima facie case; (2) even if the court properly relied on § 15-8, it nonetheless improperly weighed the evidence and failed to properly consider whether he had presented sufficient evidence to establish a prima facie case; (3) the court abused its discretion in concluding that he was not entitled to the termination of his alimony obligation because the plaintiff was cohabitating with a third party; and (4) the court abused its discretion in concluding that he was not entitled to a modification of his alimony obligation because of a substantial change

in his financial circumstances. We affirm the judgment of the court.

The following procedural history is relevant to this appeal. On November 9, 2006, the court, *Turner*, *J.*, dissolved the marriage of the parties. The court, in its judgment, incorporated by reference a written separation agreement entered into by the parties. Section 3 of the agreement states in relevant part: "The [defendant] shall pay to the [plaintiff] alimony in the amount of $100 per week for a period of twenty (20) years. Said amount shall be modifiable upon motion submitted to the Superior Court if there is a substantial change in circumstances. Said amount shall cease upon the [plaintiff's] death, remarriage or cohabitation, or the [defendant's] death."

On June 13, 2019, the defendant filed a motion seeking the termination or modification of his obligation to pay alimony to the plaintiff. The defendant alleged that the plaintiff had been "residing with her significant other in the plaintiff's home for at least the past four years." The defendant also alleged that "the plaintiff's significant other contributes to the plaintiff's residence, altering the financial needs of the plaintiff." Additionally, the defendant alleged that, at the time of the judgment of dissolution in 2006, he was gainfully employed but that, on April 12, 2019, he "was released from his longtime employer through no fault of his own. The company downsized and terminate[d] one-third of their employees." The defendant alleged that his current income, derived from his receipt of Social Security and unemployment benefits, was less than his income at the time of the dissolution. Relying on the plaintiff's cohabitation and his decrease in income, the defendant sought, inter alia, (1) a modification of his alimony obligation to zero dollars, (2) an immediate termination of his alimony obligation, and (3) a finding that he had overpaid alimony to the plaintiff.

On October 8, 2019, the court, *Gould*, *J.*, held a hearing on the defendant's motion. At the hearing, the defendant's attorney presented testimony from both parties.[1] The parties were cross-examined by the plaintiff's attorney. Both parties presented documentary evidence as well. After the witnesses were examined, the court asked the defendant's attorney if she wished to present any additional testimony, to which she replied, "[n]o, Your Honor." The court asked the defendant's attorney, "[m]oving party rests?" The defendant's attorney replied, "[y]es, Your Honor." Thereafter, the court denied the motion.

The court stated: "All right. . . . I've listened to the sworn testimony of the parties. I've carefully reviewed the evidence that's been offered on both parties' behalf. The gravamen of the motion filed on behalf of the defendant requires proof of cohabitation and/or a change—a substantial change in the circumstances on the part—behalf of the plaintiff. The court finds that the defendant has not proven a prima facie case of either cohabitation or a substantial change in circumstances. So, the motion is therefore denied." Immediately following the court's ruling, the defendant's attorney stated that she wanted to be heard with respect to the issue of cohabitation. The court replied that there was "nothing else that needs to be added . . . ." Then, the defendant's attorney stated that "we also had indicated a substantial change in circumstances was part" of the motion. The court replied, "I indicated, and I've ruled on that as well."

On October 28, 2019, the defendant, pursuant to Practice Book § 11-11, filed a motion for reargument with respect to the court's ruling as it related to both grounds on which the defendant relied in the motion for modification, namely, the alleged change in the financial circumstances of the parties and the alleged cohabitation

[1] The defendant also presented testimony from a private investigator.

of the plaintiff and a third party.[2] The court summarily denied the motion for reargument. This appeal followed.

I

We first address the defendant's claim that that the court improperly relied on Practice Book § 15-8, which applies to civil actions and not family matters, in concluding that he did not establish a prima facie case. The defendant cannot prevail on this claim.

To prevail on this claim, the defendant must first demonstrate that the court, in fact, relied on Practice Book § 15-8.[3] We take note of the fact that the plaintiff did not make a motion for judgment of dismissal under this rule of practice, nor did the court dismiss the defendant's motion. In its ruling denying the motion, the court did not refer to this rule of practice. After stating that it had considered evidence presented by both parties, the court stated "that the defendant has not proven a prima facie case of either cohabitation or a substantial change in circumstances." This statement does not establish that the court relied on Practice Book § 15-8. In light of the circumstances in which it was made, the court's statement reasonably could be interpreted to

[2] "[T]he purpose of reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 47–48 n.13, 231 A.3d 297, cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020).

[3] Practice Book § 15-8 provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made."

mean that, in its role as fact finder, the court had evaluated the totality of the evidence and did not find the relevant factual issues in the defendant's favor.

It is well settled that the defendant can prevail on appeal not by raising the possibility that an error occurred, but by demonstrating on the basis of an adequate record that the court's ruling was erroneous. "We do not presume error. The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.) *Carothers* v. *Capozziello*, 215 Conn. 82, 105, 574 A.2d 1268 (1990). The defendant has not demonstrated that the court relied on the rule of practice at issue and, thus, he is unable to demonstrate that its reliance on the rule constituted error. Accordingly, the defendant's claim fails.

II

We next turn to the defendant's three remaining claims. For the reasons that follow, we conclude that these three claims are unreviewable due to an inadequate record.

The defendant's second claim is that, even if the court properly relied on Practice Book § 15-8 and analyzed whether he established a prima facie case in support of one or both grounds set forth in his motion, the court nonetheless improperly weighed the evidence and did not properly consider whether he had presented sufficient evidence to establish a prima facie case. The defendant argues that the court's role in evaluating whether he established a prima facie case is limited to determining whether the evidence on which he relied, if taken as true and interpreted in the light most favorable to him, supported the grounds in his motion for modification. The defendant asserts that "the trial [court] employed the wrong standard" because "[its] conclusion that these facts did not support [his] motion for modification necessarily involved the trial court's

weighing the evidence . . . .'' To prevail on this claim, the defendant must first present this court with a record of what standard the court applied when it denied the motion.

The defendant's third claim is that the court abused its discretion in concluding that he was not entitled to the termination of his alimony obligation because the plaintiff was cohabitating with a third party. To prevail on this claim, the defendant must demonstrate that the court's legal analysis of the issue of cohabitation was flawed or that its findings related to the issue were clearly erroneous. See, e.g., *Cushman* v. *Cushman*, 93 Conn. App. 186, 198, 888 A.2d 156 (2006) (standard of review applicable to cohabitation determination). ''[General Statutes §] 46b-86 (b) is commonly known as the cohabitation statute in actions for divorce. . . . In accordance with the statute, before the payment of alimony can be modified or terminated [on cohabitation grounds], two requirements must be established. First, it must be shown that the party receiving the alimony is cohabit[ing] with another individual. If it is proven that there is cohabitation, the party seeking to alter the terms of the alimony payments must then establish that the recipient's financial needs have been altered as a result of the cohabitation.'' (Citation omitted; internal quotation marks omitted.) *Lehan* v. *Lehan*, 118 Conn. App. 685, 695, 985 A.2d 378 (2010).

To prevail on his fourth claim, that the court abused its discretion in concluding that the defendant was not entitled to a modification of his alimony obligation because of a substantial change in his financial circumstances, the defendant must demonstrate that the court's legal analysis of the issue of a substantial change in circumstances was flawed or that its findings related to the issue were clearly erroneous. ''Section 46b-86 (a) provides that a final order for alimony . . . may be

modified by the trial court upon a showing of a substantial change in the circumstances of either party. Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the [General Statutes § 46b-84] criteria, make an order for modification. . . . A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Internal quotation marks omitted.) *Berman* v. *Berman*, 203 Conn. App. 300, 304, 248 A.3d 49 (2021).

As we have explained, these three claims require this court to review a record that adequately sets forth the factual and legal basis of the court's decision. We must have a clear picture of what legal standard the court applied in ruling on the motion. With respect to the issue of cohabitation, we must be able to ascertain whether the court rejected the claim because it found that cohabitation did not occur or because it found

that cohabitation occurred but that it did not alter the plaintiff's financial needs. Finally, with respect to the issue of a change in the defendant's circumstances, we must be able to ascertain whether the court rejected the claim because it found that the defendant's circumstances had not changed since the last court order or because it found that circumstances had changed but that it was not unjust or inequitable to hold the defendant to the terms of the prior order.

"Practice Book § 61-10 (a) provides: 'It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal.' This court does not presume error on the part of the trial court; error must be demonstrated by an appellant on the basis of an adequate record. . . . The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . [A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative. . . . If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim." (Citations omitted; internal quotation marks omitted.) *Berger* v. *Deutermann*, 197 Conn. App. 421, 426–27, 231 A.3d 1281, cert. denied, 335 Conn. 956, 239 A.3d 318 (2020).

First, we conclude that the record does not contain a proper statement of the court's decision. The defendant provided this court with a certified transcript of the

hearing on the motion for modification. The statements made by the court which appear previously in this opinion were excerpted from the transcript and are the full extent of the court's decision in this matter. The court did not file a memorandum of decision setting forth its reasoning in denying the motion for modification, nor did it prepare and sign a transcript of its oral ruling. See Practice Book § 64-1 (a).

The defendant did not take steps to obtain a transcribed copy of the court's decision, signed by the trial court, in compliance with our rules of practice which obligated him to file a notice pursuant to Practice Book § 64-1 (b) with the appellate clerk. "In cases in which the requirements of Practice Book § 64-1 have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. . . . This court has held, however, that despite an inadequate record, *such claims may be reviewed if the certified transcript provides the basis of the trial court's decision*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Santoro* v. *Santoro*, 132 Conn. App. 41, 47, 31 A.3d 62 (2011); see also *Michaels* v. *Michaels*, 163 Conn. App. 837, 845, 136 A.3d 1282 (2016) (reviewing court may overlook lack of signed transcript of oral decision provided that it can readily identify court's decision encompassing its findings). Although the record before us includes the certified transcript, we cannot identify in the transcript the factual or legal bases for denying the defendant's motion.

Second, the defendant did not attempt to seek an articulation of the court's oral decision pursuant to Practice Book § 66-5. "It is . . . the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of [a] decision . . . [or] to clarify the legal basis of a ruling." (Internal quotation marks omitted.) *CC Cromwell, Ltd. Partnership* v. *Adames*, 124 Conn.

App. 191, 194, 3 A.3d 1041 (2010); see also *Alliance Partners, Inc.* v. *Oxford Health Plans, Inc.*, 263 Conn. 191, 204, 819 A.2d 227 (2003). Because the court's oral decision denying the motion for modification does not specify the factual or legal basis for the ruling, the defendant's failure to seek articulation is especially significant.

The court's oral ruling does not afford this court with an adequate basis for review. The defendant not only failed to comply with Practice Book § 64-1, but failed to seek an articulation of the court's ruling. For these distinct reasons, we decline to consider the merits of the defendant's remaining claims.

The judgment is affirmed.

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## ARLENE BENNETTA *v.* CITY OF DERBY
## (AC 44871)

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

*Syllabus*

The plaintiff sought to recover damages from the defendant city for public nuisance in connection with injuries she sustained when she was physically and sexually assaulted while walking along a public trail in the city. The plaintiff's complaint alleged, inter alia, that the city has a high crime rate and is one of the least safe municipalities in the state, that the city had created or participated in the development of the trail and had invited people of all ages to walk the trail and that the trail was isolated, lacked security and was prone to criminal activity. The plaintiff sought damages under the statute (§ 52-557n (a) (1) (C)) that imposes liability on a municipality when its acts constitute the creation or the participation in the creation of a nuisance. The city moved to strike the complaint, asserting, inter alia, that the plaintiff's public nuisance action was barred by governmental immunity. The trial court granted the city's motion to strike, concluding that the complaint failed to allege that the city created the nuisance by some positive act as required by § 52-557n (a) (1) (C) and that there was no logical nexus by which to attribute the criminal actions of the plaintiff's assailant to the city. Thereafter, the plaintiff filed a substitute complaint, which contained the same allegations as the original complaint and an additional allegation that

the city permitted "vandals and other non-law-abiding people" to loiter, roam and congregate on the trail, which created a dangerous condition for people walking the trail. The city filed a motion to strike the substitute complaint, which the trial court granted for the same reasons that it had granted the city's previous motion to strike. Subsequently, the trial court granted the plaintiff's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on her claim that the trial court erred in granting the city's motion to strike because she properly had alleged in her substitute complaint that the city created the nuisance by a positive act as required by § 52-557n (a) (1) (C): although the plaintiff contended that the nuisance was the dangerous condition of the trail, the allegations viewed in the light most favorable to the plaintiff indicated that the nuisance, if any, was created by the "vandals and other non-law-abiding people" on the trail, and, despite alleging that the city permitted those individuals to be on the trail, the plaintiff did not allege that the city took any action to cause them to commit crimes, and, therefore, because the acts giving rise to the alleged nuisance were those of third parties and because the city's act of participating in the construction of the trail did not create or participate in the creation of a nuisance, the plaintiff failed to allege a legally sufficient cause of action for public nuisance; moreover, insofar as the plaintiff relied on her allegations that the city itself is especially dangerous in arguing that the city's conduct of constructing a trail, permitting "vandals and other non-law-abiding people" on that trail, and inviting the public to walk on the trail created the nuisance, such allegations were not a sufficient basis on which to conclude that the city positively acted to create the alleged nuisance, as the acts giving rise to the nuisance were of third parties and, therefore, were not positive acts of the city, and there was no logical nexus by which to attribute the criminal conduct of the "vandals and other non-law-abiding people" to the city.

Argued April 5—officially released May 24, 2022

*Procedural History*

Action to recover damages for public nuisance, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Pierson*, *J.*, granted the defendant's motion to strike the complaint; thereafter, the court granted the defendant's motion to strike the substitute complaint; subsequently, the court, *Pierson*, *J.*, granted the plaintiff's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

*Andrew J. Pianka*, for the appellant (plaintiff).

*Scott R. Ouellette*, for the appellee (defendant).

*Opinion*

ALVORD, J. In this public nuisance action, the plaintiff, Arlene Bennetta, appeals from the judgment of the trial court rendered after it granted the motion filed by the defendant, the city of Derby, to strike the plaintiff's substitute complaint. On appeal, the plaintiff claims that the court erred in striking her complaint because she properly alleged that the defendant created the nuisance by a positive act as required by General Statutes § 52-557n.[1] We disagree and, therefore, affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff commenced this action on March 27, 2020, by way of a one count complaint, alleging the following: "For many years, from at least the late 1990s to the present, the city of Derby has ranked as one of the least safe municipalities in the state of Connecticut, and continuously experiences high rates of violent and nonviolent crimes." In 2005, the defendant "created or participated in the development of a walking trail located on the west side of Derby along the Naugatuck and Housatonic Rivers. The project sought to invite people of all ages, including women, children, and the elderly to walk the trail."

Specifically, the plaintiff alleged that an area of the public trail located near the "Commodore Hull Bridge was constructed in an isolated area, lacked security, and was prime grounds for criminal activity." The plaintiff

[1] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . ."

alleged that the trail did not have "adequate surveillance cameras, phone stations, emergency call boxes, [or] police patrol," and was "out of sight from the general public." In addition, this area frequently was vandalized and often was visited by panhandlers. On November 2, 2019, the plaintiff, a senior citizen, went for a walk along the trail, and, in the area near the bridge, she was physically and sexually assaulted, suffering prolonged physical and mental injuries as a result. On the basis of these facts, the plaintiff alleged that the defendant was liable in nuisance.

On April 23, 2020, the defendant filed a motion to strike, arguing that the plaintiff's public nuisance action was "barred by recreational use immunity pursuant to [the Connecticut Recreational Land Use Act, General Statutes §§ 52-557f through] 52-557i, and governmental immunity pursuant to . . . § 52-557n for failure to state a claim and failure to allege a positive act." The plaintiff objected. On November 30, 2020, the court, *Pierson*, *J.*, granted the defendant's motion, determining that, "[e]ven when read in the light most favorable to the plaintiff, the complaint fails to allege any positive act taken by the defendant which led to the creation of a public nuisance" and that "there is no logical nexus by which to attribute the criminal actions of the plaintiff's assailant to the defendant." On December 2, 2020, the plaintiff filed a motion to reargue, which was denied.

On January 4, 2021, the plaintiff filed a substitute complaint. In addition to the original allegations, the substitute complaint alleged that "the defendant permitted vandals and other non-law-abiding people to loiter, roam, and congregate on and along the [public trail], which created a dangerous condition for those seeking to walk the trail."[2] The defendant filed a motion to strike

[2] In the substitute complaint, the plaintiff also stated that the section of the trail at issue "is owned and controlled by the state of Connecticut, but developed by the defendant . . . for the benefit of the defendant."

the substitute complaint as barred by recreational use immunity and governmental immunity. The defendant referenced the court's decision granting its first motion to strike and argued that the inclusion of the allegation that the defendant "permitted vandals and other non-law-abiding people" in the area did "not cure the defective pleading of the plaintiff's original complaint . . . ." Thereafter, on June 11, 2021, the court granted the motion to strike the substitute complaint, stating that "[t]he court agrees with the defendant that the additional allegations of the substitute complaint . . . fail to allege positive acts on the part of the defendant. As a result, and for the reasons stated previously by the court in its November 30, 2020 order . . . the defendant's motion to strike is granted." This appeal followed.[3]

On appeal, the plaintiff claims that she stated a legally sufficient public nuisance claim by alleging that the defendant (1) created or participated in the creation of the public trail in an area prone to criminal activity, (2) invited women, children, and the elderly to walk on the trail, and (3) permitted "vandals and other non-law-abiding people to loiter, roam, and congregate along the [trail] . . . ." The plaintiff contends that this conduct constituted positive acts within the meaning of § 52-557n (a) (1) (C). In response, the defendant argues that, although "the plaintiff alleges that the [defendant] created the [trail], the plaintiff has failed to allege that the criminal attack on her was created by some positive act by the [defendant]. The alleged positive act of creating the [trail] did not harm the plaintiff; it was the positive act of the perpetrator."[4] We agree with the defendant.

[3] The plaintiff's first appeal was dismissed by this court for lack of a final judgment because the trial court had not yet rendered judgment on the stricken pleading. Thereafter, on August 2, 2021, the trial court granted the plaintiff's motion for judgment, and this appeal followed.

[4] The defendant also argues that the judgment can be affirmed on the alternative ground that it is immune from liability pursuant to §§ 52-557f through 52-557i. Because we conclude that the plaintiff failed to allege a positive act on the defendant's part, we need not address this argument.

"We begin by setting out the well established standard of review in an appeal from the granting of a motion to strike. 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 on the [defendants' motion] 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. . . . 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. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 252–53, 990 A.2d 206 (2010).

We next set forth the principles applicable to a nuisance claim brought against a municipality. Our Supreme Court "has stated often that a plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages. . . . In addition, when the alleged tortfeasor is a municipality, our common law requires that the plaintiff also prove that the defendants, by some positive act, created the condition constituting the nuisance." (Citation omitted;

internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 146, 989 A.2d 593 (2010). This common-law rule is codified at § 52-557n (a) (1) (C), which provides in relevant part that "a political subdivision of the state shall be liable for damages to person or property caused by . . . acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . ."

Our Supreme Court has described the positive act requirement as follows: "[A]t a bare minimum, § 52-557n (a) (1) (C) requires a causal link between the 'acts' and the alleged nuisance. A failure to act to abate a nuisance does not fall within the meaning of the term 'acts,' as used in § 52-557n (a) (1) (C), because inaction does not create or cause a nuisance; it merely fails to remediate one that had been created by some other force. Accordingly, the plain meaning of § 52-557n (a) (1) (C) leads us to conclude that provision imposes liability in nuisance on a municipality only when the municipality positively acts (does something) to create (cause) the alleged nuisance." (Emphasis omitted; footnote omitted.) *Picco* v. *Voluntown*, supra, 295 Conn. 149–50.

A positive act is conduct that "intentionally created the conditions alleged to constitute a nuisance." *Elliot* v. *Waterbury*, 245 Conn. 385, 421, 715 A.2d 27 (1998). "[F]ailure to remedy a dangerous condition not of the municipality's own making is not the equivalent of the required positive act." (Internal quotation marks omitted.) *Brown* v. *Branford*, 12 Conn. App. 106, 112, 529 A.2d 743 (1987). Similarly, permissive continuation of the alleged nuisance is not a positive act. See id. Further, when the conditions comprising the nuisance are acts committed by third parties, there must be a "logical nexus by which to attribute any of the acts of the [third parties] to the defendant." Id., 113.

The following cases guide our resolution of this appeal. In *Brown* v. *Branford*, supra, 12 Conn. App. 107, the plaintiff instituted a nuisance action against the town of Branford after he "was struck by a motorcycle being driven by an unidentified youth." The plaintiff alleged that the town had "deliberately created" the nuisance; (internal quotation marks omitted) id., 112 n.4; and that "there existed in said area of public land . . . an unsafe and dangerous condition which was the source of numerous complaints from area residents, in that it has been used and frequented by youths from Branford and surrounding towns as a motorcycle race course and as an area where they could congregate, drink alcohol, use drugs and carouse not subject to any control." (Internal quotation marks omitted.) Id., 112 n.5. The trial court granted the defendant's motion to strike. Id., 107. On appeal, this court concluded that, "although perfunctorily stating that 'the said nuisance was deliberately created by the defendant,' [the complaint] recites nothing but a litany of acts amounting at most to a permissive continuation of the alleged nuisance." Id., 112. Because the nuisance was created by the youths with no connection to the defendant, the plaintiff's nuisance complaint failed to set forth a legally sufficient claim for want of a positive act. Id., 112–13.

Similarly, in *Elliot* v. *Waterbury*, supra, 245 Conn. 389, "[the decedent] was jogging on . . . an unpaved road in Morris when he was unintentionally shot and killed by . . . a person who was hunting in the watershed area adjacent to the road and owned by Waterbury." Although the defendant city of Waterbury allowed hunting in the watershed area, the defendant town of Morris did not allow hunting on the road. Id. Our Supreme Court concluded that "[t]he plaintiff . . . has offered no evidence that reasonably could be viewed as establishing that the Morris defendants, by some positive act, intentionally created the conditions

alleged to constitute a nuisance." Id., 421. Because "[h]unting adjacent to the public roadway is the condition alleged to constitute the nuisance," and because the plaintiff alleged no facts establishing that the town of Morris did anything to create the nuisance, the plaintiff could not maintain a nuisance cause of action against the town. (Internal quotation marks omitted.) Id., 421–22.

Finally, in *Perry* v. *Putnam*, 162 Conn. App. 760, 762, 131 A.3d 1284 (2016), this court considered the plaintiffs' claim that the trial court improperly had granted the defendant town's motion to strike on the basis that they had failed to allege facts sufficient to support a nuisance action. The plaintiffs alleged that the defendant had constructed a public parking lot next to their home and further alleged "a litany of annoyances emanating from the parking lot, ranging from vehicle noise, littering of automotive parts, assorted criminal activity, loud music, and headlights shining directly into the plaintiffs' home," interfering with the use and enjoyment of their property. (Internal quotation marks omitted.) Id., 762–63. This court determined that, because "the acts giving rise to the annoyances of which the plaintiffs complain are those of third parties," the defendant's "act of siting and constructing a parking lot did not [create] or [participate] in the creation of a nuisance . . . ." (Internal quotation marks omitted.) Id., 767–68. Accordingly, this court concluded that the trial court properly granted the motion to strike. Id., 768.

In the present case, although the plaintiff argues that the nuisance is the dangerous condition of the public trail, namely, the location of the trail, a reading of the allegations in the light most favorable to the plaintiff discloses that the nuisance, if any, was created by the "vandals and other non-law-abiding people" on the trail. See *Brown* v. *Branford*, supra, 12 Conn. App. 112. Thus, in order to survive a motion to strike, the plaintiff was

required to allege facts that establish that the defendant *did something* to *cause* the conduct of the "vandals and other non-law-abiding people . . . ." See *Picco* v. *Voluntown*, supra, 295 Conn. 149–50. She has failed to do so. Although the plaintiff alleged that the defendant permitted the "vandals and other non-law-abiding people" to be on the trail, she did not allege that the defendant took any action to cause those individuals to commit crimes. Because the acts giving rise to the alleged nuisance are those of third parties, namely the "vandals and other non-law-abiding people" on the trail, and because the act of participating in the construction of the trail did not create or participate in the creation of a nuisance, the plaintiff has not alleged a legally sufficient public nuisance cause of action. See *Perry* v. *Putnam*, supra, 162 Conn. App. 768.

Ultimately, the plaintiff relies on her allegations that Derby itself is especially dangerous in arguing that the defendant's conduct of constructing a trail, "permitt[ing] vandals and other non-law-abiding people" on that trail, and inviting the public to walk on the trail created the nuisance.[5] We disagree that such allegations create a sufficient basis on which to conclude that the defendant positively acted to create the alleged nuisance. As in *Perry* v. *Putnam*, supra, 162 Conn. App. 767–68, and *Brown* v. *Branford*, supra, 12 Conn. App. 112, the acts giving rise to the nuisance in the present case are those of third parties and, therefore, are not positive acts of the defendant as required by § 52-557n (a) (1) (C).

Finally, although the plaintiff alleged that "[t]he defendant permitted vandals and other non-law-abiding people" on the public trail, she did not allege any facts

[5] During oral argument before this court, in response to a hypothetical question, the plaintiff's attorney conceded that, if the public trail was constructed *before* the crime rate in Derby allegedly increased, the plaintiff would have no argument that the defendant intentionally created the nuisance.

to create a logical nexus between the behavior of the "vandals and other non-law-abiding people" and the defendant. See *Brown* v. *Branford*, supra, 12 Conn. App. 113. The only positive acts alleged with respect to the nuisance are those on the part of the "vandals and other non-law-abiding people" and the individual who attacked the plaintiff while she was walking on the public trail. There is no logical nexus by which the conduct of the "vandals and other non-law-abiding people" can be attributed to the defendant because the only connection between the two is the fact that the conduct occurred on a public walking trail that the defendant helped create.[6] See id., 112–13. We therefore conclude that the trial court properly granted the defendant's motion to strike and rendered judgment thereon.

The judgment is affirmed.

In this opinion the other judges concurred.

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[6] The plaintiff also argues on appeal that the motion to strike could not be granted on this basis because the issue of causation was not raised in the motion to strike. The defendant did, however, assert that there is no logical nexus by which to attribute the acts of the plaintiff's assailant to the defendant in its initial motion to strike, which was incorporated by reference into the second motion to strike. Furthermore, the defendant argued this point before the trial court during the hearing on its second motion to strike.

The plaintiff argues, in the alternative, that there is a logical nexus because "[t]he history of the area, the manner in which it was developed and maintained, and the invitation [to] vulnerable people to be exposed to non-law-abiding people, created a foreseeable risk that people would be victimized." Whether there is a "logical nexus by which to attribute any of the acts of the [third parties] to the defendant"; *Brown* v. *Branford*, supra, 12 Conn. App. 113; is not a question of causation but one of whether the alleged acts of the defendant constitute a positive act—it asks whether there is a connection between the defendant's actions and the third party's actions. See id. In the present case, there is no logical nexus connecting the creation of the public trail to the conduct of the "vandals and other non-law-abiding people" on the trail.

# WILLIS W. *v.* OFFICE OF ADULT PROBATION*
## (AC 44796)

Prescott, Moll and Suarez, Js.

*Syllabus*

The petitioner, who had been convicted, following a guilty plea, of two counts of reckless endangerment in the first degree, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance. The petitioner had been sentenced, inter alia, to a period of three years of probation, which ended on April 7, 2020. The habeas court granted the respondent's motion to dismiss the petition on the basis that it lacked jurisdiction, as the court did not receive the petition until April 24, 2020, at which point the petitioner was not in custody. The habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly dismissed the petition for lack of subject matter jurisdiction: although the petitioner effected personal delivery of his petition to a state marshal on the final day of his probation, the court declined to apply the savings statute (§ 52-593a), as a habeas action, unlike other civil actions, is not initiated until a petitioner files the petition with the clerk of the court for review by a judge; moreover, this court declined to review the petitioner's claim that he met the "in custody" requirement of the statute (§ 52-466) because he was being deprived of his liberty as a result of two standing criminal protective orders, effective for ten years, which were entered by the court at sentencing, as the petitioner failed to distinctly raise this claim before the habeas court and the court did not rule on this claim in a manner adverse to the petitioner.

Argued March 10—officially released May 24, 2022

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt, J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter,

* 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 party 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 party's identity may be ascertained.

the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

*Cameron L. Atkinson*, with whom, on the brief, were *Norman A. Pattis*, and *Patrick Nugent*, certified legal intern, for the appellant (petitioner).

*Linda F. Rubertone*, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

PER CURIAM. Following a grant of certification to appeal, the petitioner, Willis W., appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus for lack of subject matter jurisdiction. The petitioner claims that the court erred by (1) declining to apply General Statutes § 52-593a,[1] a savings statute that allows a plaintiff to avoid dismissal of a civil action on statute of limitations grounds through timely personal delivery of process to a proper officer and (2) concluding that he did not meet the jurisdictional "in custody" requirement of General Statutes § 52-466 (a),[2] despite the fact that, at the time he filed his habeas petition, his liberty was being deprived as a result of two standing criminal protective orders. We affirm the judgment of the habeas court.[3]

[1] General Statutes § 52-593a provides in relevant part: "(a) Except in the case of an appeal from an administrative agency governed by section 4-183, a cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery. . . ."

[2] General Statutes § 52-466 (a) provides in relevant part: "(1) An application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty. . . ."

[3] In its brief, the respondent, the Office of Adult Probation, argued that the form of the judgment is improper and that, rather than dismissing the

The relevant procedural history is not in dispute. On April 7, 2017, pursuant to a plea agreement, the petitioner pleaded guilty to two counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63. The trial court, *Comerford*, *J.*, accepted the plea and imposed a total effective sentence of one year of incarceration, execution suspended, followed by three years of probation. The court also entered two standing criminal protective orders, which were effective for ten years. These orders precluded the petitioner from having any contact with his two minor children and from owning any firearms.

With respect to the filing of the petition for a writ of habeas corpus that is the subject of this appeal, the habeas court, *Bhatt*, *J.*, found in its memorandum of decision dismissing the petition that, "[o]n April 6, 2020, counsel for [the petitioner] gave [the habeas petition filed in the present case] to a state marshal to serve on the [Office of Adult Probation, the] named respondent.[4] Service was effectuated on April 8, 2020, and the Superior Court received a copy of the petition on April 24, 2020, and the matter was thereafter assigned a docket number. In that petition, [the petitioner] claim[ed] that he received ineffective assistance of counsel because trial counsel should not have advised him to accept a

petition pursuant to Practice Book § 23-29 (1), which grants the court the authority to dismiss a petition for a writ of habeas corpus at any time if it determines that it lacks jurisdiction, the habeas court should have declined to issue the writ of habeas corpus pursuant to Practice Book § 23-24 (a) (1), which grants the court the authority to decline to issue a writ if, following its preliminary review of the petition, it appears that the court lacks jurisdiction. During oral argument before this court, however, the respondent's attorney acknowledged that it would be proper for this court to affirm the court's dismissal of the petition under § 23-29.

[4] The court noted that "[the petitioner] initiated this petition by suing the Office of Adult Probation. The proper respondent in a habeas corpus [action] is the Commissioner of Correction. The Office of the Attorney General and the Office of the State's Attorney have filed appearances representing the respondent in this matter."

plea deal given the evidence against [him]. Had trial counsel adequately advised [the petitioner, the petitioner contended], he would not have pleaded guilty and would have received a more favorable outcome.

"On October 23, 2020, the [respondent] filed a motion to dismiss, arguing, inter alia, that the court lack[ed] jurisdiction because [the petitioner] was not in custody at the time the habeas petition was filed with the court on April 24, 2020.[5] On December 10, 2020, [the petitioner] filed a memorandum of law in opposition to the [respondent's] motion to dismiss. In that [memorandum], he alleged that his [trial] counsel mailed a copy of the petition to a state marshal who received it on April 7, 2020, the last day of his probationary period. He argues that this constitute[d] compliance with . . . § 52-593a and, therefore, the petition was filed while he was still in custody.[6] On January 12, 2021, the [respondent] filed a corrected memorandum of law in support of [its] motion to dismiss . . . . The court heard oral arguments on January 13, 2021." (Footnotes added; footnote omitted.)

In its decision granting the motion to dismiss, the court relied on the undisputed factual submissions of the petitioner with respect to the steps he took to initiate the

[5] The respondent filed a motion titled "Motion to Dismiss and/or to Strike Petition" in which it argued, in part, that the petition should be stricken because the petitioner brought the petition against an improper party and because the petitioner failed to plead sufficient facts to establish a cause of action. Alternatively, the respondent argued that the petition should be dismissed because the petitioner was not in custody when the petition was filed with the court. The court did not address or rule on the portion of the motion in which the respondent asked it to strike the petition.

[6] The court accurately noted that, "[i]n support of [the petitioner's] memorandum of law in opposition to the motion to dismiss, he submitted an affidavit from Donna Peat, an employee of [his] counsel's law firm, which states that, on April 6, 2020, she sent a copy of the petition by FedEx overnight delivery to state marshal Alex J. Rodriguez with instructions to make service as soon as possible. [The petitioner] also submitted an affidavit from Alex J. Rodriguez, which states that, on April 7, 2020, the original writ, summons and petition came with and in his hands for service. Rodriguez' affidavit further states that, on April 8, 2020, he made due and legal service on the [respondent]."

habeas action. The court, however, agreed with the respondent that it lacked subject matter jurisdiction over the habeas petition because the petitioner was not in custody—meaning in prison, on parole, or on probation—at the time that the habeas petition was filed with the court. In this regard, the court relied on § 52-466 and well established case law related thereto. The habeas court, referring primarily to this court's analysis in *Hastings* v. *Commissioner of Correction*, 82 Conn. App. 600, 847 A.2d 1009 (2004), appeal dismissed, 274 Conn. 555, 876 A.2d 1196 (2005), reasoned that the operative date for determining whether a petitioner in a habeas action is " 'in custody' " is the date on which the petition is received in court. The habeas court concluded that the petitioner was not in custody on the date on which his petition was received in court because his probationary period ended on April 7, 2020, and he was "free of any restraints on his liberty on April 24, 2020."

The habeas court rejected the petitioner's reliance on § 52-593a. As noted previously in this opinion, the petitioner argued that he was entitled to the protection afforded by this remedial statute and that the action was filed while he was in custody because he was still on probation on April 7, 2020, the date on which a marshal, Alex J. Rodriguez, received the petition to serve on the respondent. See footnote 6 of this opinion. The court, relying on *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 555–61, 223 A.3d 368 (2020), noted that, unlike other civil actions, a habeas action is initiated when a petitioner *files the petition with the clerk of the court* for review by a judge who, pursuant to Practice Book § 23-24, undertakes a preliminary review of the petition and determines whether the writ shall issue. As our Supreme Court explained in *Gilchrist*, in a habeas action, service of process does not occur until after a petition is filed in court for a preliminary review,

the court determines that the petition pleads a nonfrivolous claim upon which relief can be granted and over which the court has jurisdiction, and the writ issues. Id., 556–57. The habeas court reasoned that, "[d]ue to the difference in the manner in which a petition for a writ of habeas corpus is to be filed [with the court], § 52-593a is not implicated." Accordingly, the court dismissed the petition for lack of subject matter jurisdiction under Practice Book § 23-29 (1).[7] The court thereafter granted the petitioner's petition for certification to appeal, which was brought pursuant to General Statutes § 52-470.

"The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 784, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009).

"A court has subject matter jurisdiction if it has the authority to hear a particular type of legal controversy. . . . Our Supreme Court has held that the party bringing the action bears the burden of proving that the court has subject matter jurisdiction. . . . [W]ith regard to subject matter jurisdiction, jurisdictional facts are [f]acts showing that the matter involved in a suit constitutes a subject-matter consigned by law to the jurisdiction of that court. . . .

"Our state's habeas proceedings are defined by General Statutes § 52-466 (a) (1), which provides in relevant

[7] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction . . . ."

part that [a]n application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty. . . . [O]ur Supreme Court [has] held that the custody requirement in § 52-466 is jurisdictional. . . . Accordingly, a habeas court has subject matter jurisdiction to hear a petition for a writ of habeas corpus only when the petitioner remains in custody on that conviction. . . . [C]onsiderations relating to the need for finality of convictions and ease of administration . . . generally preclude a habeas petitioner from collaterally attacking expired convictions. . . . Thus, once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual in custody for the purposes of a habeas attack upon it." (Citations omitted; internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 619, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010); see also *Hickey* v. *Commissioner of Correction*, 82 Conn. App. 25, 31, 842 A.2d 606 (2004), appeal dismissed, 274 Conn. 553, 876 A.2d 1195 (2005).

The petitioner's first claim pertains to the court's decision not to rely on § 52-593a. As he did before the habeas court, the petitioner argues that, when Rodriguez received the habeas petition on April 7, 2020, his probationary period had not yet expired and, therefore, he met the jurisdictional "in custody" requirement of § 52-466. Under our plenary standard of review, we conclude that the court, in its memorandum of decision, properly analyzed this issue consistent with *Gilchrist* and concluded that the petitioner was unable to avail himself of the remedy provided by § 52-593a. We will not repeat that analysis here.

The petitioner's second claim is that the court erred by concluding that he did not meet the jurisdictional

"in custody" requirement of § 52-466 (a) because, at the time he filed his habeas petition with the court, he was being deprived of his liberty as a result of two standing criminal protective orders that prevented him from having any contact with his two minor children and from possessing any firearms. The petitioner referred to "a protective order" in his petition but only to the extent that it prevented him from having contact with his children. In his memorandum of law in opposition to the motion to dismiss, however, the petitioner did not rely on the standing criminal protective orders continued effect as an alternative way of satisfying the jurisdictional "in custody" requirement of § 52-466. In fact, the petitioner in his memorandum of law did not refer to the existence of the standing criminal protective orders.[8] Instead, the petitioner expressly relied on his probationary status by arguing that he was entitled to the remedy provided by § 52-593a because "Rodriguez received the process within the time allotted by law for filing this action—namely, *before* [*his*] *probation had expired*." (Emphasis added.) As we stated previously in this opinion, the court did not consider in its memorandum of decision whether the petitioner was in custody because of the standing criminal protective orders. The court, in its analysis of the "in custody" requirement, considered only the petitioner's probationary period that expired on April 7, 2020. Following the court's ruling on the motion to dismiss, the petitioner did not file a motion for articulation related to this distinct ground.

In light of the foregoing facts, which unambiguously reflect that this ground was not distinctly raised before and ruled on by the court in a manner adverse to the petitioner, we decline to reach the merits of this claim.

[8] Likewise, the respondent did not refer to the existence of the standing criminal protective orders in its memorandum of law in support of the motion to dismiss. Instead, the respondent argued that the petitioner was not in custody when the petition was filed with the court on April 24, 2020, because the petitioner's period of probation had expired on April 7, 2020.

"It is well settled that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . It is equally well settled that a party cannot submit a case to the trial court on one theory and then seek a reversal in the reviewing court on another." (Citations omitted; internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408–409, 114 A.3d 168, cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). Our review of newly raised claims of this nature would amount to an ambuscade of the habeas judge. See, e.g., *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018); *Gonzalez* v. *Commissioner of Correction*, 211 Conn. App. 632, 655, A.3d (2022).[9]

The judgment is affirmed.

[9] The petitioner raised a third claim in this appeal, that the respondent erroneously had argued in its motion to dismiss and/or strike his petition that his petition should be stricken because he brought the action against the Office of Adult Probation, rather than the Commissioner of Correction. The petitioner acknowledges that the court did not address, let alone base its ruling on, this misjoinder argument. Because this "claim" does not challenge one or more of the grounds on which the court relied in rendering its judgment, we do not consider its merits. See *State* v. *Diaz*, 109 Conn. App. 519, 559, 952 A.2d 124 ("[w]e need not review the issue raised because in light of the court's analysis, it is irrelevant to the judgment from which the defendant appeals"), cert. denied, 289 Conn. 930, 958 A.2d 161 (2008).

# MEMORANDUM DECISIONS

## CONNECTICUT APPELLATE REPORTS

## VOL. 212

# MEMORANDUM DECISIONS

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M. F. *v.* K. F.
(AC 44963)

Alvord, Clark and Seeley, Js.

Argued May 12—officially released May 24, 2022

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Hon. Constance L. Epstein*, judge trial referee.

Per Curiam. The judgment is affirmed.

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JOSEPH SARGENT ET AL. *v.* RACHEL V. CASILLO ET AL.
(AC 44522)

Alvord, Elgo and Clark, Js.

Argued May 11—officially released May 24, 2022

Appeal by the defendant Stephen Vitka from the Superior Court in the judicial district of Fairfield, *Welch*, *J.*

Per Curiam. The judgment is affirmed.

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SHERI SPEER *v.* NEW LONDON PROPERTY GROUP TRUST
(AC 44917)

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

Argued May 17—officially released May 24, 2022

Plaintiff's appeal from the Superior Court in the judicial district of New London, *Calmar*, *J.*

Per Curiam. The judgment is affirmed.

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TAMMY GERVAIS, ADMINISTRATRIX (ESTATE OF RAYMOND GERVAIS), ET AL. *v.* JACC HEALTHCARE CENTER OF DANIELSON, LLC, ET AL.
(AC 44757)

Moll, Cradle and Harper Js.

Argued May 16—officially released May 24, 2022

Plaintiffs' appeal from the Superior Court in the judicial district of Windham at Putnam, *Lynch*, *J.*

Per Curiam. The judgment is affirmed. See *Bell* v. *Hospital of Saint Raphael*, 133 Conn. App. 548, 560, 36 A.3d 297 (2012); *Lucisano* v. *Bisson*, 132 Conn. App. 459, 465–66, 34 A.3d 983 (2011).

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# NOTICE OF CONNECTICUT STATE AGENCIES

## CT PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

### NOTICE OF INTENT TO ADOPT POLICIES REGARDING THE REFUND OF CONTRIBUTION OVERPAYMENTS

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 adopt the policies describing the criteria and processes related to the refund of overpaid employee contributions into the CT Paid Leave Trust Fund.

To request a copy of the contribution overpayments policy or to submit written comments regarding the policy, please email erin.choquette@ct.gov, including ''Contribution Overpayments Policy'' in the subject line.

All written comments regarding this policy must be submitted by June 24, 2022.

# PERSONNEL NOTICES

*(Affirmative Action/Equal Opportunity Employer)*

## DIVISION OF CRIMINAL JUSTICE

*(Affirmative Action/Equal Opportunity Employer)*

### STATE'S ATTORNEY
### JUDICIAL DISTRICT OF NEW HAVEN

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of New Haven (PCN 4806). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $175,770.00. For a description of this position please visit our website at https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.

Two (2) complete sets of application forms along with resumes and cover letters must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-New Haven JD (PCN 4806) and must be postmarked no later than **June 7, 2022**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

## DIVISION OF CRIMINAL JUSTICE

*(Affirmative Action/Equal Opportunity Employer)*

### STATE'S ATTORNEY
### JUDICIAL DISTRICT OF NEW BRITAIN

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of New Britain (PCN 4902). The successful applicant shall be subject to appointment to an eight (8) year term. The annual salary is $175,770.00. For a description of this position please visit our website at https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be

downloaded from the Division website at
https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.

Two (2) complete sets of application forms along with resumes and cover letters must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-New Britain JD (PCN 4902) and must be postmarked no later than **June 7, 2022**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

# NOTICES

## CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in April 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*

Baron, Andrew J of Wilbraham, MA
Carlton, Alexandra Josephine of Long Island City, NY
Dowret, Bridget Eve of Keene, NH
Griffin, Rachel Louise of Unionville, CT
Healy, Stephen Todd of Stamford, CT
Hunlock, Ryan Joseph of New Haven, CT
Pattacini, Alexander McCray of Bloomfield, CT
Peters, David Ernest of Fairfield, CT
Romanow, Dahlia Lake of West Hartford, CT
Ryff, Tyler Michael of South Glastonbury, CT
Sriskanda, Dianna Claudia of Staten Island, NY
Sweeney, Allison N. of New York, NY
Tutu, Esther Darko of Vernon, CT
Weikel, Elizabeth A. of Albany, NY

## CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in April 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*

Brill, Jeffrey Austin of New York, NY
Cain, Kelli Provenzano of Darien, CT
Cutler, Alison Barbara of Madison, CT
Iacoi, John M. of Boston, MA
Jacobi-Parisi, Sophie of Westport, CT
Kipnes, Karen D. of Waccabuc, NY
O'Toole, Sarah Faye of Foster, RI
Reynolds, Alina Marquez of Fairfield, CT
Soutter, David C. of Boston, MA
Triantafylidis, Vasilios Laki of Glastonbury, CT
Yunghans, David Howard of Arlington, MA

## Notice of Suspension of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on May 12, 2022, Attorney Andrew Cayo, Juris # 431355, was ordered suspended from practice of

law by the Hon. Robert Genuario for a period of thirty (30) days, commencing on June 1, 2022.

The full order of the court can be found in FSTCV 22-6056198-s OFFICE OF CHIEF DISCIPLINARY COUNSEL V. CAYO, ANDRE.

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**Notice of Suspension of Attorney**

Pursuant to Practice Book Section § 2-54, notice is hereby given that on April 27, 2022, in Docket Number HHD-CV22-6153543-S, Fiore Porreca, Juris No. 420376 of Attleboro, MA was suspended from the practice of law for a period of 6 months, effective immediately.

A trustee will not be appointed as the respondent has not recently practice law in Connecticut and has no clients or IOLTA account.

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

Prior to reinstatement in Connecticut the respondent must show compliance with all terms of the Order of Term Suspension of the Commonwealth of Massachusetts and demonstrate that he is eligible for reinstatement in that Commonwealth.

Prior to reinstatement in Connecticut the respondent will satisfy any bar requirements and will be otherwise in good standing.

Prior to reinstatement in Connecticut, the respondent must file a motion with this court and demonstrate compliance with all conditions stated herein.

Susan Quinn Cobb
*Presiding Judge*

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**Notice of Suspension of Attorney**

Pursuant to Practice Book Section § 2-54, notice is hereby given that on April 27, 2022, in Docket Number HHD-CV22-6152861-S, Jose Luis Altamirano, Juris No. 426572 of Danbury, CT has engaged in misconduct in that:

As to **Count One** (Grievance complaint, #21-0012) of the Presentment Complaint, respondent is guilty of misconduct in violation of rules 1.15 (b) and 8.4 (4) of the Rules of Professional Conduct and Practice Book § 2-32 (a) (1) as more fully set forth in the reviewing committee decision dated January 14, 2022. The respondent is suspended from the practice of law in Connecticut for a period of one year.

As to **Count Two** (Grievance complaint, #20-0026) of the presentment complaint, respondent is guilty of misconduct in violation of rules 1.3, 1.4 (a), 1.5 (a), 1.15 (b), 8.4 (3) and (4) and 8.1 (2) of the Rules of Professional Conduct and Practice Book § 2-32 (a) (1) as more fully set forth in the reviewing committee decision dated January 14, 2022. The respondent is suspended from the practice of law in Connecticut for a period of one year. This suspension is to run concurrent with the suspension in count one.

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

Any application for reinstatement shall be made pursuant to the provisions of practice book § 2-53.

The respondent has already been under suspension and therefore a trustee will not be appointed.

Susan Quinn Cobb
*Presiding Judge*

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**Notice of Inactive Status of Attorney**

Pursuant to Practice Book § 2-54, notice is hereby given that on May 12, 2022, Attorney Linnea J. Levine, Juris # 405238, is placed on inactive status by the Hon. Robert Genuario until further order of the court.

The full order of the court can be found in FSTCV 2216055987-s OFFICE OF CHIEF DISCIPLINARY COUNSEL V. Levine, Linnea J.

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**Notice of Pendency of Reinstatement Application**

In accordance with Section 2-53 of the Connecticut Practice Book, notice is hereby given that the following individual has filed an application for reinstatement to the bar:

**Lawrence Dressler**

The Standing Committee on Recommendations for Admission to the Bar of Fairfield County will commence a hearing on the above application on Thursday, June 9, 2022 at 9:30 am at Bridgeport Superior Court, 1061 Main Street, Bridgeport, CT 06604 and such future dates as are necessary to conclude the matter.

Please contact Kathleen M. Dunn, Chairperson (203-375-1433) for further information regarding the matter or if you have an objection to the application.

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