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CONNECTICUT REPORTS

Vol. 343

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

LEE WINAKOR *v.* VINCENT SAVALLE
(SC 20516)

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

Syllabus

Pursuant to the Home Improvement Act (§ 20-419 (4)), home improvement includes, inter alia, "the repair, replacement, remodeling, alteration . . . [or] improvement . . . to any land or building or that portion thereof which is used or designed to be used as a private residence" but does not include "(A) [t]he construction of a new home . . . ."

The plaintiff sought to recover damages from the defendant contractor for, inter alia, breach of contract and violations of the Home Improvement Act (§ 20-418 et seq.). The plaintiff had executed a contract with G Co. for the construction of a new house on land owned by the plaintiff. That contract permitted the plaintiff to contract for necessary site work with a separate contractor. Thereafter, the plaintiff and the defendant entered into a separate contract providing that the defendant would perform certain site work in connection with the construction of the new house, including the digging of a hole for the foundation, the installation of a septic tank and footing drains, and the construction of two retaining walls and two driveways. G Co. completed its construction of the house, and the plaintiff received a certificate of occupancy. At that

time, however, the defendant had not completed the site work he was obligated to perform under the parties' contract. The planning and zoning commission of the town in which the plaintiff's property was located informed the plaintiff that the house would be approved for zoning compliance if certain site work was completed. The parties then entered into a second contract requiring the defendant to complete the work that was agreed on in the first contract by a certain date and at an additional cost. The plaintiff ultimately became dissatisfied with the quality and timing of the defendant's work, terminated their relationship, and hired another contractor to complete the site work and to remedy any flaws in the defendant's previous work. The trial court ruled in part for the plaintiff, concluding that the defendant had breached the contracts with the plaintiff by failing to complete the site work on schedule and by causing the plaintiff to incur additional expenses to repair and finish the work that the defendant was contractually required to perform. The court also concluded that the defendant had violated the Home Improvement Act by failing to comply with certain statutory requirements regarding the form of the contracts and that the defendant's violation of the Home Improvement Act constituted a per se violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). The defendant appealed to the Appellate Court, which affirmed the trial court's judgment with respect to the plaintiff's breach of contract claim but reversed with respect to the plaintiff's claims under the Home Improvement Act and CUTPA. The Appellate Court concluded that the Home Improvement Act did not apply to the defendant's work, as that work fell within the new home exception set forth in § 20-419 (4) (A), and, consequently, the plaintiff failed to state a claim under both the Home Improvement Act and CUTPA. The plaintiff, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that the Home Improvement Act did not apply to the defendant's work because that work fell within the new home exception set forth in § 20-419 (4) (A), and, accordingly, this court affirmed the Appellate Court's judgment: although the contracts between the plaintiff and the defendant were separate from the contract between the plaintiff and G Co. to construct the new house, the work the defendant agreed to perform was within the scope of the work contemplated by the contract between the plaintiff and G Co., as many of the projects the defendant was obligated to complete were expressly included in the contract between the plaintiff and G Co., and, thus, the work the defendant agreed to perform would have been completed by G Co. if the plaintiff had not elected to contract out the site work to the defendant; moreover, G Co.'s construction work could not have proceeded without the defendant's work, as G Co.'s work depended physically and temporally on the defendant's foundation work, the defendant was required to communicate with G Co. throughout the defendant's performance of the site work, and the first contract between the plaintiff and the defen-

dant specified that the defendant was to complete his work within a certain time for the purpose of facilitating G Co.'s construction of the house, and, thus, both the close timing and the extensive communication required between the defendant and G Co. led to the conclusion that the defendant's work was sufficiently interrelated with the construction of the house; furthermore, much of the work the defendant performed contributed directly to the habitability of the house, and that work was necessary in order for the house to comply with the town zoning requirements.

Argued December 20, 2021—officially released June 28, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Frechette*, *J.*; judgment for the plaintiff, from which the defendant appealed to the Appellate Court; thereafter, the court, *Frechette*, *J.*, granted the plaintiff's motion for attorney's fees, and the defendant filed an amended appeal; subsequently, the Appellate Court, *Prescott*, *Moll* and *Harper*, *Js.*, reversed in part the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Paul M. Geraghty, with whom was *Jonathan E. Friedler*, for the appellant (plaintiff).

Patrick J. Markey, with whom, were *James H. Lee* and, on the brief, *Mary H. Patryn*, for the appellee (defendant).

Opinion

KAHN, J. This appeal requires us to consider whether certain services provided by a contractor fall under the purview of the Home Improvement Act, General Statutes § 20-418 et seq. In this appeal, the plaintiff, Lee Winakor, claims that the Appellate Court incorrectly concluded that the Home Improvement Act did not apply to work performed on his property by the defendant, Vincent Savalle. The defendant claims that the

work falls under the new home exception of the Home Improvement Act and, therefore, that the Appellate Court's conclusion was correct. We agree with the defendant and, accordingly, affirm the judgment of the Appellate Court.

The following undisputed facts and procedural history are relevant to the present appeal. In 2005, the plaintiff purchased real property located at 217 Legend Wood Road in North Stonington. In 2012, the plaintiff executed a contract with Golden Hammer Builders, LLC (Golden Hammer), through its principal, Brian Mawdsley, in order to construct a single-family home on the property. The contract contemplated the construction of the home and all related site work for a price of $425,300. It also contained a provision permitting the plaintiff to subtract $55,000 from the total cost of the construction by independently contracting for the necessary site work with a separate contractor.

After meeting with the plaintiff, the defendant submitted a bid to complete that site work for under $50,000. The plaintiff accepted the defendant's bid and drafted a contract to memorialize their agreement. That contract specifically required the defendant to "[p]urchase and supply any/all supplies . . . [c]lear [the] lot . . . remove stumps, [d]ig [the] foundation hole . . . and well trenches, [p]urchase and install [a] septic [tank] . . . build a wall along [the] edge of [the] lakeside . . . build two retaining walls . . . [build] [t]wo driveways . . . [reclaim] asphalt . . . [for the] driveway . . . [g]rade [the] driveway . . . [at] 8 [percent] . . . [i]nstall footing drains and backfill foundation, [f]inish [the] grade, [s]eed [the] . . . lawn, [and conduct any] [b]lasting . . . ." The contract further specified that the defendant would complete the work within one year of the start date. After the contract was signed, the defendant also orally agreed to dig a trench for the propane system and to install a patio. Mawdsley then

applied for, and secured, a new home building permit under his new home construction contractor's license.

The defendant began his work in September, 2012. The trial court found that "[h]e hammered out a ledge for the foundation, installed a septic tank, constructed retaining walls . . . installed a propane tank and gas lines . . . installed the well electrical line, and partially finished the driveway." In December, 2013, Golden Hammer completed construction of the house, and the plaintiff received a partial certificate of occupancy. A full certificate of occupancy was issued for the house in January, 2014.

At the time the certificate of occupancy was issued, however, the defendant had not yet completed the site work as contemplated by his contract with the plaintiff. The Planning and Zoning Commission of the Town of North Stonington issued a letter to the plaintiff indicating that the house substantially conformed to its zoning regulations and would be approved for zoning compliance on the condition that, among other things, "the final grading, landscaping, and soil stabilization be completed within [six] months," and the driveway be widened. The plaintiff and the defendant subsequently entered into a second contract requiring the defendant to complete the work that was set out in their first contract by April 1, 2014, for an additional $10,000.[1]

The plaintiff ultimately became dissatisfied with the quality of the defendant's work[2] and the defendant's

[1] By this point, the plaintiff had already paid the defendant approximately $53,000 on the original contract.

[2] In its memorandum of decision, the trial court listed numerous deficiencies in the defendant's performance. "First, the defendant did not properly backfill the foundation, using large rocks and boulders instead of dirt to support the foundation. . . . Additionally, the footing drains for the foundation were improperly installed, causing flooding in the basement of the house.

"Second, the defendant improperly installed the septic system because it was backfilled with rocks instead of sand and too close to the surface, making it more likely [that] it could be crushed. That is exactly what happened in

failure to complete the project according to the schedule set forth in either their first or second contract. The plaintiff terminated his relationship with the defendant in April, 2014, and subsequently hired another contractor, Charles Lindo, to finish the work that the defendant had failed to complete and to remedy any flaws in the work that the defendant had completed. Lindo completed the site work at additional cost to the plaintiff, and the town subsequently notified the plaintiff that his new residence fully complied with its zoning regulations.

The plaintiff then commenced the present action against the defendant. The operative amended complaint contained five separate counts: (1) breach of con-

2014, when the defendant crushed the top of the tank, requiring another tank to be installed in April, 2014. This tank too was deficient and required replacing because the line running from it to the house had a break in it. . . . The defendant admitted in his posttrial brief that he crushed the septic tank.

"Third, the defendant improperly constructed the retaining walls in the front and back of the house because they leaned, contained gaps, and washed out due to improper backfilling.

"Fourth, the defendant improperly installed the patio. Although not specified in the contracts, the defendant agreed to construct the patio. Yet, his installation used rocks instead of sand as backfill, causing the patio to settle improperly.

"Fifth, the defendant did not grade and seed the property when he left the site in April, 2014. Instead, he left the property a mess with materials scattered around the property, trees knocked down, and rocks located throughout the site.

"Sixth, the defendant improperly installed the propane tank. Although not specified in the contracts, the defendant agreed to install and backfill the tank. Yet again, he used rocks rather than sand as backfill for the tank and pipe, causing the propane to leak from the pipe and damaging the tank. After inspection, the entire tank and pipe were replaced.

"Seventh, the defendant improperly installed the well electrical line, using rocks instead of sand as backfill. Consequently, the electric line failed and needed replacement.

"Eighth, the defendant did not properly reclaim or grade the driveway. The driveway was at a grade higher than 8 percent, causing the plaintiff to regrade it. Further, the lower half of the driveway was not reclaimed with asphalt because it was left as dirt."

tract; (2) unjust enrichment; (3) violations of the New Home Construction Contractors Act (New Home Act), General Statutes § 20-417a et seq.; (4) violations of the Home Improvement Act; and (5) violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., predicated on violations of the Home Improvement Act and the New Home Act. The case was subsequently tried to the court. In the memorandum of decision that followed, the trial court ruled in favor of the plaintiff on counts one, three, four, and five of the complaint. Specifically, the trial court found in favor of the plaintiff on count one, concluding that the defendant had breached his contract with the plaintiff by failing to complete the site work on schedule and by "using improper techniques and methods to [perform] the contract . . . [causing] the plaintiff [to incur] additional expenses to repair and finish the work the defendant was contractually required to do."[3] The court also ruled in favor of the plaintiff on counts three and four, concluding that the defendant violated the Home Improvement Act by failing to comply with certain statutory requirements regarding the form of the contract. The trial court's memorandum of decision characterized both counts three and four of the complaint as having alleged a violation of the Home Improvement Act.[4] Finally, the court ruled in favor of the plaintiff on count five, concluding that the defen-

[3] Because the trial court found a breach of an enforceable contract, it concluded that the plaintiff was not entitled to recover under a theory of unjust enrichment, as alleged in count two of the complaint. See, e.g., *Gagne* v. *Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001) (lack of remedy under contract is precondition for recovery under theory of unjust enrichment).

[4] The Appellate Court, however, concluded that the plaintiff had abandoned any claim under the New Home Act by failing to assign error to the trial court's conflation of those two counts. *Winakor* v. *Savalle*, 198 Conn. App. 792, 797 n.4, 234 A.3d 1122 (2020). The plaintiff does not contest this conclusion in the present appeal and has chosen, instead, to argue only that the work conducted by the defendant falls within the purview of the Home Improvement Act.

dant's violation of the Home Improvement Act constituted a per se violation of CUTPA. The court awarded the plaintiff $100,173.32 in compensatory damages on these counts.

The plaintiff subsequently filed a motion seeking an award of attorney's fees under CUTPA. The court held a hearing on that motion and awarded the plaintiff $126,126.91 in attorney's fees and $2412.05 in costs. The defendant then appealed both the trial court's judgment and the award of attorney's fees to the Appellate Court.

Before the Appellate Court, the defendant claimed that (1) there was insufficient evidence to show causation of damages on the breach of contract count, and (2) the trial court's award under CUTPA was misguided because it was based on an incorrect application of the Home Improvement Act. The Appellate Court affirmed the trial court's judgment with respect to the breach of contract count but reversed with respect to the remaining claims, concluding that the Home Improvement Act did not apply to the defendant's work under the contracts. *Winakor* v. *Savalle*, 198 Conn. App. 792, 816, 234 A.3d 1122 (2020). Specifically, the Appellate Court concluded that the work performed by the defendant fell within the new home exception of the Home Improvement Act; General Statutes § 20-419 (4) (A); and that, as a result, the plaintiff had failed to state a claim under both the Home Improvement Act and CUTPA. *Winakor* v. *Savalle*, supra, 800–801.

In the present appeal, the plaintiff contends that the Appellate Court erred because the work performed by the defendant was distinct from the construction of the new home and, as such, fell within the scope of the Home Improvement Act and was not excluded by its new home exception. In response, the defendant argues that the work he performed was so interrelated to the

construction of the new home that it must fall under the new home exception of the Home Improvement Act.

We begin by setting forth the appropriate standard of review. "Whether the [Home Improvement Act] applies to the transaction at issue is a matter of statutory construction. Statutory construction is a question of law and therefore our review is plenary." (Internal quotation marks omitted.) *Meadows* v. *Higgins*, 249 Conn. 155, 162, 733 A.2d 172 (1999). "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Marsh & McLennan Cos.*, 286 Conn. 454, 464–65, 944 A.2d 315 (2008); see also *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666, 676, 657 A.2d 1087 (1995) (*Rizzo*).[5]

[5] We note that, in some cases involving the Home Improvement Act, the parties might dispute the trial court's underlying findings of fact. Appellate review of those issues would call for a clearly erroneous standard of review. See, e.g., *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 341 Conn.

We begin our statutory analysis, then, with the language of the Home Improvement Act. The definitions set forth in § 20-419 provide in relevant part: " 'Home Improvement' includes, but is not limited to, the repair, replacement, remodeling, alteration, conversion, modernization, improvement, rehabilitation or sandblasting of, or addition to any land or building or that portion thereof which is used or designed to be used as a private residence, dwelling place or residential rental property . . . . 'Home improvement' does not include: (A) The construction of a new home . . . ." General Statutes § 20-419 (4). The Home Improvement Act, however, does not define what constitutes construction of a new home.

Thus, in order for the defendant to be liable under the Home Improvement Act, the site work at issue must fall within the definition of home improvement and outside of the scope of the exception for construction of a new home. Although what constitutes a home improvement versus a new home construction is not clearly explained by this statutory language, this court has previously considered the distinction between those two statutory categories in *Rizzo Pool Co.* v. *Del Grosso*, supra, 232 Conn. 666, and provided a definition for the scope of the new home exception. In *Rizzo*, the defendants signed a contract with the plaintiff to install a swimming pool on their property while their new home was under construction. Id., 669. After a dispute arose, the plaintiff initiated an action for breach of contract. Id., 670. The trial court in *Rizzo* held that the defendants could not assert a special defense under the Home Improvement Act on the ground that the new

750, 760, 267 A.3d 753 (2022). Because the parties in the present case do not dispute the trial court's underlying findings of fact, the question now before us—the application of the statutory language to the trial court's factual findings—is a question of law. See, e.g., *Meadows* v. *Higgins*, supra, 249 Conn. 162.

home exception applied because installation of the pool was part of the construction of a new home. Id., 671–72.

On appeal, in considering whether the pool installation was part of the construction of the new home, we interpreted the new home exception as requiring that the pool installation and the construction of the home "were so interrelated, temporally or otherwise, that the installation of the pool constituted an integral part of '[t]he construction of a new home' under § 20-419 (4) (A)." Id., 678. In interpreting the language of the new home exception, we relied on both its relationship to other statutes—namely, General Statutes §§ 47-116 through 47-121, titled "New Home Warranties"—and the statute's legislative history. Id., 678–80. Applying this definition of the new home exception to the undisputed factual findings, we held that the pool installation did not fall within the scope of this definition. Id. Specifically, we noted that the "pool installation contract was completely separate and distinct from the defendants' home construction contract, and the two contracts were to be performed by entirely different and unrelated contractors. Moreover, the documents that comprise[d] the contract for the construction of the swimming pool contain[ed] no indication that the pool was to have been installed at any particular stage of the new home construction, or even that it was to have been installed prior to the completion of the new home." Id., 677–78.

Applying this definition to the undisputed underlying factual findings regarding the site work at issue in the present case, we conclude that the work performed by the defendant clearly fell within the new home exception. Specifically, although the contract between the plaintiff and the defendant in the present case was separate from the home construction contract between the plaintiff and Golden Hammer, the work the defendant agreed to perform was within the scope of the work contemplated by the Golden Hammer home con-

struction contract. Indeed, many of the projects that the defendant was contracted to perform, such as digging the foundation hole and well trenches, installing the septic tank, building the retaining walls, constructing the driveway, and conducting the landscaping, were expressly included in the home construction contract.[6] By contract, then, the work the defendant agreed to perform would have been completed by the new home construction contractor if the plaintiff had not elected to subcontract that portion of the new home construction contract. Therefore, we agree with the Appellate Court's assessment that, unlike in *Rizzo*, both of the agreements in the present case essentially relate to the same work.

Additionally, Golden Hammer's work could not have proceeded independently from the work of the defendant. For example, the construction work performed by Golden Hammer was entirely dependent, both physically and temporally, on the defendant's foundation work. Although this case involved different contractors, it cannot be said that their work was unrelated. The plaintiff himself testified that the defendant "was asked to stay in close contact with [Mawdsley] . . . ." Indeed, testimony throughout the trial revealed that the defendant had to communicate consistently with Golden Hammer throughout the performance of the site work,

[6] Our review of the record reveals only one minor aspect of the work under the defendant's contract that was not contained within the scope of the new home construction contract, namely, the construction of the plaintiff's patio. The patio was first mentioned when the parties reached an oral agreement following the execution of the first written contract. Although the plaintiff's principal brief to this court relies on the defendant's agreement to build the patio as a basis to distinguish the defendant's work as a home improvement, the plaintiff did not raise that argument before the Appellate Court. The Appellate Court's opinion, in turn, contained no analysis of whether defects in the patio warranted independent relief under the Home Improvement Act. See generally *Winakor* v. *Savalle*, supra, 198 Conn. App. 806–10. As a result, we decline to address that same question for the first time in the present appeal.

which shows how interrelated the site work was with the overall home construction. Moreover, the contract with the defendant clearly contemplated the construction of a new home and specified that the defendant was to complete his work within one year for the purpose of facilitating that construction. Both the close timing and the extensive communication required between the contractors in the present case bolster our conclusion that the defendant's work was sufficiently "interrelated, temporally or otherwise," with the construction of the home. *Rizzo Pool Co*. v. *Del Grosso*, supra, 232 Conn. 678.

Finally, we also agree with the Appellate Court that "the nature of the construction work itself, namely, its relationship to the habitability of the home," is another consideration relevant to determining whether the work is a home improvement or part and parcel of new home construction. *Winakor* v. *Savalle*, supra, 198 Conn. App. 806. Much of the work that the defendant performed in the present case, including hammering out a ledge for the foundation, digging a trench for the well's electrical system, building retaining walls, and installing the septic tank, contributed directly to the habitability of the home. See, e.g., *Laser Contracting, LLC* v. *Torrance Family Ltd. Partnership*, 108 Conn App. 222, 227–29, 947 A.2d 989 (2008) (attachment of mobile home to new foundation fell within new home exception to Home Improvement Act). Although the plaintiff correctly notes that the defendant's work relating to the driveway and the landscaping was not required prior to the issuance of a certificate of occupancy, evidence adduced at trial showed that this work was necessary in order for the home to comply with the town zoning requirements. Thus, when we apply the definition of the new home exception to the underlying facts, it is clear that the work performed by the defendant fell within the new home exception.

The plaintiff also argues that, without recourse under the Home Improvement Act, there would be no real remedy for consumers who have contracted with unscrupulous contractors in the defendant's position. This is not so. The legislature has created such a remedy in the New Home Act, which applies to "any agreement between a new home construction contractor and a consumer for the construction or sale of a new home or any portion of a new home prior to occupancy . . . ." General Statutes § 20-417a (3). Prior to the passage of the New Home Act, the legislature noted an "anomaly" that resulted from the fact that new home construction was not covered by the Home Improvement Act and, thus, left a gap in adequate coverage for consumers. See Conn. Joint Standing Committee Hearings, General Law, Pt. 1, 1999 Sess., p. 17–18, remarks of Attorney General Richard Blumenthal. Indeed, the legislature noted that "[t]he purpose of this new home construction guarantee bill is similar to the bill that [the legislature] adopted . . . ten years [beforehand] for home remodelers." 42 H.R. Proc., Pt. 9, 1999 Sess., p. 3309, remarks of Representative Arthur J. Feltman. Although the plaintiff may have had recourse against the defendant under the New Home Act, that claim was abandoned before the Appellate Court. See footnote 4 of this opinion. The plaintiff's claim under the Home Improvement Act is unavailing.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STEPHEN BIRKHOLD *v.* SUSAN BIRKHOLD
(SC 20593)

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

Syllabus

The plaintiff, whose marriage to the defendant had been dissolved, appealed from the trial court's postdissolution decision to grant the plaintiff's

motion for modification of alimony and the defendant's motion for contempt, and to award the defendant past due alimony and attorney's fees. When the parties' marriage was dissolved in 2009, the plaintiff was employed as the chief executive officer of a major corporation and was paid a base annual salary and bonuses. The parties' separation agreement, which had been incorporated into the judgment of dissolution, required the plaintiff to pay the defendant alimony in the amount of 30 percent of his "gross annual base income from employment" and 25 percent of his gross cash bonus. The plaintiff subsequently left that corporation and, in 2015, began working as a commercial real estate broker for C Co. Under C Co.'s compensation plan, the plaintiff received annual draws on future commissions, initially in the amount of $35,000 a year, and, if he did not earn commissions sufficient to cover the draws, he was obligated to pay the difference back to C Co. The plaintiff elected to have the draws deposited into a bank account in the name of a limited liability company, S Co., that he had created in 2014. The plaintiff also deposited into that account money he earned in connection with certain consulting work he performed on the side. The plaintiff notified the defendant when his employment at C Co. began, and she initially agreed to accept monthly alimony in the amount of $875, or 30 percent of the $35,000 annual draw. The plaintiff, however, continued to pay her only $875 per month, even though his annual draw rate increased significantly between 2015 and 2019. In response, the defendant filed her motion for contempt and sought payment of accrued, unpaid alimony that purportedly was owed under the separation agreement. The plaintiff, on the other hand, sought to modify his alimony obligation due to a substantial change in circumstances relating to the nature of his employment with C Co. After a hearing, the trial court granted both motions and awarded the defendant past due alimony and attorney's fees. With respect to the plaintiff's motion to modify his alimony obligation, the court replaced the requirement under the separation agreement that he pay the defendant 30 percent of his gross annual base income from employment with a fixed alimony obligation of $6500 per month. The court also found the plaintiff in contempt for wilfully violating his alimony obligation under the separation agreement. On appeal from the trial court's decision, *held*:

1. The plaintiff could not prevail on his claim that the trial court incorrectly had interpreted the separation agreement and found that the money the plaintiff received from C Co. in the form of draws constituted income that was subject to alimony: the agreement's clear and unambiguous definition of "gross annual base income from employment" was without limitation and included income the plaintiff actually received as compensation for, or by reason of, past, present or future employment, from any and all sources, and nothing in the agreement indicated that it contemplated the payment of alimony derived from traditional salary income but not from commissions or consulting fees; moreover, although the term "income" was not defined in the separation agreement, and,

therefore, that term was ambiguous, the trial court's determination that the plaintiff's draws from C Co. constituted income was not clearly erroneous, as the draws were clearly from his employment as a real estate broker, they were listed as payroll when deposited into S Co.'s bank account, the plaintiff reported the draws as gross income on his personal tax returns, C Co. referred to the plaintiff as an employee and to his income as earnings on its pay statements, the plaintiff would have to pay back unearned draws if his employment relationship with C Co., he presented no evidence about how he earned commissions or about whether C Co. ever recovered, demanded or threatened to recover unearned draws from him such that the draws should be treated as loans rather than income, and he treated the money he received from C Co. as income in every relevant way, except to pay alimony to the defendant; furthermore, the trial court's skepticism toward the plaintiff's calculation of his alimony obligation under the separation agreement after he started working for C Co. was well founded, as the defendant failed to established how he earned his commissions, how much of them were applied to his draws, and why he did not pay alimony on commissions he earned.

2. The trial court correctly interpreted the separation agreement and treated the money the plaintiff earned from C Co. and from other entities as a consultant, which ultimately was deposited into S Co.'s bank account, as the plaintiff's personal income that was subject to alimony: the trial court's factual findings that the plaintiff treated the money he earned at C Co. and for his consulting work as his own income and that such earnings constituted income subject to alimony were not clearly erroneous because, although the plaintiff chose to have his draws from C Co. and the money he earned from consulting deposited into S Co.'s bank account, he could not structure the receipt of his income and use the corporate form to avoid his alimony obligation; moreover, many of S Co.'s claimed business deductions appeared to be personal expenses, S Co.'s actual business activities appeared to consist only of taking money received by the plaintiff and finding ways to claim deductions and expenses to shelter or hide it from the defendant, and nothing in the separation agreement addressed business related expenses; furthermore, although it may be advantageous for tax purposes to set up a limited liability company, such as S Co., that fact had no bearing on the determination of whether income is properly subject to alimony.

3. The trial court did not abuse its discretion in modifying the plaintiff's alimony obligation by requiring the plaintiff to pay to the defendant a fixed amount of $6500 per month: contrary to the plaintiff's claim that the trial court considered only his past gross income and improperly modified his alimony obligation on the basis of an earning capacity not supported by the record, the court considered all of the statutory (§ 46b-82 (a)) factors that a court must consider in determining an alimony award and found that there had been a change of circumstances that

necessitated a modification to the plaintiff's alimony obligation, namely, that the plaintiff became a consultant and an independent contractor with much more complicated finances, that his base salary was reduced and his bonuses eliminated, and that he remarried and relocated to a state without any state income tax; moreover, the record contained sufficient evidence to support the court's findings regarding the plaintiff's earning capacity, the court based its decision on the income of both parties and their income earning potential, and its order provided for a second look at the plaintiff's alimony obligation when he reached the age of sixty-five; furthermore, the court expressly noted that its alimony determination was based on a net earning capacity of $250,000, which was markedly less than the plaintiff's past gross annual income of $350,000.

4. The trial court did not abuse its discretion in finding the plaintiff in contempt for breaching his alimony obligation to the defendant: it was sufficiently clear from the terms of the separation agreement that the plaintiff was required to pay alimony on commissions he earned and on other consulting income, he did not pay such alimony, and it was untenable to conclude that he did not wilfully fail to fully comply with his obligation under the separation agreement to pay alimony on the basis of his gross annual base income from employment, in whatever form received and from any and all sources, including commissions and consulting income paid to him or deposited into S Co.'s bank account; moreover, it was abundantly clear that this failure to comply did not involve a good faith dispute or legitimate misunderstanding, as the plaintiff engaged in self-help by unilaterally reducing his alimony obligation when he first began his employment with C Co., and he sought court approval to modify that obligation only after the defendant moved for contempt; furthermore, the fact that the plaintiff informed the defendant, when the plaintiff started working for C Co., that he was adjusting his alimony payments due to the complicated nature of the payment structure at C Co. should have alerted him to the need to seek the advice of the court concerning the future calculation of his alimony obligation, and the plaintiff's concession that he did not pay alimony on his commissions and income from his consulting work undermined any contention that any ambiguity concerning his alimony obligation entitled him to resort to self-help rather than seeking the advice of the court.

Argued February 16—officially released June 28, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Pinkus*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation

agreement; thereafter, the court, *Wenzel*, *J.*, granted the defendant's motion for contempt and granted in part the plaintiff's motion for modification, and the plaintiff appealed. *Affirmed*.

Charles D. Ray, with whom, on the brief, were *Brittany A. Killian* and *Angela M. Healey*, for the appellant (plaintiff).

Alexander Copp, with whom was *Rachel A. Pencu*, for the appellee (defendant).

Opinion

D'AURIA, J. In this appeal, we are called on to interpret a separation agreement to determine whether draws or advance payments on commissions are loans, and thus do not constitute income for the purposes of awarding alimony. The plaintiff, Stephen Birkhold, appeals from the trial court's decision granting both his motion for modification of alimony and a postjudgment motion for contempt filed by the defendant, Susan Birkhold, which the trial court resolved by finding the plaintiff in contempt and awarding the defendant past due alimony and attorney's fees. On appeal, the plaintiff claims that the trial court incorrectly (1) interpreted the parties' separation agreement to conclude that the draws from his employment as a real estate broker were income subject to alimony, (2) interpreted the parties' agreement to conclude that money paid to his limited liability company (LLC) was income subject to alimony, (3) modified his future alimony obligation, (4) found him in contempt for his failure to pay alimony, and (5) awarded the defendant attorney's fees as the prevailing party under the separation agreement.[1] We affirm the trial court's decision in full.

[1] Section 11.3 of the separation agreement provides that, "[i]n the event that it shall be determined by a court of competent jurisdiction that either party shall have breached any of the provisions of this [a]greement . . . the offending party shall pay to the other party reasonable [attorney's] fees, court costs and other expenses incurred in the enforcement of the provisions of this [a]greement . . . ." After finding both that the plaintiff breached his

The record reveals the following procedural history and facts found by the trial court. The court dissolved the parties' marriage in 2009. The court's dissolution judgment incorporates a separation agreement the parties had negotiated that requires the plaintiff to pay alimony to the defendant in an amount equal to "30 percent of his 'gross annual base income from employment' as defined herein . . . and 25 percent of his gross cash bonus . . . ." The separation agreement defines "gross annual base income from employment" as "income actually received by the [plaintiff] from employment . . . from any and all sources derived. Without limiting the generality of the foregoing, 'gross annual base income from employment' shall include income from wages, salaries, consulting or other fees, commissions, director's fees and compensation for or by reason of past, present or future employment, in whatever form received." The separation agreement further provides that, in the event a court determines that either party has breached any of the provisions of the agreement, "the offending party shall pay to the other party reasonable [attorney's] fees, court costs and other expenses incurred in the enforcement of the provisions of this [a]greement and/or judgment or decree incorporating any or all of the provisions hereof."

obligation under the agreement and violated a clear and unambiguous court order by failing to pay alimony, the trial court ruled that the defendant was entitled to recover "all her reasonable attorney's fees, court costs and expenses incurred in the enforcement of this [a]greement." The trial court then ordered the plaintiff to pay $80,000 to satisfy the defendant's attorney's fees, costs, and expenses. The trial court's exercise of discretion, although it found the plaintiff in contempt, went no further than to make the defendant whole: to get the alimony and attorney's fees that she was entitled to under the agreement, irrespective of a finding of contempt. The plaintiff implicitly concedes in his brief that, if we affirm the trial court's decision as to his first two claims, the attorney's fees award should likewise be affirmed. We therefore uphold the award of attorney's fees because we agree with the defendant that the trial court's decision as to the plaintiff's first two claims was correct.

At the time of dissolution, the plaintiff was the chief executive officer of a major corporation. He was paid an annual salary and a bonus, and received a W-2 form for tax purposes. Although the plaintiff changed jobs after the divorce, he remained a highly compensated corporate executive, earning more than $2 million a year in 2013 and 2014. Pursuant to the parties' agreement, the defendant received 30 percent of his earnings, all of which was paid as base income during those years. The plaintiff was then unemployed for almost one year.

In 2015, the plaintiff informed the defendant that he had begun working for Cushman & Wakefield as a commercial real estate broker. He would receive annual draws on future commissions, initially in the amount of $35,000 a year, which he claimed he did not earn until he realized sales that resulted in commissions. The plaintiff stated that the purpose of the draw was to provide him with medical insurance. If the plaintiff did not earn commissions sufficient to cover the draw, his employment agreement obligated him to pay the difference back to Cushman & Wakefield. Two weeks after beginning at Cushman & Wakefield, the plaintiff offered to pay the defendant $875 a month (30 percent of the $35,000 draw) in alimony as long as the defendant agreed that she would pay him back if he did not earn his draw. The defendant agreed to accept the $875 a month alimony payment because she was "in a very difficult financial predicament [at that time], and even that small amount [would] aid in paying utilities."

In subsequent years, the plaintiff's annual draw rate increased. The plaintiff's total compensation from Cushman & Wakefield was $175,900 in 2016, $315,777 in 2017, $216,105 in 2018, and $138,534 in 2019. The plaintiff also received other payments as a business consultant to other entities during this time, totaling $630,930. Despite the increase in the draw rate and his

other consulting income, the plaintiff continued to pay the defendant only $875 a month in alimony.

In 2017, the defendant filed a postjudgment motion for contempt and, later, in 2018, an amended motion for contempt for the plaintiff's failure to pay alimony consistent with the separation agreement. In addition to a finding of contempt, the defendant sought an order compelling the plaintiff to pay her the accrued unpaid alimony that she claimed was owed under the separation agreement. Thereafter, the plaintiff filed a motion to modify his alimony obligation due to a substantial change of circumstances in the nature of his employment. Specifically, the plaintiff contended that the definition of "gross income" was no longer equitable because his "income through Cushman & Wakefield is subject to 'claw-back' provisions," and he is required to make business expenditures to generate income that are not accounted for in the current definition of gross annual base income from employment.

Following a multiday evidentiary hearing, the trial court issued a memorandum of decision and awarded the defendant past due alimony as of October 1, 2019, in the amount of $249,570 to be paid in $3500 monthly installments,[2] and attorney's fees and costs in the amount of $80,000, to be paid in $4000 monthly installments. The trial court also granted the plaintiff's motion to modify his alimony obligation by eliminating the 30 percent of gross annual base income from employment formula and replacing it with a fixed monthly alimony

[2] The plaintiff's opening brief to this court contains an additional claim that the trial court made a mathematical error in calculating the total past due alimony. Subsequently, in response to the defendant's motion to correct, the parties filed a joint stipulation with the trial court to amend the amount of the alimony arrearage to $249,570. The plaintiff does not challenge the stipulation or otherwise respond to the defendant's argument, made in her brief to this court, that this claim is now moot. In the absence of any argument to the contrary, we assume the stipulation effectuated the necessary correction and agree with the defendant that this claim is moot.

obligation of $6500 per month.[3] The trial court also found the plaintiff in contempt for wilfully violating the "clear and unambiguous" separation agreement.

The plaintiff appealed to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.[4] Additional facts and procedural history will be provided as needed.

I

On appeal, the plaintiff claims that the trial court premised its decision awarding the defendant past due alimony on an incorrect reading of the separation agreement and a clearly erroneous finding that money he received from his work as a real estate broker for Cushman & Wakefield in the form of a draw constituted income subject to alimony under that agreement. The plaintiff argues that, because the agreement does not

[3] This order went into effect as of the date of the court's decision, April 29, 2020. The trial court ordered the parties to consult with each other and to calculate the amount of alimony the plaintiff owed pursuant to the original agreement between October 1, 2019, and April 29, 2020. The plaintiff did not receive a retroactive modification.

[4] After the plaintiff appealed, the defendant moved to terminate any appellate stay. The trial court granted the defendant's motion, concluding both that the automatic appellate stay did not apply to its order of attorney's fees and that, even if it did, the court would terminate the stay pursuant to Practice Book § 61-11 (c) and *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 493 A.2d 229 (1985). The plaintiff filed a timely motion for review pursuant to Practice Book § 66-6, requesting that this court reverse the trial court's stay decision. After oral argument before this court on the merits of the present case, we granted the motion for review but denied the requested relief. We do not have to decide whether the automatic stay exception for orders of support, prescribed by Practice Book § 61-11 (c), applies to this particular order, as fashioned by the trial court, because the trial court commendably found, in the alternative, that the *Griffin Hospital* factors weighed in favor of terminating the appellate stay. See *Griffin Hospital* v. *Commission on Hospitals & Health Care*, supra, 455–61. Even if the automatic stay did apply under these circumstances, we cannot conclude that the trial court abused its discretion in terminating any automatic stay pursuant to *Griffin Hospital*.

state or imply that gross annual base income from employment includes money received but subject to repayment, the draws are not "income actually received," as contemplated by the separation agreement, until he earns the commission. The money, the plaintiff contends, is a loan requiring repayment and therefore cannot properly be considered income for the purposes of determining alimony. The defendant responds that the trial court's finding that the draws were income and not a series of loans was not clearly erroneous. We agree with the defendant.

The interpretation of a separation agreement "incorporated into a dissolution decree is guided by the general principles governing the construction of contracts." (Internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008). When the language of a contract is clear and unambiguous, the contract "must be given effect according to its terms, and the determination of the parties' intent is a question of law." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 192, 112 A.3d 144 (2015). "When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact." (Internal quotation marks omitted.) Id.

"When construing a contract, we seek to determine the intent of the parties from the language used interpreted *in the light of the situation of the parties and the circumstances connected with the transaction*. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Emphasis in original; internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 180, 972 A.2d 228 (2009).

We agree with the trial court's conclusion that the clear and unambiguous definition of gross annual base income from employment included income from self-employment or as an independent contractor. The definition of gross annual base income from employment provided by the separation agreement "is expressly stated to be without limitation" and includes income "actually received" by the plaintiff from employment as "compensation for or by reason of past, present or future employment, in whatever form received," and from "any and all sources derived." Some examples of gross annual base income from employment, like consulting fees, commissions, and director's fees, "might be reported as either W-2 wages or 1099s."No language in the separation agreement "suggests the form of reporting income should control which income is recognized for the purpose of alimony computation," and, therefore, the trial court correctly rejected the argument that the separation agreement contemplated the plaintiff paying alimony derived only from traditional W-2 salary.

Although the trial court never said so, the term "income" is ambiguous; its meaning in any particular case will depend on the surrounding context. The separation agreement defines "gross annual base income from employment" but does not define "income." We previously have observed that "income" is defined broadly, particularly in family cases. See *Unkelbach* v. *McNary*, 244 Conn. 350, 360–61, 710 A.2d 717 (1998). This is consistent with our approach of "includ[ing] in income items that increase the amount of resources available for support purposes." Id., 360. Indeed, we have held that, even gifts, if received regularly and consistently, "whether in the form of contributions to expenses or otherwise, are properly considered in determining alimony awards to the extent that they increase the amount of income available for support purposes." Id., 360–61.

For example, Black's Law Dictionary defines "income" as "[t]he money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts, and the like." Black's Law Dictionary (11th Ed. 2019) p. 912. Another dictionary defines "income" as "something that comes in as an increment or addition usu[ally] by chance . . . a gain or recurrent benefit that is usu[ally] measured in money and for a given period of time, derives from capital, labor, or a combination of both, includes gains from transactions in capital assets, but excludes unrealized advances in value: commercial revenue or receipts of any kind except receipts or returns of capital . . . ." Webster's Third New International Dictionary (2002) p. 1143; see also *Gay* v. *Gay*, 70 Conn. App. 772, 778, 800 A.2d 1231 (2002) (quoting definition in Webster's Third New International Dictionary to determine meaning of "income," as used in General Statutes § 46b-82), aff'd, 266 Conn. 641 835 A.2d 1 (2003).

Despite the generally expansive meaning of the term, not every receipt of funds will be considered income.[5] Perhaps most prominently, a loan is "not an [asset] but a liability" and cannot properly be considered income

[5] "Income" is consistently defined broadly in a variety of circumstances, such as tax; see 26 U.S.C. § 61 (a) (2018) (defining "gross income" for purposes of Internal Revenue Code as "all income from whatever source derived"); General Statutes § 12-213 (9) (A) (defining "gross income" consistent with 26 U.S.C. § 61 (a)); see also *Collins* v. *Commissioner of Internal Revenue*, 3 F.3d 625, 630 (2d Cir. 1993) ("[T]he term gross income has been read expansively to include all realized gains and forms of enrichment, that is, 'all gains except those specifically exempted.' . . . Under this broad definition, gross income does not include all moneys a taxpayer receives. It is quite plain, for instance, that gross income does not include money acquired from borrowings. Loans do not result in realized gains or enrichment because any increase in net worth from proceeds of a loan is offset by a corresponding obligation to repay it." (Citations omitted.)); and child support. See *Jenkins* v. *Jenkins*, 243 Conn. 584, 589 and n.4, 704 A.2d 231 (1998) (explaining that "gross income" for child support purposes is "the average weekly income before deductions" (internal quotation marks omitted)).

to determine alimony. *Schmidt* v. *Schmidt*, 180 Conn. 184, 188, 429 A.2d 470 (1980).

Because of the broad but not limitless definition of income, appellate courts often hold that, when a separation agreement provides no definition of income, the term is ambiguous. See, e.g., *Marcus* v. *Marcus*, 175 Conn. 138, 141, 394 A.2d 727 (1978) (term "income" is ambiguous when undefined in separation agreement); *Baldwin* v. *Baldwin*, 19 Conn. App. 420, 422, 562 A.2d 581 (1989) (same). It is, therefore, unsurprising that, historically, the question of "[w]hether money should be characterized as income or a loan is a question of fact for the trial court." *Keller* v. *Keller*, 167 Conn. App. 138, 152, 142 A.3d 1197, cert. denied, 323 Conn. 922, 150 A.3d 1151 (2016); see also *Zahringer* v. *Zahringer*, 262 Conn. 360, 369–71, 815 A.2d 75 (2003).[6] Although the plaintiff is correct that, as a matter of law, loans are not income that a court may consider in determining alimony, this rule is implicated only if a court first

[6] Similarly, whether money is income or a loan is often also treated as a question of fact in other areas of the law. See, e.g., *Commissioner of Internal Revenue* v. *Indianapolis Power & Light Co.*, 493 U.S. 203, 208, 110 S. Ct. 589, 107 L. Ed. 2d 591 (1990); see also id., 208–12 ("The recipient of an advance payment, in contrast, gains both immediate use of the money (with the chance to realize earnings thereon) and the opportunity to make a profit by providing goods or services at a cost lower than the amount of the payment. . . . When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, he has received income . . . . Whether these payments constitute income when received, however, depends [on] the parties' rights and obligations at the time the payments are made. . . . When the Commissioner [of Internal Revenue] examines privately structured transactions, the true understanding of the parties, of course, may not be apparent." (Citation omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.)); *American Valmar International Ltd., Inc.* v. *Commissioner of Internal Revenue*, 229 F.3d 98, 101–102 (2d Cir. 2000) ("We must uphold the Tax Court's factual findings unless they are clearly erroneous . . . . Customer deposits over which the recipient does not have 'complete dominion' are not taxable as income upon their receipt." (Citations omitted; footnote omitted.)).

makes the factual finding that the money at issue is indeed a loan.

Because the parties' separation agreement in the present case does not define the term "income," we conclude that it is susceptible to more than one reasonable interpretation and is therefore ambiguous. This conclusion is reinforced, rather than undermined, by the text of the separation agreement, which provides that gross annual base income from employment includes "income actually received" from any and all sources, and encompasses income from wages, salary, consulting fees, commissions, director's fees, "and compensation for or by reason of past, present or future employment, in whatever form received." Accordingly, we apply the clearly erroneous standard of review to the trial court's factual determination that the plaintiff's draws from Cushman & Wakefield were income. A finding of fact is clearly erroneous when no evidence in the record supports it "or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 356, 999 A.2d 713 (2010).

There is ample evidence in the record that supports the trial court's finding that the money received by the plaintiff from Cushman & Wakefield in the form of a draw was includable as gross annual base income from employment. The trial court found that the moneys from Cushman & Wakefield "were clearly from employment," regardless of "whether they were currently earned or still subject to repayment." The draws were paid for the plaintiff's services as a commercial real estate broker at Cushman & Wakefield. He received semimonthly deposits, listed as "C & W Inc. 1099 Payroll," to his LLC bank account. The plaintiff reported the draws as "gross income" on his personal tax returns. Cushman & Wake-

field referred to the plaintiff as an "employee," and to his income as "earnings," on a 2019 pay statement, and noted that he would have to pay back unearned draws "[i]n the event [his] *employment* or relationship" with Cushman & Wakefield ended. (Emphasis added.)

Although the plaintiff presented evidence in the form of draw agreements and promissory notes with Cushman & Wakefield, and testified that the draws were loans, he presented no evidence about how he actually earned his commissions and no evidence that Cushman & Wakefield, in fact, "ever did recover, demand or even threaten to recover unearned draws." Even when the plaintiff did earn commissions, he "did not pay alimony to the [defendant] based on such funds." Rather, the trial court found that the plaintiff treated the money from Cushman & Wakefield as income "in every relevant way," except to pay alimony to the defendant, such as reporting his draws as "gross income" on his personal tax returns. As the trial court observed, "[w]hile there was a continuing dispute over the issue of whether . . . the [defendant] would agree to repay the alimony she received based on draws from [Cushman & Wakefield] if [the draws] were recouped by [Cushman & Wakefield] as unearned, the [plaintiff] recognized [that] the payments to her would reflect the amounts of such payments from [Cushman & Wakefield]." (Footnote omitted.) The trial "court, as the trier of fact and thus the sole arbiter of credibility, was free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Remillard* v. *Remillard*, supra, 297 Conn. 357.

Consistent with the parties' intent at the time they signed the separation agreement, as evidenced by their having provided a very broad definition of gross annual base income from employment, the defendant clearly expected some form of alimony so long as the plaintiff was employed. For the first four months after the

divorce, the separation agreement required the plaintiff to pay $11,750 a month in alimony. After those four months, the separation agreement required the plaintiff to pay 30 percent of his gross annual base income from employment, up to $600,000—meaning, a maximum of $15,000 a month (if he did not receive a bonus). And, indeed, for years, the plaintiff paid the defendant thousands of dollars a month in alimony. Although the law and the separation agreement account for changes in circumstances, the plaintiff, as the moving party, is required to "demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it." (Internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 672, 81 A.3d 215 (2013). The plaintiff's interpretation that he was required to pay the defendant only $875 a month in alimony would be a dramatic departure from the agreement they negotiated, and, therefore, he bore the burden of proving a change of circumstances to justify a new order. In the end, the trial court did not hold the plaintiff to the expectation that he pay tens of thousands of dollars a month in alimony, even if the defendant thought she would be receiving the higher amount she was accustomed to in the years immediately following the parties' divorce. After hearing evidence, the trial court was constrained to observe that the plaintiff had failed to establish how he earned his commissions, why his purported debt to Cushman & Wakefield fluctuated, how much of his commissions were applied to his draws, and why the plaintiff did not pay alimony on commissions he earned. The trial court's skepticism toward the plaintiff's calculation of his alimony obligation in light of his new arrangement was well founded. We conclude that the trial court correctly interpreted the parties' separation agreement and that its findings were not clearly erroneous.

II

The plaintiff next claims that the trial court also premised its decision on the amended motion for contempt on an incorrect interpretation of the parties' separation agreement and a clearly erroneous finding that money earned by and paid to his LLC was his personal income and subject to alimony. The plaintiff argues that the money paid to the LLC was not income subject to his alimony obligation because it was not received by him, and, alternatively, any money the LLC received is subject to business related expense deductions. The plaintiff contends that, although he rendered services on behalf of the LLC, that does not make the resulting income paid to the LLC the plaintiff's personal income. The defendant responds that the record supports the trial court's finding that the money from Cushman & Wakefield and other entities was income to the plaintiff and not the LLC. We agree with the defendant.

Interpretation of an ambiguous contract is a question of fact. E.g., *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 192. A finding of fact is clearly erroneous when no evidence in the record supports it or when the reviewing court is "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Remillard* v. *Remillard*, supra, 297 Conn. 356.

Due to the ambiguity in the term "income," we also must determine whether the trial court was correct about whether payments to the LLC fell within the scope of that definition. In 2014, the plaintiff created a limited liability company called SNB NYC Consulting, LLC. He was a 50 percent member of the LLC with his new wife until 2019; he is now the sole member. Since 2017, the plaintiff has elected to have the LLC taxed as an S corporation.[7] The plaintiff similarly chose to have his

[7] That the LLC did not become an S corporation until 2017 does not change our conclusion as to the money paid from Cushman & Wakefield to the LLC in 2015 and 2016 because an LLC performs the same pass-through function

Cushman & Wakefield draws and money earned from other consulting services deposited into the LLC's account. We agree with the trial court that the plaintiff cannot structure the receipt of his income and use the corporate form to avoid his alimony obligation. As the trial court found, "[w]hile such manipulations may have yielded tax benefits to the [plaintiff], there was no evidence [they] were necessary to earn this income." The trial court specifically found that "[m]any of the claimed business deductions by [the LLC] appeared to be entirely personal expenses of the [plaintiff] and his new wife. More importantly, the actual business activities of [the LLC] appear to consist only of taking moneys already received by the [plaintiff] and finding ways to claim deductions and expenses to shelter this income and/or hide it from the [defendant]." Also, nothing in the separation agreement addresses business related expenses. These facts, as found by the trial court, are not clearly erroneous and support the court's determination that the LLC was used to shield the plaintiff's income from his alimony obligations, that the income was properly subject to alimony, and that the plaintiff was not entitled to business expense deductions.

The fact that it may be advantageous for tax purposes to set up an LLC has no bearing on the determination that the income is properly subject to alimony. Our decision in *Tuckman* v. *Tuckman*, 308 Conn. 194, 61 A.3d 449 (2013), is instructive. In *Tuckman*, the defen-

that S corporations do. See, e.g., *Benjamin* v. *Island Management, LLC*, 341 Conn. 189, 205 n.17, 267 A.3d 19 (2021) ("Our common law does not recognize LLCs, which were first created by statute in Connecticut in 1993. Public Acts 1993, No. 93-267. An LLC is a distinct type of business entity that allows its owners to take advantage of the pass-through tax treatment afforded to partnerships while also providing them with limited liability protections common to corporations." (Internal quotation marks omitted.)). Additionally, the LLC remained closely held—the plaintiff and his new wife being the only two members—and therefore maintained the same characteristics in 2015 and 2016 that made it eligible to be considered an S corporation in 2017.

dant challenged the trial court's determination that, when fixing alimony and child support, her taxable income from an S corporation[8] should be included in her annual net income. Id., 208–209. This court, in considering how to treat "the retained earnings of an S corporation that are passed through to a shareholder for purposes of measuring and imposing a child support obligation," followed the Massachusetts Supreme Judicial Court's decision in *J.S.* v. *C.C.*, 454 Mass. 652, 662–63, 912 N.E.2d 933 (2009), which concluded that "[t]he better reasoned decisions require a [case specific], factual inquiry and determination . . . . We follow the lead of these cases, and similarly conclude that a determination whether and to what extent the undistributed earnings of an S corporation should be deemed available income to meet a child support obligation must be made based on the particular circumstances presented in each case. Such a [fact based] inquiry is necessary to balance, inter alia, the considerations that a [well managed] corporation may be required to retain a portion of its earnings to maintain corporate operations and survive fluctuations in income, but corporate structures should not be used to shield available income that could and should serve as available sources of child support funds." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, supra, 210–11. In *Tuckman*, this court detailed some relevant factors trial courts should

[8] Limited liability companies can be organized as S corporations. "An S corporation is a small business corporation that qualifies for certain tax and financial prerogatives." *Berkley* v. *Gavin*, 253 Conn. 761, 763 n.3, 756 A.2d 248 (2000). In an S corporation, "all of its capital gains and losses, for federal income tax purposes, pass through . . . to the individual shareholders, and any federal income tax liability on capital gains is the responsibility of the individual shareholder." *Tuckman* v. *Tuckman*, supra, 308 Conn. 209. "A subchapter S corporation is a flow through entity. All of the earnings of such a company must be reported as individual income by its [shareholders]. The corporation files federal tax returns only for informational purposes." *Outdoor Development Corp.* v. *Mihalov*, 59 Conn. App. 175, 180 n.7, 756 A.2d 293 (2000).

weigh "in determining what portion of undistributed corporate earnings may be available to a shareholder for a child support obligation": (1) the shareholder's level of control over corporate distributions, as measured by the shareholder's ownership interest, (2) legitimate business interests justifying retained corporate earnings, and (3) evidence of an attempt to shield income by means of retained earnings. Id., 211. In the present case, to determine that the earnings deposited in the plaintiff's LLC account were attributable to him as income under the separation agreement, the trial court properly conducted just such a fact based inquiry.

The plaintiff relies on *Yomtov* v. *Yomtov*, 152 Conn. App. 355, 98 A.3d 110 (2014), in which the Appellate Court held that, because an LLC is a "distinct legal entity whose existence is separate from its members"; (internal quotation marks omitted) id., 362; income must be actually received by the plaintiff, and not the LLC, to be properly subject to alimony obligations. The defendant argues that *Yomtov* is distinguishable because, in that case, there was no dispute that the money in question was initially gross revenue to the LLC and the LLC existed at the time the parties signed their separation agreement, whereas, in the present case, the trial court was not required to accept the plaintiff's claim that the LLC earned revenue separate from his own income.

The plaintiff's reliance on *Yomtov* is unpersuasive. At best, *Yomtov* can be understood to stand for the proposition that income the LLC received *may* be properly considered separate and distinct from its members' income. But, as *Tuckman* instructs, that determination is undertaken on a case-by-case basis after the trial court's careful consideration of the parties' circumstances. As the Appellate Court noted in *Yomtov*, "the circumstances of the parties at the time of the dissolution do not support the contention that the plaintiff's income is that of his limited liability company." Id., 363.

In the present case, however, the trial court made the factual finding that the plaintiff treated as his own income the money received for work conducted for Cushman & Wakefield, as well as other consulting work, even if deposited into the LLC's account. The trial court concluded that the parties' circumstances at the time of dissolution confirms that the separation agreement "was intended to be broad and include all forms of income" and, therefore, was not limited to "traditional executive compensation in the form of W-2 reported income." The fact that the plaintiff elected to operate as an LLC cannot justify the nonpayment of alimony, even if being an S corporation may have permitted him to treat the income differently if the choice had not been his. Thus, we conclude that the trial court correctly interpreted the parties' separation agreement, and its findings were not clearly erroneous.

III

The plaintiff also claims that the trial court incorrectly modified his future alimony obligation based on a net annual income and earning capacity not supported by the record. He argues that the trial court did not take into account all relevant statutory criteria and that the only factor the court considered was his past gross income. The defendant responds that the trial court did not abuse its discretion because the record supports the alimony award. She also notes that the trial court's memorandum of decision expressly states that the court considered all relevant statutory factors, and there is no requirement that it use a precise formula to calculate available net income. We agree with the defendant.

Addressing the plaintiff's motion for modification, the trial court found that there had indeed been a substantial change in circumstances that necessitated a modification to the plaintiff's alimony obligation. Specifically, after considering all the factors required by

§ 46b-82,[9] the court found (1) a substantial reduction in the plaintiff's income from his base salary of $470,000 with annual bonuses as a senior corporate executive to an average gross income of approximately $350,000 with no bonus income during the fifty-one months from mid-2015 to September, 2019, and an annualized income of $311,000 for the first nine months of 2019, (2) that he had remarried,[10] (3) that he had relocated twice, and (4) that he is became a consultant and independent contractor with much more complicated financial affairs. Although $350,000 represents the plaintiff's average past gross income, the trial court based its alimony award on a net earning capacity of at least $250,000, taking into consideration the factors required by § 46b-82 and that his new residence of Texas has no state income tax.[11] The trial court also found that

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

[10] Remarriage of an alimony payor is not an appropriate ground for a downward modification. See *Heard* v. *Heard*, 116 Conn. 632, 636, 166 A. 67 (1933). The plaintiff has not challenged the trial court's decision on the basis of this error, however, and, thus, we deem it waived.

[11] The trial court did not indicate why the lack of a state income tax results in a lower net income but did state more generally that, given the plaintiff's "current residence in Texas, the court has determined his net annual income and earning capacity to be approximately $250,000." The record supports the inference that the net earning capacity determination based on a Texas residence is also rooted in the plaintiff's testimony that he traveled back and forth to New York City for business. The plaintiff consulted for at least one New York based entity, Applied DNA Sciences, Inc., for which he facilitated the entry of the company's technology in the apparel market, including developing sales strategy and making introductions to stakeholders. The plaintiff testified that he would travel from Texas to New York to conduct some of that work. Although the plaintiff now complains that there was no evidence of his ability to "earn a salary in Texas at all" and no evidence that there were jobs in Texas that require his skill set, he was in

the parties appeared to be in good health and that there were established financial records pertaining to the parties' income and income earning potential. The trial court then declined the plaintiff's request to modify the separation agreement to have his alimony determined by net income rather than gross income because the plaintiff had structured his financial affairs "in such a way as to minimize his tax obligations, as well as his obligations to pay alimony. . . . The court believes that modification of the agreement to allow [him] to claim and deduct expenses would invite misadventures by [the plaintiff] and inevitably lead to future disputes . . . . This is simply not the formula which was originally negotiated by the parties." (Footnote omitted.) Minimizing future conflict—not to mention litigation—is itself an appropriate exercise of discretion. See, e.g., *Pasquariello* v. *Pasquariello*, 168 Conn. 579, 584, 362 A.2d 835 (1975) ("trial courts have a distinct advantage over an appellate court in dealing with domestic relations, where all of the surrounding circumstances and the appearance and attitude of the parties are so significant" (internal quotation marks omitted)). The trial court therefore went on to modify the alimony provisions of the separation agreement so that the plaintiff now pays the defendant a flat $6500 a month, as opposed to an amount based on a specific formula, with the parties being entitled to a "second look" following the plaintiff's sixty-fifth birthday.

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has

the best position to present that evidence and failed to do so. See *Britto* v. *Britto*, 166 Conn. App. 240, 247, 141 A.3d 907 (2016). There was otherwise sufficient evidence to support the trial court's determination that the plaintiff's net annual earning capacity was $250,000.

abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Morris* v. *Morris*, 262 Conn. 299, 305, 811 A.2d 1283 (2003). "To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous." (Internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 64, 111 A.3d 551 (2015). "[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When . . . the disputed issue is alimony . . . the applicable provision of the statute is § 46b-86 (a), which 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." (Footnote omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, supra, 310 Conn. 671–72.

"[A] court must base child support and alimony orders on the available net income of the parties, not gross income." *Morris* v. *Morris*, supra, 262 Conn. 306. However, a "trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards [pursuant to §§ 46b-82 (a) and 46b-86] on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health. . . . When determining earning capacity, it . . . is especially appropriate for the court to consider whether [a person] has wilfully restricted his [or her] earning capacity to avoid support obligations." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Tanzman*

v. *Meurer*, 309 Conn. 105, 113–14, 70 A.3d 13 (2013). It is also appropriate to consider a party's earning capacity when there is evidence of that party's previous earnings. See, e.g., *Miller* v. *Miller*, 181 Conn. 610, 612–13, 436 A.2d 279 (1980).

Sufficient evidence in the record supported the trial court's findings regarding the plaintiff's earning capacity such that its award of a monthly alimony obligation of $6500 was not an abuse of discretion. The trial court based its modified award not only on the plaintiff's past gross earnings but also on his long and successful career as a senior executive, broker, and consultant, and his move to a state without a state income tax. The court's order specifically provided for a "second look" when the plaintiff reaches the age of sixty-five. The trial court also based its decision on the income and income earning potential of *both* parties. It could have been an abuse of discretion for the court to have based its decision solely on the plaintiff's past gross income without taking into account any other facts or circumstances whatsoever, but the trial court expressly noted that its alimony determination was anchored on the conclusion that the plaintiff's net earning capacity was $250,000, which is markedly less than his past gross annual income of $350,000 from mid-2015 to September, 2019. The trial court's alimony award of $6500 per month therefore did not amount to an abuse of discretion.

IV

The plaintiff challenges the trial court's finding of contempt against him for breaching his alimony obligation because he claims that his nonpayment was based on a good faith belief that he did not owe alimony on money received from Cushman & Wakefield and on revenue to his LLC. Specifically, he argues that the language of the separation agreement was not clear and that his actions were not wilful because he sought and

relied on the advice of professional advisors. The defendant argues that the overall obligation to pay alimony in the separation agreement was clear and unambiguous, that the plaintiff's actions were wilful because he took unilateral action, and that, although he testified that he consulted with professional advisors for tax purposes, there was no evidence that he received advice related to the calculation of the amount of his alimony payments under the separation agreement. We agree with the defendant.

"It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive." *Puff* v. *Puff*, 334 Conn. 341, 365, 222 A.3d 493 (2020). The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. See, e.g., *In re Leah S.*, 284 Conn. 685, 693, 935 A.2d 1021 (2007). We review the trial court's determination that the violation was wilful under the abuse of discretion standard. See id., 693–94.

The present case involves allegations of indirect civil contempt. "A refusal to comply with an injunctive decree is an indirect contempt of court because it occurs outside the presence of the trial court." (Internal quotation marks omitted.) *Brody* v. *Brody*, 315 Conn. 300, 317, 105 A.3d 887 (2015). "[C]ivil contempt is committed when a person violates an order of [the] court which requires that person in specific and definite language to do or refrain from doing an act or series of acts." (Emphasis omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 333, 152 A.3d 1230 (2016).

Addressing the defendant's motion for contempt, the trial court found that "the obligation in question, to pay

alimony pursuant to the [separation] [a]greement, is clear and unambiguous. The court finds that the [plaintiff] did fail to pay the amounts due, [and] such failure to pay was wilful and that both of these elements were established by clear and convincing evidence." The trial court went on to state that it could award the defendant her requested relief "independent[ly] of any finding of contempt" because the plaintiff had breached his alimony obligation under the separation agreement, and the agreement contained a fee shifting provision. See footnote1 of this opinion. Although the defendant requested $88,789 in attorney's fees, the trial court awarded her $80,000.

We conclude that the trial court did not abuse its discretion in finding the plaintiff in contempt. During the time in question, the plaintiff did not pay *any* alimony on Cushman & Wakefield commissions he in fact earned, totaling $439,919, or on other self-employment income not subject to any claim of repayment, totaling $653,639.[12] It was sufficiently clear from the terms of the separation agreement that the plaintiff had to pay alimony on commissions he did earn and other consulting income, thereby constituting independent violations to support the finding of contempt. Notwithstanding our determination that it is not clear and unambiguous from the terms of the separation agreement whether the plaintiff's draws constituted income or a loan, we also agree with the trial court that it is untenable on this record to conclude that the plaintiff did not wilfully fail to fully comply with his obligation to pay as alimony 30 percent of his gross annual base income from employment "in whatever form received" from "any and all sources derived," including consulting or commission work paid to him or to his LLC. As the trial

[12] According to the parties' stipulation; see footnote 2 of this opinion; the amount of other consulting income, as originally found by the trial court, was understated by $23,249.

court found, through his LLC, the plaintiff treated his income in a "byzantine and highly structured manner" to the detriment of the defendant. As a result, in the four years in question, the plaintiff earned a gross income of $1,531,900, yet he paid the defendant only $210,000 in alimony. The plaintiff's position on appeal that it was not clear that he had to pay alimony on "income other than W-2 income" is belied by his 2015 e-mail offering to pay the defendant 30 percent of his Cushman & Wakefield draw. Yet, the plaintiff concedes that, even when his annual draw rate increased, he continued to pay the defendant only $875 a month.

Moreover, any ambiguity in the definition of "income" in the separation agreement does not affect our conclusion because it is abundantly clear that this was not a good faith dispute or legitimate misunderstanding. "A party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in 'self-help' by disobeying a court order to achieve the party's desired end." *Hall* v. *Hall*, 335 Conn. 377, 397, 238 A.3d 687 (2020). The principle against self-help often applies in situations "in which previously compliant parties stopped complying with court orders after changes in circumstances rendered the orders unclear without first seeking judicial clarification or modification." *In re Leah S.*, supra, 284 Conn. 700.

In *Eldridge* v. *Eldridge*, 244 Conn. 523, 710 A.2d 757 (1998), this court recognized that, although contempt is " 'particularly harsh,' " a good faith dispute or legitimate misunderstanding does not preclude a finding of wilfulness as a predicate to a judgment of contempt. Id., 529. In affirming the contempt order in *Eldridge*, this court reasoned that (1) the plaintiff should have moved to modify his alimony obligation prior to unilaterally suspending periodic alimony payments, (2) the plaintiff had the ability to comply and chose not to comply, and

(3) the fact that the plaintiff was *ultimately proven correct* that he was owed a credit from the defendant did not undermine the trial court's determination that the plaintiff's behavior was contemptuous. See id., 529–34. We explained in *Eldridge*: "This is not a case in which the [plaintiff] did not have the ability to comply. Rather, he chose not to. The fact that the plaintiff ultimately was proven correct in his calculations of the various debits and credits between him and the defendant does not mean . . . that the court was precluded from finding him in contempt as a matter of law. Whether to find a party in contempt is ultimately a matter within the trial court's discretion. The trial court could have exercised its discretion so as not to find the plaintiff in contempt. The fact that the plaintiff exercised self-help when he was not entitled to do so, however, by disobeying the court's order without first seeking a modification was a sufficient basis for the trial court's contrary exercise of discretion. The court was entitled to determine that to exonerate the plaintiff would be an undue inducement to litigants' exercise of self-help." (Emphasis omitted.) Id., 532.

In *Sablosky* v. *Sablosky*, 258 Conn. 713, 784 A.2d 890 (2001), this court cited *Eldridge* approvingly and concluded that, "[when] there is an ambiguous term in a judgment, a party must seek a clarification upon motion rather than resort to self-help. Id., 720. The appropriate remedy for doubt about the meaning of a judgment is to seek a judicial resolution of any ambiguity; it is not to resort to self-help." Although *Sablosky* presented the issue of child support orders, this court reasoned that it was similar to when "a party makes a motion for modification of a support order on the ground of a substantial change in circumstances. Although one party may believe that his or her situation satisfies this standard, until a motion is brought to and is granted by the court, that party may be held in contempt in

the discretion of the trial court if, in the interim, the complaining party fails to abide by the support order." Id., 722.

The present case is similar to *Eldridge* and *Sablosky*. The plaintiff unilaterally reduced his alimony when he first began his employment with Cushman & Wakefield in 2015. Article V, § 5.8, of the separation agreement provides only that the "[plaintiff] shall not make an application to any [c]ourt for modification of his obligations pursuant to this [a]rticle V *on the basis of the* [*defendant's*] *income* unless she earns more than $35,000 in any year . . . ." (Emphasis added.) The separation agreement, therefore, does not prevent the plaintiff from seeking to modify his alimony obligation, as long as it is for a reason other than the defendant's income increasing, but not surpassing, $35,000 in any year. The plaintiff filed the motion to modify his alimony obligation only after the defendant filed her motions for postjudgment contempt for the plaintiff's failure to pay alimony to her as contemplated by the separation agreement for the preceding four years. In *Eldridge*, the plaintiff was explicitly directed in a prior Appellate Court decision "to seek the assistance of the court and not to engage in self-help"; *Eldridge* v. *Eldridge*, supra, 244 Conn. 531; and, therefore, we held in that case that the trial court "properly concluded that the plaintiff was not justified in his stated belief that he simply could withhold payments and . . . that his explanations were not adequate to explain his failure to obey the court order." Id., 531–32. In the present case, the fact that the plaintiff reached out to the defendant when he began his employment with Cushman & Wakefield to adjust his alimony payments because the payment structure was "a little complicated" should have alerted him to the need to seek the advice of the court concerning the future calculation of his alimony payments. We recognize that, in other cases, a party facing a poten-

tially ambiguous court order after a change in circumstances can avoid being held in contempt due to a reasonable mistake, without first resorting to the court, by proceeding in good faith. In this case, the plaintiff crossed the line from what could have been a good faith misunderstanding to knowingly taking advantage of an ambiguity at the expense of the defendant. The plaintiff cannot use that ambiguity to escape contempt.

Last, the plaintiff conceded that he did not pay alimony on commissions he did earn at Cushman & Wakefield, as well as on money paid to him in connection with other consulting work. This concession "seriously undermine[s] any contention that the ambiguity entitled the [plaintiff] to eschew seeking the court's advice and, instead, to resort to self-help." *Sablosky* v. *Sablosky*, supra, 258 Conn. 720–21. Accordingly, we uphold the trial court's finding of contempt.

The decision of the trial court is affirmed.

In this opinion the other justices concurred.

ORDERS

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IN RE RYDER M.

The petition of the respondent father for certification to appeal from the Appellate Court, 211 Conn. App. 793 (AC 44831), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Nisa Khan and *Jennifer C. Leavitt*, assistant attorneys general, in opposition.

Decided June 14, 2022

STATE OF CONNECTICUT *v.* MATTHEW AVOLETTA ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 212 Conn. App. 309 (AC 43851), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that No. 17-4 of the 2017 Special Acts is an unconstitutional public emolument?"

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

Deborah G. Stevenson, assigned counsel, in support of the petition.

Michael K. Skold, deputy solicitor general, in opposition.

Decided June 14, 2022

SANDHYA DESMOND *v.* YALE-NEW HAVEN HOSPITAL, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 212 Conn. App. 274 (AC 44180/AC 44181/AC 44182), is denied.

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

Eric M. Desmond, in support of the petition.

Phyllis M. Pari, in opposition.

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CONNECTICUT APPELLATE REPORTS

Vol. 213

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

POINTE RESIDENTIAL BUILDERS BH, LLC *v.* TMP CONSTRUCTION GROUP, LLC, ET AL.
(AC 44063)

Alvord, Prescott and Clark, Js.

Syllabus

The plaintiff general contractor sought to recover damages for, inter alia, an alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), in connection with a breach of contract claim between the plaintiff and the defendants, a subcontractor, T Co., and its manager, P. Under the contract, T Co. was to perform certain work on a construction project to build a condominium complex at a fixed sum. Although the contract called for payment upon delivery for furnished materials and equipment, the defendants convinced the plaintiff to pay a 30 percent deposit for all of the estimated costs of materials and equipment up front, claiming that the deposit would be used to buy materials ahead of time to avoid an anticipated price increase and to avoid delivery delays. Unknown to the plaintiff, the defendants did not intend to use these funds as promised but, instead, intended to use the funds to finance its payroll and work on other projects. When the invoices for supplies remained unpaid by the defendants, a mechanic's lien was placed on the property and, thereafter, the plaintiff terminated the contract. The trial court concluded that the defendants breached the contract, inter alia, in failing to perform the work and to pay for materials, equipment and labor used, and that the defendants were unjustly enriched. It also found the defendants' conduct was deceptive, unethical and unscrupulous and constituted an unfair and deceptive business practice in violation of CUTPA. On the defendants' appeal to this court, *held*:

1. Contrary to the defendants' claims, there was sufficient evidence of intentional, reckless, unethical and unscrupulous conduct by both defendants to establish a violation of CUTPA: the record supported a finding that P, as the manager and controlling member of T Co., knowingly or recklessly engaged in the unscrupulous acts, because he personally represented

to the plaintiff that the deposit would be used for materials, labor, and overhead for the plaintiff's project, and P controlled how the deposit was ultimately spent; moreover, the court's finding of ascertainable loss was not clearly erroneous, as the court expressly found that, although the plaintiff deposited a certain sum of money, the plaintiff only received value in completed work in an amount less than the deposit and, accordingly, there was little question that the difference between the money paid and the value received constituted an ascertainable loss for the purposes of CUTPA.

2. The court did not abuse its discretion in awarding the plaintiff punitive damages, as the evidence sufficiently supported the court's findings that the defendants' false representations to the plaintiff that the deposit would be used to purchase materials and rent equipment was intentional, deceptive, unethical, and unscrupulous and that the defendants fully intended to use the deposit to fulfill obligations under other projects unrelated to the plaintiff's project; moreover, the record also supported the court's finding that it was known to P that T Co. was in a shaky financial condition when it convinced the plaintiff to pay the deposit and, thus, these findings supported the court's conclusion that the defendants acted with reckless indifference to the plaintiff's rights; furthermore, the court did not abuse its discretion in awarding attorney's fees to the plaintiff, as the court properly found that the defendants violated CUTPA.

Argued November 17, 2021—officially released June 28, 2022

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Unfair Trade Practices Act, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee; judgment for the plaintiff, from which the defendants appealed to this court; thereafter, the court, *Hon. Edward T. Krumeich II*, judge trial referee, awarded attorney's fees and costs to the plaintiff, and the defendants filed an amended appeal. *Affirmed.*

James Colin Mulholland, for the appellants (defendants).

Opinion

CLARK, J. This appeal arises out of a contract for the construction of a condominium complex in Greenwich.

The defendants, TMP Construction Group, LLC (TMP), and Olin Paige III, appeal from the judgment of the trial court, rendered in favor of the plaintiff, Pointe Residential Builders BH, LLC,[1] following a trial to the court. On appeal, the defendants claim that the court erred by rendering judgment for the plaintiff with respect to the plaintiff's count alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the plaintiff's count alleging unjust enrichment. We conclude that the court did not improperly render judgment on the plaintiff's CUTPA claim. In light of this conclusion, we need not address the defendants' claims pertaining to the unjust enrichment claim.[2] Accordingly, the judgment of the trial court is affirmed.

The following procedural history and facts, as found by the trial court, are relevant to this appeal. In a three count complaint dated June 1, 2018, the plaintiff alleged that the defendants breached a construction contract between the parties, that the defendants were unjustly enriched, and that they violated CUTPA. Following a

[1] The plaintiff's brief to this court was due on February 19, 2021. On March 23, 2021, this court issued an order noting the plaintiff's noncompliance with this deadline and extending the plaintiff's opportunity to file its brief to April 6, 2021. The plaintiff never filed a brief. On April 7, 2021, this court ordered that the appeal would be considered on the basis of the defendants' brief and the record. The same day, the defendants filed a motion for sanctions pursuant to Practice Book § 85-1, asking this court to set aside the judgment with costs due to the plaintiff's lack of due diligence defending the appeal. The defendants' motion was denied.

[2] As we explain subsequently, the court found that "[t]he damages for unjust enrichment and the actual damages recoverable under CUTPA . . . are the same under the facts proven." "Therefore, as long as the court's finding of liability is proper with respect to one of those counts on which the damages award is based, then the damages award, if proper in itself, would stand." *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*, 113 Conn. App. 509, 517, 967 A.2d 550, cert. denied, 292 Conn. 907, 973 A.2d 103 (2009). Because we conclude that the court's finding of liability is proper with respect to the CUTPA claim, we need not reach the defendants' claims as to unjust enrichment.

trial to the court, the court issued a memorandum of decision on February 18, 2020. The court found that the plaintiff, as general contractor, entered into a construction contract with TMP, as subcontractor, dated December 8, 2016 (contract), in relation to the construction of a condominium complex in Greenwich (project). At the time, Paige was the manager and controlling member of TMP. Under the contract, TMP was to perform certain work on the project at a fixed contract sum of $1,071,500. Although the contract called for payment upon delivery for furnished materials and equipment stored on-site, TMP convinced the plaintiff to pay an upfront 30 percent deposit for all of the estimated costs of materials and equipment by representing that those funds would be used to buy the materials ahead of time to avoid an anticipated 20 percent price increase on drywall and to avoid delays on the delivery of material needed for the first few weeks on the job. Relying on these representations, the plaintiff paid TMP $305,377.50 on December 13, 2016, which had been requisitioned by TMP for "material procurement".

Unknown to the plaintiff (but known to the defendants), TMP was "in a shaky financial condition" when it persuaded the plaintiff to pay the deposit. The court found that "TMP did not intend to use these funds to acquire materials and equipment for the project but, instead, intended to use the funds to finance its payroll and work on other projects."[3] In particular, TMP intended to use the funds from the deposit to fund its obligations under an unrelated subcontract with Viking Construction, Inc. (Viking), dated December 27, 2016, for a project in Bridgeport (Bridgeport project) that

[3] The court found that "TMP used a single bank account to service its business and for expenses on multiple projects, including to pay its employees, vendors and equipment suppliers, debt service, state and federal taxes and other obligations. TMP's financing scheme depended on continued cash flow from its projects and favorable extended credit terms from vendors and suppliers to continue to operate its business and fulfill its contracts."

would occur simultaneously with the project that is the subject of this appeal.

The court found that "TMP's financial house of cards came tumbling down" when Viking demanded that TMP increase its workforce on the Bridgeport project. The court stated: "Unlike the contract with [the plaintiff], [TMP's] subcontract with Viking was not frontloaded and TMP was paid on a thirty day net basis, based on detailed payment requisition forms. When it increased its labor force in response to Viking's demands, TMP could not carry its payroll. TMP also was not able to pay its principal materialman, Marjam Supply Company ('Marjam'), which also supplied materials for the project. When Viking refused to pay TMP and later terminated its subcontract in May, 2017, TMP used the balance of funds in its account to make payroll. Paige decided the remaining funds would not be used to pay state and federal taxes or to pay its suppliers. Marjam had a balance due on the Bridgeport project of $147,000. Marjam was owed $70,617.32 on the project for materials delivered but not paid for by TMP. Marjam placed a mechanic's lien in that amount on the property . . . . The mechanic's lien has not been released, remains on the property and is subject to a pending foreclosure action . . . to which [the plaintiff] is not a party." Due to TMP's failure to perform in accordance with the contract, the plaintiff sent TMP notices of default on June 22 and December 12, 2017. The contract ultimately was terminated by the plaintiff on December 17, 2017.

With respect to the breach of contract claim, the court concluded that the contract was properly terminated and that TMP breached the contract by its failure (1) to perform the work, and to promptly cure defaults upon written notice, (2) to pay the difference between the value of the completed work and the amounts requisitioned and paid to TMP, (3) to pay for materials, equipment and labor used in the period covered by the

requisitions, and (4) to furnish satisfactory evidence of completed work upon request by the plaintiff. The court, however, concluded that the plaintiff failed to satisfy its burden of proving damages in accordance with the provision of the contract entitling it to replacement costs, stating that the "witnesses' estimate of 'approximately $500,000' premium paid to replacement subcontractors seems to have been a guess plucked out of the air and is not credible."

The court also found that TMP was unjustly enriched. It found that "[u]nder the circumstances here, the injustice was TMP's deceiving [the plaintiff] into paying a deposit not required under the contract and requisitioned in violation of contract terms and under false pretenses. TMP and Paige never intended to use the deposit to order materials and equipment for the project as represented. There is no remedy under the contract for restitution of the deposit wrongfully requisitioned."[4]

As to the CUTPA claim, the court found that the defendants' conduct was "deceptive, unethical and unscrupulous and constituted an unfair and deceptive business practice" in violation of the statute. It found that "Paige was aware the deposit was requisitioned for material procurement for the project but was not intended or used for the purposes represented, but failed to disclose this contrary intention to [the plaintiff]. Paige used the funds provided by [the plaintiff] to pay other expenses of TMP unrelated to the project. Moreover, the financial circumstances and needs of

[4] Section 14.1.3 of the parties' contract provides: "If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such costs and damages exceed the unpaid balance, the Subcontractor shall pay the difference to the Contractor. The amount to be paid to the Subcontractor or Contractor, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract."

TMP were such that Paige was aware that TMP would not be able to finish the project or pay [the plaintiff] back if TMP's expenses grew or cash flow was disrupted and recklessly exposed [the plaintiff] to this risk."

The court found that "[t]he damages for unjust enrichment and the actual damages recoverable under CUTPA . . . are the same under the facts proven here: $224,878, the net of the $305,378 deposit paid less the $80,500 stated value in the requisition for [the] completed work. This sum represents the unjust benefit received by TMP and also equals the actual loss sustained by [the plaintiff] . . . ." The court also awarded punitive damages pursuant to General Statutes § 42-110g (a) in the amount of $225,000 because it found that the "defendants' conduct in requisitioning a deposit specifically for material purchases with the intention of diverting the funds for other uses and depleting the funds for purposes unrelated to the project was intentional, wilful and done with reckless indifference to [the plaintiff's] rights." In concluding that the plaintiff proved its CUTPA claim, the court exercised its discretion and awarded reasonable attorney's fees. In its memorandum of decision, the court ordered the plaintiff to submit an affidavit as to fees and costs.[5] The court rendered judgment in the amount of $463,519.77, in favor of the plaintiff on February 18, 2020. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendants make various claims pertaining to the court's judgment in favor of the plaintiff on its CUTPA claim. The defendants argue that (1) the evidence does not support a finding that either defendant engaged in aggravating unscrupulous conduct, that Paige knowingly or recklessly engaged in

[5] On August 7, 2020, the court awarded the plaintiff reasonable attorney's fees in the amount of $13,040 and costs in the amount of $601.77 pursuant to General Statutes § 42-110g (d).

unfair or unscrupulous acts with respect to TMP's taking of the deposit, that the plaintiff suffered any ascertainable loss of money or property due to a CUTPA violation, or that either defendant engaged in conduct or practices that violated the so-called cigarette rule; and (2) that the court abused its discretion by awarding the plaintiff "double" damages and attorney's fees and costs. We disagree.

We turn now to the legal principles that guide our resolution of the defendants' claims. CUTPA provides that: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b (a). "Any person who suffers any ascertainable loss of money . . . as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages. . . ." General Statutes § 42-110g (a).

"[I]n determining whether a practice violates CUTPA we have adopted the criteria [previously] set [forth] in the cigarette rule by the [Federal Trade Commission] for determining when a practice is unfair: (1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]." (Internal quotation marks omitted.) *Kent Literary Club of Wesleyan University* v. *Wesleyan University*, 338 Conn. 189, 232, 257 A.3d 874 (2021).

"It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices

under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 353, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017). "In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 694–95, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011). "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Emphasis omitted; internal quotation marks omitted.) *Osborn* v. *Waterbury*, 197 Conn. App. 476, 482, 232 A.3d 134 (2020), cert. denied, 336 Conn. 903, 242 A.3d 1010 (2021).

I

We first address the defendants' claim that the trial court improperly found that both TMP and Paige, in his individual capacity, had violated CUTPA. Specifically, they claim that the record does not support a finding of aggravating unscrupulous conduct by either defendant and that the evidence does not support a finding that Paige "knowingly or recklessly" engaged in unfair or unscrupulous acts. They further contend that the court's finding that the plaintiff suffered an ascertainable loss

due to a CUTPA violation was clearly erroneous. We disagree.

In cases involving claims of breach of contract, our courts repeatedly have held that the same facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation. See *Ulbrich* v. *Groth*, 310 Conn. 375, 410, 78 A.3d 76 (2013); see also *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 777, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021). That being said, "not every contractual breach will rise to the level of a CUTPA violation." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 228, 990 A.2d 326 (2010). "In the absence of aggravating unscrupulous conduct, mere incompetence [in performing a contract] does not by itself mandate a trial court to find a CUTPA violation." Id., 229. In cases where the facts that establish a breach of contract are the same as those relied on to support a CUTPA claim, "our focus . . . has been on whether the defendant's breach of contract was merely negligent or incompetent, in which case the CUTPA claim was barred, or whether the defendant's actions would support a finding of *intentional, reckless, unethical or unscrupulous conduct*, in which case the contractual breach will support a CUTPA claim under the second prong of the cigarette rule." (Emphasis added.) *Ulbrich* v. *Groth*, supra, 410; see also *IN Energy Solutions, Inc.* v. *Realgy, LLC*, 114 Conn. App. 262, 274–75, 969 A.2d 807 (2009) (breach of sales contract did not constitute CUTPA violation when trial court specifically found that plaintiff failed to prove that defendant's breach was unethical, unscrupulous, wilful or reckless).

With respect to whether and under what circumstances an individual may be held liable under CUTPA, our Supreme Court has made clear that "[t]he plain

language of § 42-110b clearly indicates that an individual can be liable for a CUTPA violation." *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 587, 119 A.3d 570 (2015). "In order for any individual liability to attach under CUTPA, someone must knowingly or recklessly engage in unfair or unscrupulous acts, as contemplated by the statute, in the conduct of a trade or business." Id., 592. To prevail on a CUTPA claim against an individual based on a business entity's conduct, a plaintiff must prove "(1) the entity's violation of CUTPA; (2) the individual's participation in the acts or practices, or the authority to control them; and (3) the individual's knowledge of the wrongdoing at issue." *Onofrio* v. *Mineri*, 207 Conn. App. 630, 643, 263 A.3d 857 (2021).

The following additional facts, as found by the trial court, are relevant to our disposition of the defendants' claims. The court found that Paige, who was the manager and controlling member of TMP, was aware that TMP requisitioned the deposit for the purported reason that TMP needed that money for material procurement for the project but that TMP, in fact, did not intend to use the deposit for the purposes represented, and that he failed to disclose this contrary intention to the plaintiff. The court found that the "defendants' conduct in requisitioning a deposit specifically for material purchases with the intention of diverting the funds for other uses and depleting the funds for purposes unrelated to the project was intentional, willful and done with reckless indifference to the [plaintiff's] rights." "Moreover, the financial circumstances and needs of TMP were such that Paige was aware that TMP would not be able to finish the project or pay [the plaintiff] back if TMP's expenses grew or cash flow was disrupted and recklessly exposed [the plaintiff] to this risk." If necessary, the defendants would use strategic defaults on payments to suppliers to extend credit terms until more cash came into TMP's account. Later, Paige sought

to shift supplier costs to the plaintiff and to Viking by involving the contractors in material purchases and equipment rental.[6] The court further found that "TMP's and Paige's business plan and practice to finance the project, the Viking project, and various other ongoing projects, was literally 'robbing Peter to pay Paul,' " finding that this conduct was "deceptive, unethical and unscrupulous."

The defendants argue that the "evidence does not support a finding of aggravating unscrupulous conduct by either defendant." They also contend that "without addressing the aggravation factor," the court improperly held against the defendants on the CUTPA claim.

First, the defendants' contention that the court did not address the "aggravating" nature of their conduct lacks any merit. The court's memorandum of decision goes to great lengths to detail the defendants' conduct, which it ultimately found to be, inter alia, intentional, deceptive, unethical, and unscrupulous, in that the defendants fully intended for TMP to use the plaintiff's deposit for materials and equipment to fulfill its obligations on other projects unrelated to the plaintiff's project, despite the defendants' representations to the contrary. The court also found that Paige was aware of the purported reasons given for the deposit but nonetheless "used the funds provided by [the plaintiff] to pay other expenses of TMP unrelated to the project." Accordingly,

[6] The evidence in the record discloses that, after failing to fulfill its obligations to pay for the materials for the project, the defendants tried to persuade the plaintiff to sign a joint pay agreement with the suppliers. Daniel Goldstone, the managing director for the plaintiff, testified that a joint pay agreement is in essence "an agreement where when we issue payment to him, it would also be made out to a supplier so he can in turn sign over his portion of the rights to that money to pay for materials that were provided." Paige referred to this joint pay agreement as a joint check agreement. Paige described the joint check agreement as "me signing away my right to receive the check. It would have been drafted with both parties' names on it and it would go to pay for the material."

to say that the court did not address the "aggravation factor" is simply incorrect.

Turning our attention to the court's findings as to the aggravating unscrupulous conduct of both TMP and Paige, we conclude that there is sufficient evidence in the record to support those findings. The record, which includes both documentary and testimonial evidence, discloses, inter alia, that upon request from TMP, the plaintiff paid to TMP an up-front deposit in the amount of $305,377.50, despite the fact that the contract between the parties did not require any deposit. E-mails admitted into evidence, in addition to testimony at trial, show that TMP represented to the plaintiff that it needed this money up front in order to secure materials for the project, including for the purpose of buying drywall before prices went up "another 20 [percent] in January." Daniel Goldstone, the managing director for the plaintiff, testified at trial that the deposit was requested to "purchase materials" for the project. Paige himself confirmed at trial that he represented "to [Goldstone] directly . . . that we required a deposit on the job because we're not a big company. . . . It was intended to support that project to get it off the ground and continue it through whether that be labor, material, overhead, whatever it took to get to the next step."

Despite TMP's representations, the record shows that TMP did not use the deposit money for materials on the project. Goldstone testified that he learned months after making the deposit that TMP had failed to pay Marjam, the company that TMP contracted with to secure the materials for the project, for the materials needed for project. In light of this nonpayment, Marjam placed a mechanic's lien on the property.

Goldstone further testified that when he confronted Paige regarding this nonpayment, Paige admitted that TMP did not pay Marjam and that it used the deposit

money "to fund payroll for . . . other projects in hopes that he would be able to complete those projects and be able to put the money back into our project to pay for those materials." Paige himself confirmed in his testimony at trial that he requested the deposit to get the project "off the ground and continue it through whether that be labor, material, overhead, whatever it took to get to the next step," but nevertheless testified that, because TMP did not get "paid hundreds of thousands of dollars for payroll" on the Viking project, TMP "elected to take the remaining funds from the TMP account and pay all of our employees." After discussing with Paige these nonpayment issues and other nonperformance issues, the plaintiff sent a formal default letter to TMP on June 22, 2017. Goldstone testified that TMP failed to cure any items identified in the letter, which prompted the plaintiff to terminate the contract. According to Goldstone, "[b]asically everything that [TMP was] contracted to do was not complete, so in essence everything needed to be completed."

In light of the foregoing, in addition to other evidence in the record, we conclude that there is sufficient evidence of intentional, reckless, unethical or unscrupulous conduct to establish a violation of CUTPA under the second prong of the cigarette rule. See *Ulbrich* v. *Groth*, supra, 310 Conn. 410 ("our focus in such cases has been on whether the defendant's breach of contract was merely negligent or incompetent, in which case the CUTPA claim was barred, or whether the defendant's actions would support a finding of intentional, reckless, unethical or unscrupulous conduct, in which case the contractual breach will support a CUTPA claim under the second prong of the cigarette rule"). The evidence also supports a finding that Paige knowingly or recklessly engaged in the unscrupulous acts, as he was the manager and controlling member of TMP; he personally represented to the plaintiff that the deposit would be

used for materials, labor, and overhead for the plaintiff's project; and he controlled how the deposit was ultimately spent. We accordingly cannot conclude that the court's findings are clearly erroneous.

The defendants also argue that it was clearly erroneous for the court to render judgment against them pursuant to CUTPA because the evidence does not support a finding that the plaintiff suffered any ascertainable loss of money or property due to a CUTPA violation. This claim lacks merit.

"[T]o be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . CUTPA, however, is not limited to providing redress only for consumers who can put a precise dollars and cents figure on their loss . . . as the ascertainable loss provision do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case. . . . Rather . . . [d]amage . . . is only a species of loss . . . hence [t]he term loss necessarily encompasses a broader meaning than the term damage. . . . Accordingly . . . for purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the amount of the actual loss." (Emphasis omitted; internal quotation marks omitted.) *Kelly* v. *Kurtz*, 193 Conn. App. 507, 536–37, 219 A.3d 948 (2019). "Of course, a plaintiff still must marshal some evidence of ascertainable loss in support of [its] CUTPA allegations, and a failure to do so is indeed fatal to a CUTPA claim . . . ." (Internal quotation marks omitted.) *Herron* v. *Daniels*, 208 Conn. App. 75, 100, 264 A.3d 184 (2021).

The court expressly found that, although the plaintiff made a deposit in the amount of $305,378, the plaintiff

only received value in completed work in the amount of $80,500. There can be little question that the difference between the money paid and the value received constituted an ascertainable loss for purposes of CUTPA. Because the court's findings are supported by evidence in the record, we cannot conclude that the court's finding of ascertainable loss was clearly erroneous.

II

The defendants next claim that the court abused its discretion by ordering the defendants to pay "double damages" under CUTPA. They also contend the court's award of counsel fees cannot stand because there was no proven CUTPA claim. For the reasons set forth herein, we disagree.

The court awarded the plaintiff $224,878 in compensatory damages for the differential between the deposit paid by the plaintiff and the value of the work actually provided by TMP. The court also ordered the defendants to pay an additional $225,000 in punitive damages because the court found "that the defendants' conduct in requisitioning a deposit specifically for material purchases with the intention of diverting the funds for other uses and depleting the funds for purposes unrelated to the project was intentional, wilful and done with reckless indifference to [the plaintiff's] interest." At the conclusion of its memorandum of decision, the court also awarded reasonable attorney's fees and ordered the plaintiff to file an affidavit as to fees and expenses, with attached documentation. After receiving the plaintiff's affidavit, the court awarded the plaintiff $13,040 in reasonable attorney's fees and $601.77 in costs.

At the outset, we note that, although the defendants purport to challenge the court's award of "double damages," the court did not, in fact, award the plaintiff double damages. Rather, the court awarded punitive damages in addition to compensatory damages. We

accordingly construe the defendants' first argument as challenging the court's award of punitive damages.

Section 42-110g (a) provides in relevant part: "The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper." General Statutes § 42-110g (d) further provides: "In any action brought by a person under this section, the court may award to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ."

"Awarding punitive damages and attorney's fees under CUTPA is discretionary . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 310 Conn. 446. Awarding punitive damages based on a multiple of a plaintiff's actual damages "is a recognized method for determining punitive damages under CUTPA." *Staehle* v. *Michael's Garage, Inc.*, 35 Conn. App. 455, 463, 646 A.2d 888 (1994).

In determining whether a punitive damages award pursuant to § 42-110g (a) is so excessive as to constitute an abuse of discretion, we look to the factors that the United States Supreme Court discussed in *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 503, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). See *Ulbrich* v. *Groth*, supra, 310 Conn. 454. Those factors included "the degrees of relative blameworthiness, i.e., whether the defendant's conduct was reckless, intentional or malicious; [among

other factors].” (Citations omitted; internal quotation marks omitted.) Id.

Under the circumstances of the present case, we conclude that the court did not abuse its discretion in awarding the plaintiff punitive damages in the amount of $225,000. See id., 456 (although punitive damages award in amount of $1,251,000 was large, especially in light of compensatory award in amount of $417,000, court cannot conclude that award constituted abuse of discretion). As we concluded in part I of this opinion, the evidence supports the court’s findings that the defendants’ false representations to the plaintiff that the deposit would be used to purchase materials and rent equipment was intentional, deceptive, unethical, and unscrupulous in that they fully intended for TMP to use the deposit to fulfill obligations under other projects unrelated to the plaintiff’s project. The evidence in the record also supports the court’s finding that it was known to Paige that TMP was in a shaky financial condition when it convinced the plaintiff to pay the deposit. These findings support the court’s conclusion that the defendants acted with reckless indifference to the plaintiff’s rights.

As to the award of attorney’s fees, the defendants argue that the award cannot stand because there was no proven CUTPA violation. In part I of this opinion, however, we concluded that the court properly found that the defendants violated CUTPA. Upon our review of the record in this case, we cannot conclude that the court abused its discretion in awarding attorney’s fees to the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

HENRY LAVETTE III *v.* STANLEY BLACK & DECKER, INC.
(AC 44465)

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

Syllabus

The plaintiff employee sought to recover damages from the defendant employer for personal injuries he sustained while working for the defendant. In his complaint, the plaintiff, whose employment duties included painting, alleged, inter alia, that, although he was initially provided a respirator by another employee to prevent excessive inhalation of toxic chemicals from the paint he used, after about one month, D, the defendant's safety manager, informed the plaintiff that he was not authorized to use the respirator in the workplace. The plaintiff further alleged that the defendant had deliberately instructed him to continue to paint in known dangerous conditions, the defendant was aware that his injuries were substantially certain to result from its action, and it had engaged in wilful and serious misconduct. The defendant filed a motion to strike with prejudice on the ground that the plaintiff's claim was barred by the exclusivity provision (§ 31-284) of the Workers' Compensation Act (act) (§ 31-275 et seq.), which provides that the act is the exclusive remedy for employees injured in most instances, because the plaintiff failed to allege sufficient facts that D was the defendant's alter ego such that the defendant could be held liable for D's tortious conduct, and, alternatively, D's actions did not constitute intentional misconduct. The trial court granted the defendant's motion to strike, concluding that the plaintiff's complaint did not state a legally sufficient cause of action that fell within the intentional tort exception to the exclusivity provision of the act. In its memorandum of decision, the court concluded that the plaintiff did not allege the level of control required by the instrumentality rule or the unity of ownership interest required by the identity rule to disregard the defendant's corporate structure, but merely attempted to impose liability on the defendant for the alleged intentional acts of D, as a supervisor, on the basis of her apparent authority to act on the defendant's behalf. The court granted the motion to strike with prejudice, reasoning that the claim had been stricken multiple times and it was clear that the plaintiff was unable to cure the legal insufficiencies in the allegations. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendant's motion to strike with prejudice, the plaintiff having failed to plead that D was the defendant's alter ego such that D's alleged intentional torts could be attributed to the defendant to pierce the corporate veil and fall within the exception to the exclusivity provision of the act: the plaintiff's allegations simply established D's control was typical of any corporate safety manager and did

not rise to the level of alter ego status to disregard the defendant's corporate structure, the plaintiff's allegations having failed to meet the stringent alter ego test, which requires that the corporation have no separate existence from the alter ego who controls and dominates the corporation's business affairs, as the plaintiff's allegation that D created a policy regarding the use of respirators did not establish the requisite level of control over the defendant; moreover, this court declined to review the plaintiff's argument that it should reconsider its jurisprudence regarding the alter ego exception to the act's exclusivity provision with respect to larger corporations, as the plaintiff failed to raise this argument before the trial court and raised it for the first time to this court in his reply brief; furthermore, although our Supreme Court in *Patel* v. *Flexo Converters, U.S.A., Inc.* (309 Conn. 52), reasoned that a plaintiff alleging an intentional tort directly committed or authorized by the employer was not required to prove that the actor was the employer's alter ego, this court declined to consider the applicability of that exception to the exclusivity provision of the act, as the plaintiff did not allege or argue that an intentional tort had been directly committed or authorized by the defendant.

Argued January 10–officially released June 28, 2022

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of the defendant's alleged wilful misconduct, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble, J.*, granted the defendant's motion to strike with prejudice, and the plaintiff appealed to this court; thereafter, the court, *Noble, J.*, granted the plaintiff's motion for judgment and rendered judgment for the defendant, and the plaintiff filed an amended appeal. *Affirmed.*

James F. Sullivan, for the appellant (plaintiff).

Nicholas N. Ouellette, with whom, on the brief, was *Samuel N. Rosengren*, for the appellee (defendant).

Opinion

ALEXANDER, J. The plaintiff, Henry Lavette III, a former employee of the defendant, Stanley Black & Decker, Inc., appeals from the judgment of the trial

court, rendered in favor of the defendant following the court's decision to strike count one of his fourth amended complaint with prejudice. On appeal, the plaintiff claims that the court improperly concluded that he had failed to allege sufficient facts to establish that his claim came within the intentional tort exception to the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's fourth amended complaint and construed in the manner most favorable to sustaining its legal sufficiency,[1] and procedural history are relevant to our discussion. On or about September 2, 2014, the defendant hired the plaintiff as a "store attendant" and his essential employment duties included painting by brush and by spray. Initially, another employee provided the plaintiff with a respirator to prevent excessive inhalation of toxic chemicals from the paint. After approximately one month, however, Kim Derin, the defendant's safety manager, informed the plaintiff that he was not authorized to use the respirator in the workplace. The plaintiff then developed symptoms from his exposure to the paint, such as pain, nausea, diarrhea, and headaches. His symptoms worsened over time.

On or about July 9, 2015, the plaintiff informed Derin that "he was continuously getting headaches, feeling nauseous and experiencing shortness of breath from painting at work . . . ." Derin never responded to the plaintiff regarding his health issues. In January, 2016, the plaintiff reported that he was feeling "violently ill" but was reluctant to file a union grievance concerning

[1] See, e.g., *Doe* v. *Cochran*, 332 Conn. 325, 328, 210 A.3d 469 (2019); *Sullivan* v. *Lake Compounce Theme Park*, 277 Conn. 113, 117, 889 A.2d 810 (2006).

the hazardous conditions due to a fear of being "targeted" by other employees and supervisors. The use of a different brand of paint did not relieve or ameliorate the plaintiff's symptoms.

On or about February 28, 2016, the plaintiff "became extremely ill including excessive vomiting and diarrhea." His symptoms did not improve and a few days later he experienced dizziness and cloudy vision. He was hospitalized overnight and returned to work a few days later. The plaintiff worked only one day between February 28, 2016, and March 17, 2016. The plaintiff filed a complaint with the federal Occupational Safety and Health Administration (OSHA),[2] which led to an investigation of the defendant and fines exceeding $35,000. The defendant terminated the plaintiff's employment on or about January 20, 2017.

The plaintiff commenced this action and, in his operative fourth amended complaint, alleged that the defendant "deliberately instructed the plaintiff to continue to paint in what [was known] to be dangerous conditions." He further claimed that the defendant was aware that his injuries were substantially certain to occur and engaged in wilful and serious misconduct. As a result of this misconduct, the plaintiff purportedly suffered "injuries including nausea, long-term headaches, sharp pain and cramps in his legs, excessive shortness of breath, diarrhea, and overall pain and fatigue in his body, [as well as] emotional distress and concerns for his overall well-being."[3]

[2] "OSHA is designed to impose duties upon employers to ensure worksite safety for the benefit of their own employees as well as any other employees working on or at any worksite that is under the employer's control." *Bouchard* v. *Deep River*, 155 Conn. App. 490, 497–98, 110 A.3d 484 (2015); see also 29 U.S.C. § 651 et seq. (2018).

[3] Count two of the plaintiff's fourth amended complaint set forth a claim of unlawful retaliation. General Statutes § 31-51q provides in relevant part: "Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of

On April 20, 2020, the defendant moved to strike count one of the plaintiff's fourth amended complaint with prejudice. In the attached memorandum of law, the defendant argued that the plaintiff had failed to allege sufficient facts that Derin was the "alter ego" of the defendant and, in the alternative, that her actions did not constitute intentional misconduct.[4] It further argued that without a sufficiently pleaded alter ego theory, the plaintiff's action was legally insufficient due to the exclusivity provision of the act,[5] and, therefore, the court should grant its motion to strike with prejudice. The plaintiff filed his objection to the defendant's motion to strike on May 26, 2020. The court conducted a remote hearing on September 28, 2020.

On December 8, 2020, the court issued a memorandum of decision granting the defendant's motion to

article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages." The trial court presumed that the plaintiff's multiple references in the fourth amended complaint to General Statutes § 31-51g constituted a typographical error.

The defendant objected to count two of the fourth amended complaint on the grounds that this cause of action was raised for the first time and was "exceedingly and unjustifiably untimely and . . . would be barred by the statute of limitations." The court sustained the defendant's objection to the plaintiff's request for leave to add count two to the fourth amended complaint, and the plaintiff has not challenged that ruling in this appeal.

[4] In the proceedings before the trial court, the plaintiff also alleged that another employee, Kristen Sabatino, the defendant's human resources director, acted as its alter ego because she had the authority to "make policy and implement strategies for the defendant regarding training, development, safety and health." The court concluded that the plaintiff's allegations against Sabatino were legally insufficient, and the plaintiff has not challenged this aspect of the court's ruling on appeal. Accordingly, we limit our discussion to the plaintiff's allegations regarding Derin.

[5] See General Statutes § 31-284; *Mello* v. *Big Y Foods, Inc.*, 265 Conn. 21, 25–26, 826 A.2d 1117 (2003).

strike count one of the plaintiff's fourth amended complaint with prejudice. At the outset of its analysis, the court summarized the arguments of the parties as follows: "The first issue to be addressed is whether the plaintiff alleges sufficient facts in the [fourth amended] complaint to subject the claim in count one to the intentional tort exception [to the exclusivity provision of the act found in] § 31-284 (a). The defendant argues that the plaintiff fails to allege sufficient facts to establish [Derin's] . . . alter ego status, [and] thus fails to bring the claim in count one within the ambit of the intentional tort exception. The plaintiff disagrees by pointing to the allegation that Derin had complete and final control over the removal of the plaintiff's respirator, [and] therefore, is the alter ego of the defendant with respect to this specific transaction, satisfying the instrumentality rule for piercing the corporate veil."

Citing to *Jett* v. *Dunlap*, 179 Conn. 215, 219, 425 A.2d 1263 (1979), the court first noted the limited nature of the alter ego intentional tort exception to the exclusivity provision of the act, which provides that, if an assailant employee is of such a rank in the corporation so as to be considered its alter ego, then the corporation may be assigned responsibility for the assailant employee's conduct. Next, the court, citing to *Patel* v. *Flexo Converters U.S.A., Inc.*, 309 Conn. 52, 58, 68 A.3d 1162 (2013), observed that this stringent exception does not impose liability on the corporation for the intentional acts of supervisors based on their apparent authority to act on behalf of their employer.

The court then summarized the relevant allegations in the fourth amended complaint. "[T]he plaintiff alleges that Derin had the authority to make and control policy for the defendant regarding safety procedures, and had the 'complete and final authority' with respect to the removal of the plaintiff's respirator. . . . The plaintiff further alleges that when Derin exercised her authority

to remove the [plaintiff's respirator], she 'bound the defendant to her decision so that, at the time, the defendant had no separate mind, will or existence of its own.' " (Citations omitted.) With respect to the first allegation concerning Derin, the court concluded that this description established nothing more than the duties of any corporate safety manager. As to the latter allegation, the court determined that it lacked legal significance because a motion to strike does not admit legal conclusions or the accuracy or truth of the opinions stated. "The plaintiff alleges no specific fact[s] to substantiate his proposition that the defendant . . . ha[s] no separate mind, will or existence of its own with respect to the removal of the respirator. . . . Furthermore . . . it is not alleged . . . that Derin . . . has any ownership interest in the defendant or that the defendant does not properly maintain corporate formalities. . . . Overall, the plaintiff alleges neither the level of control required by the instrumentality rule nor the unity of ownership interest required by the identity rule, but merely attempts to impose liability on the employer for the intentional acts of supervisors on the basis of apparent authority to act on the employer's behalf." (Citations omitted; internal quotation marks omitted.) The court subsequently granted the motion to strike this count with prejudice because it had been stricken multiple times and "it is clear that the plaintiff cannot cure the legal insufficiencies in the allegations." Thereafter, the plaintiff filed a motion for judgment, which the court granted on January 8, 2021.[6] This appeal followed. Additional facts will be set forth as needed.

[6] As a general rule, "[a]fter a court has granted a motion to strike, the plaintiff may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as] [t]he filing of an amended pleading operates as a waiver of the right to claim that there was error in the sustaining of the [motion to strike] the original pleading." (Citation omitted; internal quotation marks omitted.) *St. Denis* v. *de Toledo*, 90 Conn. App. 690, 693–94, 879 A.2d 503, cert. denied, 276 Conn. 907, 884 A.2d 1028 (2005); see also *Sempey* v. *Stamford Hospital*, 194 Conn. App. 505, 511–12, 221 A.3d 839 (2019). In the present

On appeal, the plaintiff claims that the court improperly granted the defendant's motion to strike count one of the fourth amended complaint with prejudice. Specifically, he argues that the facts pleaded "clearly [allege that] . . . Derin had the complete and final authority regarding whether the plaintiff could use a respirator while painting" and that these allegations were sufficient to satisfy the alter ego exception to the exclusivity provision of the act. The plaintiff further contends that the court erred in concluding that the allegations regarding Derin constituted a legal conclusion. We are not persuaded.

We begin our analysis by setting forth our standard of review and the relevant legal principles. "The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Sieranski* v. *TJC Esq, A Professional Services Corp.*, 203 Conn. App. 75, 81, 247 A.3d 201 (2021); see also *Karagozian* v. *USV Optical, Inc.*, 335 Conn. 426, 433–34, 238 A.3d 716 (2020). Additionally, 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]

case, however, the plaintiff was not permitted to amend his fourth amended complaint because the court had granted the defendant's motion to strike with prejudice. See, e.g., *DeCorso* v. *Calderaro*, 118 Conn. App. 617, 624, 985 A.2d 349 (2009), cert. denied, 295 Conn. 919, 991 A.2d 564 (2010).

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.) *Piccolo* v. *American Auto Sales, LLC*, 195 Conn. App. 486, 490, 225 A.3d 961 (2020).

Next, we set forth the relevant principles regarding our workers' compensation jurisprudence. "The purpose of the [act] is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer . . . . [The act] compromise[s] an employee's right to a [common-law] tort action for [work-related] injuries in return for relatively quick and certain compensation." (Internal quotation marks omitted.) *Dominguez* v. *New York Sports Club*, 198 Conn. App. 854, 859, 234 A.3d 1017 (2020); see also *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, 131 Conn. App. 415, 422–23, 28 A.3d 347 (2011).

General Statutes § 31-284 (a)[7] sets forth the relevant aspects of the exclusivity provision of the act, and provides that workers' compensation payments are the

[7] General Statutes § 31-284 (a) provides: "*An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment* or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication. *All rights and claims between an employer who complies with the requirements of subsection (b) of this section and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other than rights and claims given by this chapter*, provided nothing in this section shall prohibit any employee from securing, by agreement with his employer, additional compensation from his employer for the injury or from enforcing any agreement for additional compensation." (Emphasis added.)

exclusive source of remedy against an injured employee's employer in most instances. *Mariano* v. *Hartland Building & Restoration Co.*, 168 Conn. App. 768, 778, 148 A.3d 229 (2016); see also *Motzer* v. *Haberli*, 300 Conn. 733, 743–44, 15 A.3d 1084 (2011). Specifically, our Supreme Court has stated that "where a worker's personal injury is covered by the act, statutory compensation is the sole remedy and recovery in common-law tort against the employer is barred." *Jett* v. *Dunlap*, supra, 179 Conn. 217; see also *Driscoll* v. *General Nutrition Corp.*, 252 Conn. 215, 221, 752 A.2d 1069 (2000).

There is, however, an exception to the act's exclusivity. If a plaintiff can demonstrate that his injury was the result of an intentional tort[8] that was committed by his employer, then the corporation is subject to common-law tort liability. See *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 274, 698 A.2d 838 (1997); *Perille* v. *Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 532–33, 494 A.2d 555 (1985); *Jett* v. *Dunlap*, supra, 179 Conn. 217–18.

Our Supreme Court has recognized two different ways for an employee to allege and prove an intentional tort. In *Jett* v. *Dunlap*, supra, 179 Conn. 218, our Supreme Court first explained that an employer cannot rely upon the exclusivity of the act if it intentionally directed or authorized its employee to strike another employee. Next, after noting a distinction between an

[8] "[I]n *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 639 A.2d 507 (1994) . . . and *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (1997) . . . the court expanded the intentional tort exception to the exclusivity provision to include circumstances in which either . . . the employer actually intended to injure the plaintiff (actual intent standard) or . . . the employer intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur (substantial certainty standard)." (Internal quotation marks omitted.) *Binkowski* v. *Board of Education*, 180 Conn. App. 580, 586, 184 A.3d 279 (2018); see also *Lucenti* v. *Laviero*, 327 Conn. 764, 778–79, 176 A.3d 1 (2018); *Stebbins* v. *Doncasters, Inc.*, 263 Conn. 231, 233, 819 A.2d 287 (2003).

assault directly committed or authorized by an employer and an unauthorized assault committed by an employee, the court turned to the question of whether that employee was the alter ego of the corporation such that the employer should be held liable for the employee's tortious conduct. Id., 218–19. The court in *Jett* reasoned that if the assailant is of such a rank in the corporation so as to be deemed its alter ego, under standards governing disregard of the corporate entity, it was appropriate for the corporation to bear reasonability for that actor's unauthorized conduct. Id., 219. *Jett* did not, however, extend corporate liability for the conduct of an assailant to mere supervisors or foremen. Id. In summary, the court in *Jett* concluded: "If the assailant can be identified as the alter ego of the corporation, or the corporation has directed or authorized the assault, then the corporation may be liable in common-law tort; if the assailant is only another employee who cannot be so identified, then the strict liability remedies provided by the [act] are exclusive and cannot be supplemented with common-law damages." Id.

Our Supreme Court subsequently revisited this exception to the act's exclusivity provision in *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 255. In that case, the trial court had instructed the jury that the intentional actions of an employee could be attributed to the corporate defendant if that employee had apparent authority to act on the corporation's behalf or was its alter ego. Id., 272. On appeal, our Supreme Court reviewed and applied the analysis from *Jett* v. *Dunlap*, supra, 197 Conn. 218–19, and concluded that the assailant must be of such a rank in the corporation to be deemed its alter ego under the standard governing the disregard of the corporate entity. *Suarez* v. *Dickmont Plastics Corp.*, supra, 273–75. It further noted that to overcome the act's exclusivity provision, both the actions producing the injury and the resulting actions must have been

intentional or substantially certain to have occurred. Id., 280.

In the present case, the plaintiff consistently has relied on its allegations that Derin acted as the alter ego of the defendant and committed an intentional tort. Consequently, we turn to our Supreme Court's most recent discussion of that specific exception to the act in *Patel* v. *Flexo Converters, U.S.A., Inc.*, supra, 309 Conn. 52. In *Patel*, the employee challenged the summary judgment rendered in favor of the employer with respect to his action to recover damages for personal injuries that resulted from the alleged intentional misconduct by a fellow employee. Id., 53–54. The dispositive issue in *Patel* was whether the trial court properly concluded that no genuine issue of material fact existed as to whether the fellow employee's position as a night supervisor made him the defendant's alter ego. Id., 55–57.

Our Supreme Court, citing to *Jett* v. *Dunlap*, supra, 179 Conn. App. 219, iterated the narrow exception to the exclusivity provision of the act for intentional torts committed by the alter ego of a corporation. *Patel* v. *Flexo Converters, U.S.A., Inc.*, supra, 309 Conn. 57. It emphasized that this exception does not apply to supervisory employees but only an alter ego of the corporation. Id., 57–58. Our Supreme Court explained: "*The alter ego test is stringent.* The supervisory employee alleged to have intentionally injured the plaintiff must be the employer's alter ego under the standards governing disregard of the corporate entity . . . a test corresponding to the requirements for piercing the corporate veil. The concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule . . . as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case. . . . *The standard requires that the corporation, functionally speaking,*

have no separate existence from the alter ego who controls and dominates the corporation's affairs. The alter ego test is therefore incompatible with imposing liability on the employer for the intentional acts of supervisors on the basis of apparent authority to act on the employer's behalf. . . .

"The alter ego test is functional, and a supervisory employee's title is not dispositive of the ultimate question of whether the employee meets the standards governing disregard of the corporate entity . . . . In the context of a small family owned corporation, for example, a supervisor could sufficiently dominate and control the corporation so as to justify liability under the alter ego theory." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) Id., 58–60; see also *Melanson* v. *West Hartford*, 61 Conn. App. 683, 690–91, 767 A.2d 764, cert. denied, 256 Conn. 904, 772 A.2d 995 (2001). The court also observed that, as noted in *Jett* v. *Dunlap*, supra, 179 Conn. 218, if a plaintiff alleged an intentional tort directly committed or authorized by the employer, he or she would not be required to prove that the actor was the employer's alter ego. *Patel* v. *Flexco Converters U.S.A., Inc.*, supra, 58 n.6.

Our Supreme Court then described the two methods for determining whether a defendant's corporate structure has been disregarded: the instrumentality rule and the identity rule. Id., 59 n.7. "The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or

other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. . . . The identity rule has been stated as follows: If [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) Id.; see also *Hersey* v. *Lonrho, Inc.*, 73 Conn. App. 78, 87, 807 A.2d 1009 (2002).

With this background in mind, we consider the extensive procedural history in this case regarding the plaintiff's intentional tort claim to determine if the plaintiff pleaded sufficient facts to come within the intentional tort committed by an alter ego exception to the exclusivity provision of the act. The plaintiff commenced this action on March 20, 2017. In count one of his complaint, the plaintiff alleged that the defendant deliberately had instructed him to continue to paint in what it knew to be dangerous conditions. He further claimed that the defendant was aware that his "injuries were substantially certain to flow from [its] actions" and had "engaged in wilful and serious misconduct." As a result of this misconduct, the plaintiff purportedly suffered "injuries including nausea, long-term headaches, sharp pain and cramps in his legs, excessive shortness of breath, diarrhea, and overall pain and fatigue in his body."[9]

[9] The plaintiff's complaint also included a second count claiming wrongful discharge in violation of § 31-51m in which he alleged that he was terminated for exercising his first amendment rights when he reported the defendant to OSHA. On October 4, 2018, the plaintiff filed a request to amend the complaint to add a second wrongful discharge claim. Specifically, he sought to include an additional count alleging that he had been terminated "in

On November 5, 2018, the defendant moved to strike counts one and three of the amended complaint.[10] With respect to count one of the amended complaint, the defendant argued that the plaintiff failed to allege that the employees controlled and dominated the corporate entity so as to constitute its alter ego. On November 30, 2018, the plaintiff filed a revised amended complaint.[11] In anticipation of the filing of another amended complaint, the court, on January 2, 2019, declined to rule on the defendant's motion to strike count one of the amended complaint, and granted the defendant's motion to strike with respect to count three.

On February 7, 2019, the plaintiff filed a second revised complaint. On March 21, 2019, the defendant filed a motion to strike count one of the plaintiff's second revised complaint. In its accompanying memorandum of law, the defendant argued, inter alia, that the plaintiff had failed to allege sufficient facts that the employees identified in the second revised complaint controlled and dominated the defendant's business affairs so as to be deemed its alter ego. On April 18, 2019, the plaintiff filed his memorandum of law in opposition to the defendant's motion to strike.[12] On September 17, 2019, the court issued a memorandum of decision granting the defendant's motion to strike. The court noted that the plaintiff had failed to "cite any facts to buttress the claim that Derin . . . [was] the alter ego"

retaliation for raising issues that derive from the law that support important public polices about health and safety in the workplace." The court overruled the defendant's objection and permitted the plaintiff to amend his complaint.

[10] See footnote 9 of this opinion.

[11] The statement of facts section and count one of the revised amended complaint essentially mirrored those of the amended complaint.

[12] While the defendant's motion to strike the second revised complaint was pending, the plaintiff filed a request to file a third revised complaint on June 10, 2019. The proposed third revised complaint included, inter alia, language regarding Derin and her employment role for the defendant. The defendant objected to the plaintiff's request and, on July 1, 2019, the court sustained the defendant's objection.

of the defendant or recite the elements of the tests used to determine whether the defendant's corporate structure had been disregarded.

On October 2, 2019, the plaintiff filed his third amended complaint. In that pleading, the plaintiff alleged that Derin, as the defendant's safety manager, held "a title of such rank as it is deemed as an alter ego of the defendant, and . . . Derin is so situated in the corporate structure as to bind the corporation." The defendant responded thirteen days later by filing a motion for judgment pursuant to Practice Book § 10-44,[13] or, in the alternative, to strike count one of the third amended complaint. The defendant argued that the plaintiff had not cured the pleading deficiencies in the second revised complaint that had been stricken by the court. In its accompanying memorandum of law, the defendant argued that the plaintiff still had failed to allege sufficient facts to satisfy either the instrumentality rule or the identity rule despite the inclusion of the job responsibilities of Derin and the assertion that her position was of such a rank so as to bind the defendant and to deem her as its alter ego.

The plaintiff filed his objection to the motion for judgment and the motion to strike on October 31, 2019. Therein, he maintained that sufficient facts had been pleaded to satisfy the instrumentality rule and, therefore, Derin was the alter ego of the defendant. He further argued that this pleading was sufficient to establish that the defendant, through its alter ego, intentionally acted

[13] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross complaint has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . ."

in a way to cause the plaintiff's injuries and that those injuries were substantially certain to result from the defendant's conduct.

On March 5, 2020, the court issued an order indicating that it was granting the defendant's October 15, 2019 motion, which it treated as a motion to strike. In recounting the procedural history, the court commented that a prior pleading had been stricken because the plaintiff's bald assertion regarding Derin as an alter ego of the defendant was insufficient to bring his claim within the exception to the act's exclusivity provision. With respect to the third amended complaint, which added a description of employment duties for Derin's position, the court agreed with the defendant that despite these additions, the plaintiff had failed to set forth sufficient allegations to advance a claim for alter ego status pursuant to either the instrumentality rule or the identity rule. The court issued an order stating: "The new allegations fail to allege facts sufficient to implicate alter ego status, and therefore the motion to strike the first count is granted."

On April 3, 2020, the plaintiff filed his fourth amended complaint. In that pleading, the plaintiff alleged the following: "Derin . . . had the complete and final authority regarding whether the plaintiff could use a respirator while painting. . . . Derin exercised her authority and judgment when she took the respirator from the plaintiff. . . . In so exercising her authority and judgment . . . Derin bound the defendant to her decision so that, at the time, the defendant had no separate mind, will or existence of its own. . . . Derin was the safety manager of the [defendant] . . . . This is a title of such rank as it is deemed as an alter ego of the defendant, and . . . Derin is so situated in the corporate structure as to bind the corporation. . . . Derin, as the defendant's safey manager, had the authority to make policy for the defendant regarding safety

procedures. . . . Derin had the authority to control policy for the defendant regarding safety procedures."

The defendant moved to strike the fourth amended complaint with prejudice. The defendant again contended that the pleading was legally insufficient to bring this claim within the alter ego exception to the exclusivity provision of the act. The court agreed with the defendant and granted the motion to strike with prejudice.

We conclude that the trial court properly determined that the plaintiff's allegations established nothing more than that Derin exercised the control typical of any corporate safety manager and did not rise to the level of alter ego status. The plaintiff failed to allege "complete domination" over the defendant, as required by the instrumentality rule. See *Patel* v. *Flexo Converters, U.S.A., Inc.*, supra, 309 Conn. 59 n.7. Additionally, the allegations in the fourth amended complaint failed to establish the type of unity of interest and ownership between Derin and the defendant to satisfy the identity test. See id. We note that the "alter ego test is stringent" and that the "standard requires that the corporation, functionally speaking, have no separate existence from the alter ego who controls and dominates the corporation's affairs." Id., 58–59. The allegation that Derin created a policy regarding the use of respirators did not establish the level of control over the defendant necessary to pierce the corporate veil and come within the alter ego exception to the act's exclusivity provision, which was announced in *Jett* v. *Dunlap*, supra, 179 Conn. 219, and further explained in *Patel*.

We also agree with the trial court that the plaintiff's bald assertion that the defendant lacked a separate mind, will or existence from Derin constituted a legal conclusion, and, therefore, lacked legal significance. "A motion to strike does not admit legal conclusions." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*,

184 Conn. App. 583, 588, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018); *Cadle Co.* v. *D'Addario*, 131 Conn. App. 223, 230, 26 A.3d 682 (2011); see also *Heyward* v. *Judicial Dept.*, 178 Conn. App. 757, 762, 176 A.3d 1234 (2017) (motion to strike properly granted if complaint alleges mere conclusions of law unsupported by facts alleged). For these reasons, we conclude that the trial court properly granted the defendant's motion to strike the plaintiff's fourth amended complaint with prejudice.

In an attempt to avoid this result, the plaintiff has raised two arguments which we conclude are not properly before this court. First, in his reply brief and at oral argument, the plaintiff claimed that we should reconsider our jurisprudence regarding the alter ego exception to the workers' compensation exclusivity provision, particularly with respect to larger corporations. We decline to consider this argument because it was not raised before the trial court; see *Taylor* v. *Pollner*, 210 Conn. App. 340, 345, 270 A.3d 213 (2022); and was raised for the first time to this court in the plaintiff's reply brief. See *Ostapowicz* v. *Wisniewski*, 210 Conn. App. 401, 413–14 n.9, 270 A.3d 145 (2022) (declining to review claim raised for first time in reply brief). Additionally, as an intermediate appellate court, we are bound to follow the controlling precedent from our Supreme Court. *Onofrio* v. *Mineri*, 207 Conn. App. 630, 645 n.4, 263 A.3d 857 (2021) (noting that this court is unable to modify Supreme Court precedent). For these reasons, we decline to consider the plaintiff's argument that we should reconsider our law pertaining to the alter ego exception.

Second, at oral argument before this court, a discussion regarding certain language from *Patel* v. *Flexo Converters, U.S.A., Inc.*, supra, 309 Conn. 58 n.6, occurred. This footnote in *Patel* describes an additional way for

a plaintiff to avoid the exclusive nature of the act. Specifically, it states: "We note that a plaintiff alleging an intentional tort directly committed or authorized by the employer need not prove that the actor was the employer's alter ego. *Jett* v. *Dunlap*, supra, 179 Conn. 218." (Internal quotation marks omitted.) *Patel* v. *Flexo Converters, U.S.A., Inc.*, supra, 58 n.6. During argument, the plaintiff's counsel appeared to take the position that this alternative means to bypass the exclusivity provision of the act provided an additional pathway to reverse the granting of the motion to strike the fourth amended complaint with prejudice.

After our careful review of the record, as demonstrated by the extensive review of the plaintiff's pleadings from his initial complaint to the fourth amended complaint that was stricken with prejudice, we conclude that the plaintiff did not allege or argue that an intentional tort had been directly committed or authorized by the defendant. Specifically, we note that in its September 17, 2019 memorandum of decision granting the defendant's motion to strike the first count of the plaintiff's revised complaint, the court expressly stated that "[t]he *alter ego status of Derin . . . was the only basis on which the plaintiff asserted the intentional tort exception to the workers' compensation exclusivity*." (Emphasis added.) The allegations set forth in the plaintiff's third and fourth amended complaints did not advance a claim of an intentional tort directly committed or authorized by the defendant. "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Citation omitted; internal quotation marks omitted.) *Avoletta* v. *Torrington*, 133 Conn. App. 215, 223 n.8, 34 A.3d 445 (2012).

Furthermore, the plaintiff failed to adequately brief the issue of whether an intentional tort had been directly committed or authorized by the defendant. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021). For these reasons, we decline to consider the applicability of the exception to the exclusivity provision of the act set forth in *Patel* v. *Flexco Converters U.S.A., Inc.*, supra, 309 Conn. 58 n.6.

The judgment is affirmed.

In this opinion the other judges concurred.

U.S. BANK TRUST, N.A., TRUSTEE *v.* LESLEY DALLAS ET AL.
(AC 45003)

Moll, Cradle and Eveleigh, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the named defendant, D. D filed special defenses, asserting, inter alia, that the plaintiff engaged in residential mortgage fraud and fraud in the inducement. The trial court granted the plaintiff's motion for summary judgment as to liability against D, determining that the plaintiff had established a prima facie case as to liability and that D failed to submit any evidence to support her special defenses. Thereafter, the trial court rendered a judgment of strict foreclosure in favor of the plaintiff, from which D appealed to this court. *Held* that the trial court

properly granted the plaintiff's motion for summary judgment; because the trial court aptly addressed the arguments raised in this appeal in its memorandum of decision, this court adopted the trial court's thorough and well reasoned decision as a proper statement of the facts and the applicable law on the issues.

Argued May 11—officially released June 28, 2022

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *J. Moore*, *J.*, granted the plaintiff's motion for summary judgment as to liability against the named defendant and rendered judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

Gary L. Seymour, for the appellant (named defendant).

Frank B. Velardi, *Jr.*, for the appellee (plaintiff).

Opinion

EVELEIGH, J. The defendant Lesley Dallas[1] appeals following the judgment of strict foreclosure rendered against her in favor of the plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, in this residential mortgage foreclosure action. On appeal, the defendant claims that the court improperly granted the plaintiff's motion for summary judgment as to liability only because it erred in determining that there were no genuine issues of material fact as to the defendant's

[1] Additional defendants named in the action by virtue of an interest in the real property subject to the mortgage are Norbert E. Mitchell Co., Inc., by virtue of a judgment lien from 2009; Midland Funding, LLC, by virtue of a judgment lien from 2011; Beck & Beck, LLC, by virtue of a judgment lien from 2011; and The Connecticut Light & Power Company, by virtue of judgment liens from both 2011 and 2015. Because none of these parties is a participant in this appeal, we refer to Dallas as the defendant throughout this opinion.

special defenses of residential mortgage fraud and fraud in the inducement. We affirm the judgment of the trial court.

The following facts and procedural history are revealed by the record. On November 2, 2005, the defendant executed a promissory note in the amount of $650,000 payable to the order of Chase Bank USA, N.A., and secured by a mortgage on the property located at 1 Skiff Mountain Road in Sharon. The mortgage and the note eventually were assigned to the plaintiff before it commenced this action.

On February 11, 2016, the plaintiff commenced the present foreclosure action by way of a complaint alleging that the mortgage and promissory note executed by the defendant are now in default by virtue of her failure to pay the monthly installments of principal and interest due on January 1, 2009, and on the first day of each month thereafter. On October 25, 2017, the defendant filed her operative revised special defenses, which asserted, inter alia, that the plaintiff engaged in residential mortgage fraud (first special defense) and fraud in the inducement (fourth special defense).[2] Both of these special defenses generally allege that the plaintiff "forged, fabricated, and robo-signed" documents it knew were untrue and made false representations to the defendant during the mortgage process.

On June 10, 2019, the plaintiff filed a motion for summary judgment as to liability only against the defendant. In support of its motion, the plaintiff attached a series of documents evincing that it was the holder of the note and mortgage, that the defendant was in default, and that the defendant's special defenses were legally insufficient. On August 7, 2019, the defendant

[2] The defendant alleged thirteen special defenses in total. On May 1, 2018, the trial court granted the plaintiff's motion to strike with respect to all but the defendant's first and fourth special defenses.

filed an objection and a memorandum of law in opposition to the plaintiff's motion in which she argued that her first and fourth special defenses precluded judgment in favor of the plaintiff. The defendant submitted only her own affidavit in support of her objection.

On May 24, 2021, the court, *J. Moore*, *J.*, after a hearing, issued an order and memorandum of decision granting the plaintiff's motion for summary judgment as to liability only. In its memorandum of decision, the court reviewed the plaintiff's claims, the defendant's special defenses, and the relevant legal authority, followed by a thorough analysis of the legal issues presented. The court determined that the documents submitted by the plaintiff established a prima facie case as to liability and that there was nothing in the defendant's affidavit that negated or undermined the plaintiff's prima facie case. Ultimately, the court concluded that the defendant failed to submit any evidence to support her special defenses and, therefore, summary judgment was warranted as to the issue of liability. On September 13, 2021, the court rendered a judgment of strict foreclosure against her in favor of the plaintiff. This appeal followed.

On appeal, the defendant claims that the court improperly granted the plaintiff's motion for summary judgment as to liability only because it erred in determining that there were no genuine issues of material fact as to the defendant's special defenses of residential mortgage fraud and fraud in the inducement. On the basis of our examination of the record on appeal, and the briefs and arguments of the parties, we are persuaded that the judgment of the trial court should be affirmed. Because the court's memorandum of decision aptly addresses the arguments raised by the defendant, we adopt its thorough and well reasoned decision as a proper statement of the facts and applicable law on

these issues. See *U.S. Bank Trust, N.A.* v. *Dallas*, Superior Court, judicial district of Litchfield, Docket No. CV-16-6013346-S (May 24, 2021) (reprinted at 213 Conn. App. 487, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Ortiz* v. *Torres-Rodriguez*, 205 Conn. App. 129, 132, 255 A.3d 941, cert. denied, 337 Conn. 910, 253 A.3d 43 (2021); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

APPENDIX

U.S. BANK TRUST, N.A., TRUSTEE *v.* LESLEY DALLAS ET AL.*

Superior Court, Judicial District of Litchfield
File No. CV-16-6013346-S

Memorandum filed May 24, 2021

Proceedings

Memorandum of decision on plaintiff's motion for summary judgment. *Motion granted.*

Adam L. Avallone and *Frank Velardi*, for the plaintiff.

Gary L. Seymour, for the named defendant.

Opinion

J. MOORE, J. The plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, filed a motion for summary judgment in this foreclosure action on liability only on June 10, 2019 (#172). The defendant

* Affirmed. *U.S. Bank Trust, N.A.* v. *Dallas*, 213 Conn. App. 483, A.3d (2022).

Lesley Dallas (Dallas) filed a memorandum in opposition to the motion for summary judgment on August 7, 2019. The court conducted a remote hearing on the motion for summary judgment on January 15, 2021. The plaintiff filed the requisite Federal Mortgage Foreclosure Moratorium Affidavit on April 20, 2021 (#185). For the reasons set forth below, the court grants the motion for summary judgment on liability only.

Dallas' memorandum in opposition and her supporting affidavit rely solely on her two remaining special defenses. There is nothing in the memorandum in opposition or in Dallas' affidavit that attempts to negate or undermine the conclusion that the plaintiff has established a prima facie case of foreclosure.

The plaintiff has, indeed, established a prima facie case for foreclosure by means of an affidavit submitted by the mortgage loan servicer of the plaintiff and by the exhibits attached thereto. The plaintiff's affidavit satisfies the prerequisites of General Statutes § 52-180, as construed in *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 235–36, 32 A.3d 307 (2011), overruled in part on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013). The plaintiff's affidavit establishes the following facts: (1) the defendant Dallas executed and delivered a promissory note on November 2, 2005, in favor of the original lender, Chase Bank USA, N.A., in the amount of $650,000; (2) through two assignments, the plaintiff has become the payee of the note and was in possession of the note prior to filing this lawsuit; (3) the defendant Dallas executed and delivered a mortgage on 1 Skiff Mountain Road, Sharon, Connecticut on November 2, 2005, in favor of the plaintiff's predecessor in interest, which mortgage was recorded on December 30, 2005; (4) as of May 22, 2019, the unpaid balance of the note is $632,361.19 plus interest, late charges and collections costs, and this unpaid balance, although due

and payable, has not been paid; (5) the defendant Dallas has been in default under the terms of the note and mortgage since January 2, 2009; (6) notice of the default was dated on or about October 15, 2009, and was sent by first class mail, postage fully paid to the defendant Dallas; (7) the notice set forth the default, the action required to cure it and a date by which the default needed to be cured; (8) the defendant Dallas did not cure the default in timely fashion and, as a result, the plaintiff elected to accelerate the indebtedness owed and brought this foreclosure action; and (9) the defendant Dallas has not yet cured the default. These facts establish a prima facie case in a mortgage foreclosure action under *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013).

Based on the Federal Mortgage Foreclosure Moratorium Affidavit recently filed in court, the court finds that the loan secured by this mortgage is not a " 'Federally Backed Mortgage Loan' " as defined by 15 U.S.C. 9056 (a) (2) of the CARES Act, and is, therefore, not subject to any federal foreclosure moratorium.

Dallas has, however, raised two special defenses and has argued that the court must, in an equitable action such as this foreclosure, review all of her pleadings liberally to see if she has raised any other defenses. The court will consider the issues raised by each of her special defenses, and then the argument about other equitable special defenses, seriatim.

The first special defense is entitled, "Residential Mortgage Fraud." This special defense, read generously, essentially makes two kinds of allegations. The first pertains to documents and alleges that the original lender and the existing plaintiff (called the plaintiff and the substitute plaintiff, respectively, in the special defense) "knowingly and wilfully omitted mandatory

disclosure documents, and forged, fabricated and robo-signed documents they knew were untrue," that the original lender and that the plaintiff "knowingly, intentionally and wilfully" did so "to deceive, mislead and induce" Dallas to enter into the loan. The second is a very vague allegation that the original lender and the plaintiff made false representations that Dallas relied on to her detriment. As a result of this misconduct, "foreclosure cannot be had."

The second remaining special defense is entitled, "Fraud in the Inducement." This special defense alleges that the plaintiff is liable for the actions of its predecessor lender, that the plaintiff, its predecessor and their agents deliberately either made false statements to Dallas or deceitfully omitted to tell Dallas important facts about the loan, and that Dallas reasonably relied on these statements or omissions to her detriment.

In sum, the special defenses aver that some documents were "forged, fabricated and robo-signed," that some documents were not given to the defendant and that someone on behalf of the plaintiff made false representations that Dallas relied on to her detriment.

It is hornbook law that " 'the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party

has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.' " *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008); see also *Baldwin* v. *Curtis*, 105 Conn. App. 844, 850–51, 939 A.2d 1249 (2008).

In this case, as set forth above, the plaintiff has established a prima facie case for foreclosure. It is incumbent on Dallas to not only claim that there is a genuine issue of material fact in regard to her special defenses, but also to provide evidence in support of that claim.

Such evidence may be in the form of an affidavit. Affidavits must be based on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify. Practice Book § 17-46; *Barrett* v. *Danbury Hospital*, 232 Conn. 242, 251, 654 A.2d 748 (1995). Affidavits that fail to meet the criteria of Practice Book § 17-46 are defective and may not be considered to support the judgment. Defects in affidavits include such things as assertions of facts or conclusory statements. See *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 793–94, 749 A.2d 1144 (2000); *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 596–97, 687 A.2d 111 (1996). "Mere statements of legal conclusions . . . are not sufficient to raise the issue [of material fact]." *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 377, 260 A.2d 596 (1969).

The only potential source of evidence filed by Dallas in her effort to raise a genuine issue of material fact is her own affidavit, which is appended to her memorandum in opposition to this motion. Paragraph 6 of Dallas' affidavit sets forth her claim of forgery. In this paragraph, Dallas swears that, at some time after the closing, someone "supplied a bogus 'chicken scratch signature' on my mortgage documents above the 'WITNESS' line

with no name attached beneath [it] in a ridiculous attempt to try and make it look as if there was a witness present at closing. . . . I have no idea who signed it, and I stress again . . . at no time was this supposed 'chicken scratch witness' present at my home for my closing, and at no later time did this 'chicken scratch witness' ever appear before me to confirm that I had executed the mortgage."

Such a claim of forging a witness' signature or leaving out a witness' signature cannot create a genuine issue of material fact under a recent Appellate Court decision. Failure to include a witness' signature or signatures is remedied under General Statutes § 47-36aa, even when there is a claim of fraud, unless the purported victim files a lawsuit challenging the validity of the mortgage and records a lis pendens within two years after the mortgage is recorded. *Wells Fargo Bank, N.A.* v. *Fratarcangeli*, 192 Conn. App. 159, 167–68, 217 A.3d 649 (2019).

As the Appellate Court put it, "[t]he express language of § 47-36aa (a) (2) provides, inter alia, that any mortgage containing a conveyancing defect as a result of being 'attested by one witness only or by no witnesses' is 'as valid as if it had been executed without the defect or omission' unless an action challenging the validity of the mortgage is commenced and a notice of lis pendens is recorded within two years after the mortgage is recorded. There is no language in § 47-36aa (a) that limits the applicability of subdivision (2) or otherwise carves out a fraud exception for instances where it is alleged that the lack of a valid second attesting witness resulted from a fraudulent act. We conclude that the meaning of the validating act with regard to the question before us is plain and unambiguous and, therefore, our inquiry as to such meaning ends. See *In re Elianah T.-T.*, 326 Conn. 614, 624, 165 A.3d 1236 (2017) ('[i]f the legislature's intent is clear from the statute's plain and

unambiguous language, our inquiry ends'). Simply put, § 47-36aa does not contain a fraud exception, and we do not write one into the statute. We further note that when the legislature wants to carve out a fraud exception, it knows how to do so. See, e.g., General Statutes § 12-415 (f) ('[*e*]*xcept in the case of fraud* . . . every notice of a deficiency assessment shall be mailed within three years after the last day of the month following the period for which the amount is proposed to be assessed or within three years after the return is filed, whichever period expires later' . . .).

"Applying the language of § 47-36aa (a) (2) to the present case, we conclude that, in the absence of a timely filed action specifically challenging the validity of the mortgage at issue on the basis of an enumerated conveyancing defect, namely, the lack of a valid second witness as otherwise required by [General Statutes] § 47-5 (a), the validating act automatically cured such defect or omission." (Emphasis in original; footnote omitted.) *Wells Fargo Bank, N.A.* v. *Fratarcangeli*, supra, 192 Conn. App. 167–68.

Dallas has presented no evidence that she filed an action challenging the validity of the mortgage or recorded a lis pendens within two years of the mortgage having been recorded, on or before December 30, 2007. Therefore, she cannot succeed on a claim that the witness' signature on the mortgage was forged or that the mortgage lacked the requisite number of witnesses.

Neither can Dallas succeed on her claim that someone acting on behalf of the plaintiff made fraudulent representations to her or withheld mortgage related documents from her.

Once again, Dallas' affidavit is the only document she submitted in an attempt to put evidence in front of the court. Paragraphs 3, 4, 5 and 6 detail the false statements or omissions allegedly made to defraud Dallas. The

court will not rehash them at this point, because of Dallas' failure to create any genuine issue of material fact that would serve to tie these statements to either the plaintiff or its predecessor.

Specifically, Dallas mentions only two people who made statements to her about the mortgage, one an unnamed "representative from Black Dog Title," the mortgage broker, and the other an attorney named "Michael Vernile," whom she terms the "bank's attorney/title representative . . . ." Dallas also swears that Vernile never provided her with copies of the requisite mortgage documents and seems to swear that either the unnamed representative or someone else associated with Black Dog Title never provided her with the requisite documents before the closing. Black Dog Title is neither the plaintiff's predecessor nor the plaintiff.

Although the existence of an agency relationship and whether a person is acting within the bounds of his authority as an agent are factual questions; *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 805, 842 A.2d 1134 (2004); Dallas' affidavit is totally devoid of any evidence from which the court could find that Black Dog Title, its unnamed representative and Vernile were agents of the plaintiff's predecessor, much less of the plaintiff, and even less so that Black Dog Title was authorized to make statements pertaining to the mortgage issued by the plaintiff's predecessor. Although Dallas avers that she relied "in good faith to my great harm on Chase Bank," she cites to no conversations with Chase Bank. Moreover, she provides no evidence of any link between Chase Bank, the plaintiff's predecessor, and Black Dog Title. All that the court knows is that Black Dog Title placed the mortgage. Finally, Dallas' statement that Vernile was the "bank's attorney/title representative" is not supported by any facts that could possibly show that Vernile was the agent of the plaintiff's predecessor, much less of the plaintiff. The only

fact that Dallas provided about Vernile was that he was a "Commissioner of the Superior Court." (Emphasis omitted.) Dallas' counsel's statements in his memorandum in opposition to this motion that Vernile was the "express agent of Black Dog Title," and that Black Dog Title was "an agent of Chase Bank USA, the originating lender," are not evidence before the court, as they were not sworn to. At best, Dallas' statement about Vernile and the "[b]ank" is the kind of unsupported legal conclusion denounced by applicable case law as insufficient to raise any kind of genuine issue of material fact. *United Oil Co.* v. *Urban Redevelopment Commission*, supra, 158 Conn. 377.[1]

A defendant seeking to invalidate a mortgage by reason of claimed fraud must demonstrate that the lender either participated in making the false representation, was aware of the false representation or that the individual who perpetrated the alleged fraud was the agent of the lender. See *Chase Manhattan Mortgage Corp.* v. *Machado*, 83 Conn. App. 183, 188–89, 850 A.2d 260 (2004). Dallas has failed to submit even a scintilla of evidence in support of any one of these required alternative elements of a special defense of fraud in a foreclosure action.

Therefore, insofar as Dallas' remaining two special defenses attempt to raise a genuine issue of material fact as to the claims of fraudulent representations or omissions, they fail to do so.

Dallas also argues that the court should construe her special defenses liberally to suss out elements of the

[1] This affidavit stands in stark contrast to the affidavit discussed in *Barasso* v. *Rear Still Hill Road, LLC*, supra, 81 Conn. App. 804. The affidavit submitted in opposition to summary judgment in that case clearly stated that the plaintiff's brother, Ralph Barasso, "repeatedly had represented to the defendants that he was an authorized agent of both the plaintiff and [the plaintiff's alleged business partner] . . . ." Id.

special defenses of unclean hands and equitable estoppel.

There are fatal problems for Dallas with both special defenses.

Unclean hands must be specifically pleaded. See *Kosinski* v. *Carr*, 112 Conn. App. 203, 209 n.6, 962 A.2d 836 (2009). Dallas failed to do so.

Equitable estoppel requires the same kind of link between the plaintiff or its predecessor and the person who, by means of words or actions, causes another to believe in certain facts that the other then relied on. See *Johnnycake Mountain Associates* v. *Ochs*, 104 Conn. App. 194, 208–209, 932 A.2d 472 (2007), cert. denied, 286 Conn. 906, 944 A.2d 978 (2008). As with the allegations of fraud, Dallas has failed to provide any evidence that would link the plaintiff or its predecessor to the words or actions of Black Dog Title's unnamed representative or Vernile.

For all of the above stated reasons, the court grants the motion for summary judgment as to the issue of liability.

ANTONIO INGLIS *v.* COMMISSIONER OF CORRECTION
(AC 44492)

Prescott, Moll and Bishop, Js.

Syllabus

The petitioner, who had been convicted of several crimes, including murder, as a result of a shooting in a nightclub, sought a writ of habeas corpus. He claimed that his trial counsel rendered ineffective assistance as to the petitioner's third-party culpability defense and the admission into evidence of eyewitness identifications of the petitioner. The petitioner further claimed that his right to due process under the state constitution

(article first, §§ 8 and 9) was violated because the eyewitness identifications of him were obtained through unnecessarily suggestive identification procedures. The petitioner had claimed that he could not properly be identified as the shooter because the witnesses could not distinguish between him and his brother, W, who was present at the time of the shooting. The trial court declined the petitioner's request to instruct the jury on third-party culpability, reasoning that the evidence failed to establish a direct connection between W and the crimes at issue. The petitioner claimed that his trial counsel were ineffective for having filed a request to charge that did not adequately refer to the evidence in support of the charge, which, in turn, resulted in the court's declining to give the jury a third-party culpability instruction. The habeas court rendered judgment denying the petition and, thereafter, denied the petitioner certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petitioner certification to appeal with respect to his claims that his trial counsel were ineffective in litigating his third-party culpability defense and issues relating to the admission at trial of the eyewitness identifications of him:

a. The habeas court properly determined that the petitioner was not prejudiced by his trial counsel's failure to cite certain evidence in their request for a jury instruction on third-party culpability, the petitioner having failed to demonstrate that there was a reasonable probability that the outcome of his trial would have been different had counsel included references to that evidence in the request to charge, as this court previously determined in the petitioner's direct appeal from his conviction that the trial court did not improperly decline to instruct the jury on the proposed charge because the evidence raised merely a bare suspicion as to a third party, which was insufficient to establish the required direct connection to that third party so as to warrant a charge on third-party culpability; moreover, contrary to the petitioner's claim that his trial counsel rendered ineffective assistance in failing to present the testimony of certain eyewitnesses in support of the petitioner's identification defense, the petitioner failed to rebut the presumption that counsel declined to call those witnesses on the basis of reasonable professional judgment, the habeas court having credited counsel's testimony that they had engaged in a risk analysis concerning whether to call the witnesses, one of whom may have given contradictory statements to the police, and the other of whom, in a written statement to the police, had identified the petitioner as the shooter, and it was not for this court to second-guess the decision of trial counsel when counsel were aware of the substance of the witnesses' anticipated testimony and made the reasonable decision not to present it due to its potentially harmful nature.

b. The petitioner failed to show a reasonable probability that counsel would have been successful in seeking to offer the testimony of an eyewitness identification expert, as any such effort would likely have

been fruitless in light of our Supreme Court's case law at the time of the petitioner's criminal trial, which made clear that such testimony generally was disfavored and that it would not have been an abuse of a trial court's discretion to refuse to allow it; accordingly, the petitioner could not demonstrate that his trial counsel rendered ineffective assistance by declining to pursue a motion for expenses to retain and, ultimately, not to call, an eyewitness identification expert; moreover, the procedures the police employed concerning the photographic array of suspects that they showed to the witnesses were within the acceptable parameters of effective and fair police work and satisfied the requirements of due process, as the petitioner failed to present credible evidence that those procedures were so flawed as to present a very substantial likelihood of irreparable misidentification; furthermore, the petitioner failed to establish that his trial counsel performed deficiently by not presenting evidence that an eyewitness to the shooting had chosen a photograph other than that of the petitioner from the array of photographs prepared by the police, as counsel's choice not to call that witness was not outside the wide range of reasonable professional assistance, the witness was only 50 percent sure of his choice from the array, he was not emphatic in his knowledge of the shooter's identity and, thus, could have testified that the petitioner was the shooter, thereby hurting the petitioner's defense, the witness' statement to the police tended to undermine the petitioner's third-party culpability defense and, even if counsel had performed deficiently by failing to question the witness, the jury's guilty verdict was supported by substantial other evidence concerning the petitioner's identity as the shooter.

2. The petitioner failed to establish cause and prejudice to overcome his procedural default in having failed to claim at his criminal trial and on direct appeal that the admission into evidence of the eyewitness identifications of him as the shooter violated his right to due process under article first, §§ 8 and 9; contrary to the petitioner's contention that good cause existed for that failure because established law at that time would have made his argument futile, the habeas court properly determined that he had a reasonable basis at that time to claim that the identification procedures at issue were unnecessarily suggestive and, thus, that he did not establish good cause and prejudice because our Supreme Court's case law at that time explicitly invited continued challenges to identification procedures.

Argued January 31—officially released June 28, 2022

Procedural History

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

petition for certification to appeal and issued an articulation of its decision, and the petitioner appealed to this court. *Appeal dismissed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, *Tamara A. Grosso*, former senior assistant state's attorney, and *Samantha L. Oden*, former deputy assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Antonio Inglis, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly rejected his claims that (1) his trial counsel rendered ineffective assistance in his underlying criminal trial, and (2) his right to due process under the Connecticut constitution was violated by the admission of both out-of-court and in-court eyewitness identifications of him that were obtained through unnecessarily suggestive identification procedures. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. After a jury trial, the petitioner was convicted of two counts of murder in violation of General Statutes § 53a-54a (a), one count of capital felony murder in violation of General Statutes (Rev. to 2007) § 53a-54b (7), one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), and one count of carrying a pistol without a permit

in violation of General Statutes § 29-35 (a). The petitioner received a total effective sentence of life imprisonment without the possibility of release, plus twenty-five years.

This court's opinion in the petitioner's direct appeal; see *State* v. *Inglis*, 151 Conn. App. 283, 94 A.3d 1204, cert. denied, 314 Conn. 920, 100 A.3d 851 (2014), cert. denied, 575 U.S. 918, 135 S. Ct. 1559, 191 L. Ed. 2d 647 (2015); sets forth the following facts: "[I]n the early hours of February 10, 2008, an altercation ensued at the Cocktails on the Green nightclub (club) in Cromwell that left two men dead and another wounded. The altercation began when the [petitioner] repeatedly antagonized one of the victims, Tyrese Lockhart, a patron seated at the bar with friends. Lockhart and his friends eventually confronted the [petitioner] and asked him to leave Lockhart alone. A group of the [petitioner's] friends that included his brother, Daren Walls, likewise encouraged the [petitioner] to leave Lockhart alone. When Israel Dandrade, a disc jockey who was performing at the club that evening, announced 'last call' soon thereafter, Lockhart headed toward an exit with friends. At that moment, the [petitioner] brandished a chrome revolver and fired several shots in Lockhart's direction. One shot struck Lockhart in the head, another struck Dandrade in the eye, and a third grazed the cheek of Kenneth Lewis, a cook at the club. Lockhart and Dandrade died as a result of their respective gunshot wounds.

"The [petitioner] subsequently was arrested and charged with the aforementioned offenses. A jury trial followed,[1] at which the state presented eyewitness testimony from multiple individuals identifying the [petitioner] as the shooter. The theory advanced by the defense was that, due to the facial similarit[ies] between

[1] The petitioner's criminal trial took place in September and October, 2009.

Walls and the [petitioner], those witnesses could not distinguish between the two brothers to properly identify the shooter." (Footnote added; footnote omitted.) Id., 286–87.

On May 27, 2015, the petitioner filed a petition for a writ of habeas corpus. Subsequently, on September 24, 2018, the petitioner filed the operative, third amended petition for a writ of habeas corpus. In the amended petition, the petitioner set forth numerous claims, including that (1) his constitutional right to the effective assistance of counsel was violated, (2) his constitutional right to the effective assistance of appellate counsel was violated, and (3) his constitutional right to due process and a fair trial was violated.

On November 6, 2018, pursuant to Practice Book § 23-30,[2] the respondent, the Commissioner of Correction, filed a return, asserting, inter alia, that the petitioner was procedurally defaulted with respect to his due process claims because he had failed to raise them at his criminal trial or on direct appeal, and that he could not establish good cause or prejudice sufficient to excuse his failure to assert those claims on direct appeal. On December 6, 2018, pursuant to Practice Book § 23-31,[3] the petitioner filed a reply to the return in which he contended that his state due process claim was not

[2] Practice Book § 23-30 provides: "(a) The respondent shall file a return to the petition setting forth the facts claimed to justify the detention and attaching any commitment order upon which custody is based.

"(b) The return shall respond to the allegations of the petition and shall allege any facts in support of any claim of procedural default, abuse of the writ, or any other claim that the petitioner is not entitled to relief."

[3] Practice Book § 23-31 provides: "(a) If the return alleges any defense or claim that the petitioner is not entitled to relief, and such allegations are not put in dispute by the petition, the petitioner shall file a reply.

"(b) The reply shall admit or deny any allegations that the petitioner is not entitled to relief.

"(c) The reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. The reply shall not restate the claims of the petition."

procedurally defaulted because any attempt to raise that claim at trial would have been futile given that "the Connecticut Supreme Court [in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)] has only recently recognized that the Connecticut . . . constitution affords greater protection than the federal constitutional standard against the admission of unreliable eyewitness identification evidence or testimony." In the alternative, the petitioner contended that, if the claim is procedurally defaulted, it can be cured by a showing of cause and prejudice because there is a reasonable probability that he would have raised this claim but for the deficient performance of trial counsel and, had the claim been raised, there is a reasonable probability that he would have prevailed.

After trial, the court denied the petition for a writ of habeas corpus. The petitioner thereafter filed a petition for certification to appeal from the court's judgment, which the court denied. The petitioner moved the court for an articulation as to the basis for the court's denial of his petition for certification, which the court granted, stating that "the petition for certification was denied on the merits." This appeal followed. Additional facts and procedural history will be set forth as necessary.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of

reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 74–75, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 415, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

For the reasons set forth in parts I and II of this opinion, we conclude that the petitioner has failed to demonstrate that the habeas court abused its discretion in denying his petition for certification to appeal.

I

The record reflects that in the underlying criminal trial the petitioner was represented by Attorney Walter

Bansley III and Attorney Walter C. Bansley IV.[4] In support of his claim that the habeas court abused its discretion in denying his petition for certification to appeal with respect to its decision regarding the petitioner's claim that his trial counsel rendered ineffective assistance, the petitioner asserts that his trial counsel were ineffective in two ways: (1) by failing to litigate adequately a third-party culpability defense, and (2) by failing to litigate effectively issues relating to the admission of eyewitness identifications at trial. We discuss these claims in turn.

We begin by setting forth the standard of review and principles of law applicable to ineffective assistance of counsel claims. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Citation omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

Finally, to the extent that the petitioner generally does not challenge the habeas court's factual findings,

[4] We refer to both attorneys collectively as trial counsel throughout this opinion, except when necessary to distinguish between them.

"each of his claims raises either questions of law or mixed questions of law and fact, over which we exercise plenary review." *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 509, 193 A.3d 625 (2018).

A

The petitioner first claims that his trial counsel were ineffective in failing to litigate adequately a third-party culpability defense. Specifically, the petitioner asserts that his trial counsel (1) filed a request to charge the jury that did not adequately refer to the evidence that supported the charge, which, in turn, resulted in the court's denial of a third-party culpability instruction, and (2) failed to present two eyewitnesses in support of the defense. We are not persuaded.

1

First, the petitioner contends that the request to charge filed by his counsel with respect to the third-party culpability defense failed to comply with the requirements of Practice Book § 42-18.[5] He argues that the request to charge did not include a reference to the evidence to which the third-party culpability instruction would apply. Specifically, he contends that, "[a]t a minimum, reasonably competent counsel would have listed the three main pieces of evidence supporting the third-party culpability defense: the fact that eyewitness identifications described the shooter as having cornrows, a hooded sweatshirt, and a baseball cap." The petitioner contends that this failure resulted in the court's denial of a request for a third-party culpability charge to which he otherwise would have been entitled.

[5] Practice Book § 42-18 (a) provides in relevant part: "When there are several requests, they shall be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, and the evidence to which the proposition would apply. . . ."

The following additional facts are relevant to our resolution of this claim. At the petitioner's criminal trial, trial counsel sought to introduce evidence that another individual—Walls—was the shooter. On direct appeal, this court summarized the evidence concerning the petitioner's third-party culpability claim at the criminal trial as follows: "Walls was the [petitioner's] brother and bore a strong facial resemblance to him. He did not [otherwise] physically resemble the [petitioner]. Unlike the [petitioner], who stood five feet, seven inches tall with a 'husky' and 'more muscular' build, Walls was five feet, ten inches tall and had a 'slim' physique. At the time of the shooting, Walls' hair was braided in cornrows, whereas the [petitioner's] hair was short and curly. The two also were dressed differently at that time. The [petitioner] wore a black knit cap, a baggy grey jacket with yellow trim, jeans, and tan boots. By contrast, Walls had on a fitted and light-colored jacket with a large emblem on the upper left chest, jeans, and no cap.

"Lockhart was seated at the bar when the [petitioner] began antagonizing him. After several minutes, Lockhart turned around and said, 'I don't even know who you are, who are you, leave me alone . . . what is the problem?' As Lockhart turned back to the bar to finish his drink, Walls intervened and attempted to calm the [petitioner]. Walls told the [petitioner] to 'let it go' and made a 'calm down' gesture with his hands. The [petitioner] nevertheless refused to 'let it go' and remained agitated. Walls continued his efforts to calm the [petitioner], telling him to 'chill, just let it go, back up . . . .' Lockhart was fatally shot soon thereafter." (Footnote in original; footnote omitted.) *State* v. *Inglis*, supra, 151 Conn. App. 290–91.

On October 9, 2009, trial counsel submitted a request to charge to the court. With respect to the third-party culpability defense, the proposed charge stated: "You

have heard evidence in this case from several witnesses that someone other than [the petitioner] committed these crimes. This type of evidence is known as third-party guilt. As I have already made clear to you, the state has the burden of proving the [petitioner's] guilt beyond a reasonable doubt. . . . The question presented by third-party culpability evidence is not whether the guilt of another person has been proven, but whether, after a full consideration of all of the evidence in this case, there is a reasonable doubt that [the petitioner] was the perpetrator. Evidence that a third party may have committed this crime may, if credited, tend to raise a reasonable doubt as to whether the state has met its required burden to prove the identity of the [petitioner] as the perpetrator. If, after considering all of the evidence, you have a reasonable doubt as to the [petitioner's] guilt, you must find the [petitioner] not guilty. See generally *State* v. *Echols*, 203 Conn. 385 [524 A.2d 1143] (1987)." On October 14, 2009, at a charging conference, the court denied the petitioner's request to charge on third-party culpability.

At the habeas trial, Bansley IV conceded that the request to charge did not contain any recitation of evidence in support of the petitioner's third-party culpability claim. In its memorandum of decision, the habeas court, *Chaplin*, *J.*, determined that the petitioner failed to prove that he was prejudiced by counsel's failure to include any recitation of evidence in the proposed request to charge on third-party culpability. The habeas court stated: "At the underlying criminal trial, [Bansley IV] argued the third-party culpability request to charge to the court, *Clifford*, *J.* Thereafter, the [trial] court addressed [Bansley IV's] argument by indicating that [it] disagreed with [his] view of the applicability of the third-party culpability charge to the evidence that had been presented to the jury. Specifically, the court noted a lack of corroborating evidence that Walls had motive

and opportunity to commit the shootings. The court opined that the third-party culpability jury charge was not appropriate based on the . . . evidence before the jury, but that [it] was 'giving a more extensive charge on identification of the person who actually caused the death of the two individual[s] here.' In denying the . . . request to charge, the court reiterated, 'I don't really see it as a classic third-party culpability, and I think the instructions are adequate.' . . .

"Even if [trial counsel] had included supporting evidence in the request to charge, the evidence included would have been the same evidence that the court considered in denying the third-party culpability request to charge. Based on the court's rationale for denying the request to charge, this court finds that the inclusion of the proffered evidence in the request to charge would not have resulted in the trial court granting the . . . request to charge. For that reason, the court finds that the petitioner was not prejudiced by the . . . failure [of his trial counsel] to include evidence in the written third-party culpability request to charge."

Our analysis of the prejudice prong of *Strickland* necessarily requires a determination of whether reference to specific evidence in the request for a third-party culpability charge would have resulted in the trial court's granting of the request and whether such a charge would have resulted in a different verdict.

Upon our thorough review of the record, we find no disagreement with the habeas court's conclusion that the petitioner failed to demonstrate that there was a reasonable probability that, but for the failure of his trial counsel to include references to specific pieces of evidence in the request to charge, the outcome of his trial would have been different. We note, as well, that the evidence that the petitioner contends should have

been included in the request to charge—the eyewitnesses' descriptions of the shooter as having cornrows and wearing a hooded sweatshirt and a baseball cap—nevertheless was considered by the trial court and found to be insufficient to support a charge on third-party culpability. The trial court declined to charge the jury on third-party culpability on the basis of all of the evidence presented at trial, not because of any perceived insufficient reference to such evidence in the proposed charge itself.

Indeed, this court, in the petitioner's direct appeal, previously determined that the trial court did not abuse its discretion in failing to submit a third-party culpability instruction to the jury on the basis of its determination that the evidence before the jury failed to establish a direct connection between Walls and the criminal offense. Specifically, in his direct appeal, the petitioner argued that his request for a third-party culpability instruction was appropriate in light of the evidence that "Walls and the [petitioner] look alike, Walls was present when the shooting occurred . . . Walls had a motive to shoot Lockhart . . . and . . . at least one witness testified that the shooter's hair was braided in cornrows." (Internal quotation marks omitted.) *State* v. *Inglis*, supra, 151 Conn. App. 294. We disagreed and stated: "The mere fact that Walls bore a facial resemblance to the [petitioner] and was present at the club does not establish 'a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, [such that] a trial court has a duty to submit an appropriate charge to the jury'; *State* v. *Arroyo*, [284 Conn. 597, 610, 935 A.2d 975 (2007)]; particularly when the jury heard ample testimony that Walls attempted to calm the [petitioner] and to diffuse the situation immediately prior to the shooting. Accordingly, we cannot say that the court improperly declined

to instruct the jury on the proposed charge when the evidentiary basis proffered by the [petitioner] plainly did not meet that standard." *State* v. *Inglis*, supra, 295. Similarly, in the present case, even if trial counsel had identified all of this evidence in the request to charge on third-party culpability, it would not have resulted in such an instruction being given, nor would it have changed the outcome of the petitioner's criminal trial.

Accordingly, the habeas court properly concluded that the petitioner failed to demonstrate that there was a reasonable probability that, but for the failure of his trial counsel to include references to specific pieces of evidence in the request to charge, the outcome of his trial would have been different. Given the trial court's determination that there was insufficient evidence presented to the jury to establish a direct connection to a third party to warrant a charge on third-party culpability, the habeas court properly determined that the failure of trial counsel to cite evidence in the request to charge on third-party culpability did not prejudice the petitioner. As this court noted in the petitioner's direct appeal, the cumulative evidence presented to the jury raised a mere bare suspicion regarding a third party. In light of the foregoing, we conclude that the petitioner has failed to demonstrate that the habeas court abused its discretion in denying his petition for certification to appeal as to this issue.

2

In furtherance of his ineffective assistance of counsel claim related to a third-party culpability defense, the petitioner also contends that his trial counsel failed to introduce into evidence the testimony of two eyewitnesses who had provided descriptions of the shooter to the police, which he argues were consistent with his theory that Walls was the shooter. Specifically, the petitioner asserts that "Lisa Siena and Andre Henton

both provided [the] police with signed and sworn statements that described Walls, not [the petitioner], as the shooter."

The following additional facts are relevant to our resolution of this claim. Both Siena and Henton were present at the time of the shooting and subsequently provided the police with written statements describing the shooter. Henton described the shooter as a Hispanic male, about five feet, three inches or five feet, four inches tall, 145 pounds, with curly brown hair, wearing jeans, a dark colored coat, and a baseball cap that might have been yellow and blue. Henton was close enough to the shooting such that he had blood spatter on his shirt. Siena identified the petitioner as the shooter in her written statement. She stated: "I . . . saw that [the petitioner] was holding a gun. I only saw the top half of [the petitioner]. I would say that I was less than five feet away from [the petitioner]. I then saw [the petitioner] fire a shot. . . . I heard a total of three or four shots. . . . When I saw [the petitioner] on the night of the shooting, he was wearing a black long sleeve sweater and jeans. The sweater was not casual, but more dressy. [The petitioner] has a medium to light complexion, about [five feet, eight inches to five feet, nine inches] tall, and has a thin build. [The petitioner] had his hair in [cornrows] and he did not have a hat on."

With respect to the present claim, the habeas court found that the petitioner's trial counsel did not render deficient performance. The court based its decision on the habeas testimony of the petitioner's trial counsel that they had "made a strategic decision as to each witness and whether to present such testimony, which included the testimony of Siena and Henton." The habeas court found the testimony of trial counsel to be credible. Bansley IV testified that both he and Bansley III were "intimately aware of the issues and witnesses at the time of trial, much more so than at the time of

their testimony for this matter." Bansley III testified that, "if I think they're gonna hurt the case, I don't call them as a witness. . . . [Y]ou have to make decisions in the courtroom pretty frequently as to who you present, how you present 'em, and what information you want to bring. And then you have to do a risk analysis of whether or not . . . they [are going to] help you more than hurt ya." In addition, Bansley III testified that he thought Henton had given contradictory statements to the police and to a private investigator hired by trial counsel.[6]

When asked whether Siena would have been a favorable witness, Bansley IV testified at the habeas trial that, "at the time, I knew this case inside and out. I knew all these witnesses. I knew all these statements, all these reports. . . . Even the notes you showed me shows that we looked at . . . Siena and knew the positives, the pros and cons of it. It'd be speculation to say why she was or was not called." When asked for a possible reason why he did not call her, Bansley IV answered, "[m]aybe we couldn't have found her. Maybe we did find her and talk to her and she was adamant it was [the petitioner]. We didn't need the jury hearing that." The habeas court found that the testimony of trial counsel did not support the petitioner's claim that they performed deficiently by failing to call either Siena or Henton to testify at the petitioner's criminal trial.

In resolving this claim we are guided by the principles elucidated by our Supreme Court. "[T]he decision

[6] Specifically, the petitioner's habeas counsel asked Bansley III, "I believe you stated that possibly . . . Henton had given two different statements; one to the police, and then a separate one that was maybe contradictory to your investigator. Is that correct?" He responded: "That's what I think, but I'm not sure." Further, Bansley III testified that he thought Henton's statement to the police was "totally inconsistent" with the description of Walls, particularly because his description did not mention anything about cornrows.

whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel . . . .'' (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 628, 212 A.3d 678 (2019).

''Regarding ineffectiveness claims relating to the failure to call witnesses, [w]hen faced with the question of whether counsel performed deficiently by failing to call a certain witness, the question is whether this omission was objectively reasonable because there was a strategic reason not to offer such . . . testimony . . . [and] whether reasonable counsel could have concluded that the benefit of presenting [the witness' testimony] . . . was outweighed by any damaging effect it might have. . . . Moreover, our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses . . . such as when . . . counsel learns the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . .'' (Citation omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 304, 267 A.3d 120 (2021).

Indeed, the present case is unlike *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 683, 51 A.3d 948 (2012), in which trial counsel failed entirely to contact or investigate a potentially advantageous witness. In *Gaines*, trial counsel's complete lack of investigation resulted in his total ignorance of the substance of the potential witness' testimony. Id. Our Supreme Court explained, ''[t]herefore, [trial counsel's] failure to investigate and call [the potential witnesses] was not based on a reasonable professional judgment that their testimony would be either irrelevant or harmful to his case. Indeed, [trial counsel] acknowledged that, had he

known the substance of their testimony, he would have called them to testify at trial . . . .'' Id.

In the present case, neither Bansley III nor Bansley IV could recall the specific reason for not calling these witnesses at the criminal trial. Nevertheless, the habeas court specifically credited their testimony that they had investigated the witnesses present at the time of the shooting and were intimately familiar with the case at the time of the criminal trial.[7] Thus, because the habeas court determined that trial counsel testified credibly, that they had thoroughly investigated the potential witnesses at the time of the criminal trial, and that they engaged in a risk analysis concerning whether to call

[7] Bansley IV testified at the habeas trial that, ''[a]t the time, I knew this case inside and out. I knew all these witnesses. I knew all these statements, all these reports. I know everyone's considered.''

In addition, during cross-examination, the following colloquy occurred between the petitioner's habeas counsel and Bansley IV:

''Q. . . . [C]an you tell the court what investigation you conducted to pursue your theories of defense?

''A. Generally, we always have an investigator that goes out. I cannot think of a trial that I have conducted where I did not have an investigator. So, that would've been the primary focus. . . .

''Q. . . . [W]hat did you do to research and investigate the eyewitness identification issues?

''A. I think the main thing is, going over discovery, looking at all the commonsense inconsistencies and applying that to all the theories behind why there are misidentifications. . . .

''Q. . . . And I believe you said that you knew all of the witnesses in this case, both the lay witnesses and the police officers. . . . I mean that you had investigated them, that you spoke with them.

''A. I would've at least read reports, at a minimum.

''Q. Okay. Well, I'm just . . . trying to restate that you familiarized yourself with all the witnesses.

''A. I knew this case.''

In addition, Bansley III testified: ''I know that we spent a lot of time and money with a private investigator . . . . He was, in my opinion, very diligent. He did a lot of work. I do recall he brought us some information that was really helpful. I just don't remember the specifics of it at the moment. . . . [M]y son and I also went out and, you know, we like to do hands on. We went to the club and we looked at the videotape. We tried to reconstruct it. You know, so we did a lot.''

each witness at the time of trial, it concluded that the petitioner failed to overcome the presumption that the decision of trial counsel to refrain from calling Siena or Henton was based on their reasonable professional judgment. See, e.g., *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 512, 139 A.3d 798 (2016) ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.)); see also *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 628 ("decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel" (internal quotation marks omitted)); *Williams* v. *Commissioner of Correction*, 177 Conn. App. 321, 333, 175 A.3d 565 ("[T]ime inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of ignorance, inattention or ineptitude . . . *Strickland*'s strong presumption must stand." (Internal quotation marks omitted.)), cert. denied, 327 Conn. 990, 175 A.3d 563 (2017).

With respect to the two witnesses in question, Siena and Henton, we conclude that the habeas court properly determined that the petitioner failed to present evidence sufficient to rebut the presumption that his trial counsel declined to call these witnesses on the basis of strategic reasons. Specifically, the habeas court credited the testimony of trial counsel that they undertook

a risk analysis in considering whether to call Siena and Henton, whose testimony tended to undermine the petitioner's identification defense. Siena's statement explicitly identified the petitioner as the shooter. Notably, Henton's statement identified the shooter as having "curly brown hair," not cornrows, which was the main physical characterization on which the petitioner relied in arguing that Walls was the shooter. Furthermore, Bansley IV testified that he thought Henton might have given inconsistent statements. See footnote 6 of this opinion. We note, as well, that the habeas court found that both trial counsel testified credibly at the habeas trial that they were intimately familiar with the case at the time of trial, including all potential witnesses. It is not for this court to second-guess the decision of trial counsel not to call certain witnesses when trial counsel were aware of the substance of their anticipated testimony and made the reasonable decision not to present it due to its potentially harmful nature. See, e.g., *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 636–37; *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82. In short, we find no fault in the habeas court's determination that it was sound trial strategy for trial counsel not to call two witnesses who identified the petitioner as the shooter.

B

The petitioner next claims that his trial counsel rendered ineffective assistance by failing to litigate issues concerning the state's introduction into evidence of unnecessarily suggestive eyewitness identifications. Specifically, he contends that trial counsel (1) failed to retain an eyewitness identification expert, (2) failed to file a motion to suppress the eyewitness identifications because the procedures used were unduly suggestive, and (3) failed to present evidence that Henton chose an individual other than the petitioner from a photographic array, which he contends would have undermined the

reliability of the eyewitness identifications that were offered at trial.

1

First, the petitioner contends that trial counsel should have retained an eyewitness identification expert. Specifically, the petitioner asserts that "expert testimony would have been useful during both a suppression hearing and at the actual criminal trial" and that, "[h]ad the jury been informed about the ways in which [the] eyewitness identifications in this case were unreliable, it would have acquitted [the petitioner]."

The following additional facts are relevant to our resolution of this claim. Six months prior to the commencement of the petitioner's criminal trial, trial counsel filed a motion for payment of necessary expenses, requesting that the court provide funds for the purpose of retaining an expert to "evaluate the case for the purposes of eyewitness identification issues . . . ."[8] Trial counsel later withdrew the motion, and, as a result, a defense expert was not used at trial. At the habeas trial, neither trial counsel could specifically recall why the motion for payment for necessary expenses was not pursued.[9]

[8] The trial court, *Clifford*, *J.*, on March 31, 2009, stated to trial counsel with respect to the motion for payment of necessary expenses: "[Y]ou represent the [petitioner] privately, and you're asking the Judicial Department, basically, to pay the expenses for investigators, etc. . . . I think I mentioned in chambers, I mean, part of me feels that's what the public defender system is for, and when a private attorney gets into a case, that they should be able to finance their own investigators once they file the appearance. . . . I think we're going to need a hearing." No hearing was held on the motion because trial counsel withdrew the motion two months later.

[9] At the habeas trial, the following colloquy took place between the petitioner's habeas counsel and Bansley IV:

"Q. Okay. Based on your knowledge of the case generally, can you think of a reason why that motion would have been withdrawn?

"A. I cannot.

"Q. Can you think of any strategic reason for having withdrawn the motion?

"A. I can't.

"Q. . . . And just briefly before I move on to the next topic, had you had [this eyewitness expert] testify previously at a criminal trial?

In addressing this claim, the habeas court concluded that "the petitioner failed to provide credible evidence that [trial counsel] did not have a strategic reason for withdrawing the motion for payment of necessary expenses." The court heard testimony on the issue from Attorney Brian S. Carlow, a criminal defense expert, and Margaret Kovera, an expert in forensic psychology, as well as from trial counsel. Carlow testified that his review of the trial materials "did not furnish . . . any reason for [trial counsel] to withdraw the motion for payment of necessary expenses." The court noted, however, that although Carlow reviewed the trial materials, he did not speak with anyone involved with the case at the time. Kovera opined concerning eyewitness reliability factors and various shortcomings as to what had been presented at the petitioner's criminal trial. As to these expert witnesses, the habeas court held that "the weight of expert opinions of [Kovera] and [Carlow] does not allow this court to substitute their opinion[s] of perceived deficiencies with the actual rationale or lack of rationale that existed for [trial counsel] in 2009."

"[F]ailing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy." *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 821, 194 A.3d 316 (holding that counsel was not ineffective in failing to retain or to request funding to retain expert witness), cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018); see also *Nicholson* v. *Commissioner of Correction*, 186 Conn.

"A. I don't—my recollection is, I don't believe courts were allowing it at the time.

"Q. Okay.

"A. That's my best recollection.

"Q. Alright. But is it something you were attempting to get in, nonetheless?

"A. Yes. I remember for my first five years of practice, it was a real cutting edge issue, that we were one of the first ones that contacted [the expert] and, and really explored the issue. But I don't believe the courts were allowing it. That's my best recollection."

App. 398, 414, 199 A.3d 573 (2018) ("[t]he selection of an expert witness is a paradigmatic example of the type of strategic choic[e] that, when made after thorough investigation of [the] law and facts, is virtually unchallengeable" (internal quotation marks omitted)), cert. denied, 330 Conn. 961, 199 A.3d 19, cert. denied sub nom. *Nicholson* v. *Cook*, U.S. , 140 S. Ct. 70, 205 L. Ed. 2d 76 (2019).

"[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to . . . reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Nicholson* v. *Commissioner of Correction*, supra, 186 Conn. App. 413; see also *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 636–37 (defense counsel's decision not to call certain witnesses was reasonable trial strategy despite inability of defense counsel to recall every detail of criminal trial or investigation concerning potential testimony of those witnesses, as defense counsel testified at habeas trial that, at time of criminal trial, he interviewed those witnesses and exercised his judgment not to call them). Moreover, our Supreme Court has recognized that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as

[they] did . . . .” (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 637.

The habeas court concluded that the petitioner’s trial counsel did not perform deficiently by failing to pursue the motion for necessary expenses in order to retain an expert. Specifically, in its memorandum of decision, the court stated: “[The trial counsel] could not recall the reason for not pursuing the motion; however, their recall of the circumstances surrounding this case demonstrates to the court that they knew the case well and they made strategic decisions appropriate to trial counsel by pursuing the motions that they believed would yield the most benefit to their client’s interest. The petitioner failed to present credible evidence that [an expert witness’] testimony would have been helpful to the petitioner’s case. Additionally, the petitioner failed to demonstrate that the court would have granted the motion had [trial counsel] pursued it. Thus, the petitioner presented no credible evidence to rebut the presumption that [trial counsel] acted within the bounds of reasonable professional assistance. Therefore, the petitioner’s claim must fail.”

We find no fault with the determination by the habeas court that the petitioner failed to demonstrate that his trial counsel rendered deficient performance in this regard. Even if we assume, arguendo, that trial counsel performed deficiently in failing to retain an eyewitness identification expert, the habeas court found, and we agree, that the petitioner was not prejudiced[10] given

[10] In its memorandum of decision, the habeas court noted that “the petitioner failed to demonstrate that the [trial] court would have granted the motion had [trial counsel] pursued it.” In reaching this determination, the habeas court appears to have decided that the petitioner failed to prove both prongs of the *Strickland* test for ineffective assistance of counsel. Because a habeas petition fails unless both prongs are proven, we focus in this appeal on the habeas court’s determination regarding the prejudice prong.

that the law at the time of his criminal trial was not clear as to whether trial counsel would have been able to present such testimony and whether that testimony would have been helpful to the petitioner's case.[11] In the present case, Bansley IV testified that his best recollection was that Connecticut law did not permit the use of eyewitness identification experts at the time of the petitioner's trial and that it was a "cutting edge issue . . . ." See footnote 9 of this opinion.

At the time of the petitioner's criminal trial, *State* v. *Kemp*, 199 Conn. 473, 477, 507 A.2d 1387 (1986), overruled in part by *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), overruled in part by *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), controlled the issue of expert evidence concerning eyewitness identifications. In *McClendon*, our Supreme Court reaffirmed its earlier decision in *Kemp*, holding that expert testimony on the reliability of eyewitness identifications "is within the knowledge of jurors and expert testimony generally would not assist them in determining the question. . . . [It] is also disfavored because . . . it invades the province of the jury to determine what weight or effect it wishes to give eyewitness testimony." (Internal quotation marks omitted.) Id. Although *Kemp* and *McClendon* do not prohibit a trial court from admitting expert testimony concerning the reliability of eyewitness identifications, they make clear that, at the time of the petitioner's criminal trial, such testimony generally was disfavored, and it would

[11] In his appellate brief, the respondent argues that the petitioner also failed to demonstrate that he was prejudiced by his counsel's allegedly deficient performance. Specifically, the respondent argues that, "even if counsel should have pursued the motion for payment of necessary expenses and offered testimony from an eyewitness identification expert, the petitioner has not demonstrated that the trial court would have permitted such testimony."

not have been an abuse of the trial court's discretion to refuse to allow it.

One year after the petitioner's criminal trial, our Supreme Court again held that a trial court properly excluded the testimony of an eyewitness identification expert. In *State* v. *Outing*, 298 Conn. 34, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011), our Supreme Court addressed a trial court's preclusion of testimony from an eyewitness identification expert, Jennifer Dysart, the same expert whom trial counsel in the present case sought to retain. "In *Outing*, the defendant . . . maintained that he was entitled to present expert testimony on the issue of eyewitness identifications in connection with his motions to suppress the identification testimony of two eyewitnesses. . . . The trial court declined to consider some of the proffered expert testimony and denied [the defendant's] motions to suppress. . . . Following his conviction, [the defendant] appealed to this court, claiming, inter alia, that the trial court improperly had precluded him from presenting the expert testimony at the suppression hearing. . . . In rejecting his claim, the majority in *Outing* acknowledged that it was keenly aware of the concerns [arising from] the evolving jurisprudence regarding the admissibility of expert testimony on the reliability of eyewitness identifications . . . but concluded . . . that it was both unnecessary and unwise to address his contention that [our Supreme] [C]ourt should overrule [*State* v. *Kemp*, supra, 199 Conn. 477] and [*State* v. *McClendon*, supra, 248 Conn. 586]." (Citations omitted; internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 225 n.4, 49 A.3d 705 (2012). It was not until 2012, three years after the petitioner's criminal trial, that our Supreme Court decided to abandon *Kemp* and *McClendon* and embrace the notion that "[t]he reliability of eyewitness identifications frequently is not a matter

within the knowledge of an average juror and . . . the admission of expert testimony on the issue does not invade the province of the jury to determine what weight to give the evidence." Id., 251–52; see also *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172–73, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010). Given the governing decisional law at the time of the petitioner's criminal trial, the petitioner has not shown that there is a reasonable probability that his trial counsel would have been successful in seeking to offer into evidence the testimony of an eyewitness identification expert.

Accordingly, the record and the status of the law at the time support the habeas court's conclusion that the petitioner failed to establish that he was prejudiced by the decision of his trial counsel not to pursue the motion for necessary expenses for the purpose of retaining an eyewitness identification expert witness and, ultimately, not to call an expert witness at trial because any such effort by counsel would likely have been fruitless.

2

The petitioner next contends that trial counsel should have filed a motion to suppress the pretrial and in-court eyewitness identifications made by Qualnisha Lowe and Nestor Diaz because the procedures used to solicit those identifications were unnecessarily suggestive. Specifically, the petitioner contends that, "[h]ad [trial] counsel filed and pursued a motion to suppress, there is a reasonable probability that the eyewitness identifications made by . . . Diaz and . . . Lowe would have been suppressed, and [the petitioner] would have been acquitted."

The following additional facts are relevant to our resolution of this claim. At the habeas trial, Officer William Kogut testified that, on the night of the shooting, shortly after 1:30 a.m., he met with Lowe, who provided

a description of the shooter and indicated that she would be able to identify him. At that time, an officer stopped cars on the road leading to the club and asked the individuals in those vehicles to step out. Lowe was placed in a car and was driven past these individuals, but she did not identify any of them as the shooter. The petitioner was not among those individuals. At about 3 a.m., another officer took a written statement from Lowe, who stated that the shooter was "young, late teens, about [five foot, three inches]. The next morning, at about 10:45 a.m., an officer went to Lowe's residence to present her with a photographic array. Lowe identified the petitioner as the person whom she saw "take the gun out of his waistband." (Internal quotation marks omitted.) Lowe also identified the petitioner as the shooter at the criminal trial.

Likewise, Diaz also was presented with the same photographic array at about 2 p.m. the day after the shooting. He did not identify anyone pictured. On October 7, 2009, an inspector who worked at the Office of the State's Attorney in Middletown met with Diaz and showed him an enlarged version of the surveillance video from the shooting. Diaz pointed out the person he believed to look like the petitioner. Later that same day, Diaz testified during the petitioner's criminal trial that he witnessed the shooting. He identified the petitioner in court, during the petitioner's criminal trial, as bearing a "strong resemblance" to the person he saw in the bar who had fired the gun and said he was "confident" that the petitioner was the shooter.

At the habeas trial, trial counsel testified that they had considered filing a motion to suppress but that ultimately they did not do so. Neither could recall the specific reason for not filing the motion, but, rather,

they speculated that there could have been many reasons not to and stated that, to the best of their recollection, they did not think it would be a successful motion.[12]

In its memorandum of decision, the habeas court concluded: "Having considered the totality of the circumstances, the court finds that the credible evidence presented by the petitioner demonstrates that the photographic array was not administered under pristine conditions. However, pristine conditions are not the legal standard for determining whether the administration of a photographic array was unnecessarily suggestive. *State* v. *Marquez*, [291 Conn. 122, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009)]. To that end, the court finds that the petitioner failed to present credible evidence to demonstrate that the photographic array eyewitness identification procedures used in this case were so flawed as to present a very substantial likelihood of irreparable misidentification of the petitioner. . . . Accordingly, the court cannot find that the petitioner was prejudiced by the . . . failure [of his trial counsel] to file and litigate the motion to suppress the out-of-court identifications of the petitioner by Lowe and Diaz." (Internal quotation marks omitted.)

[12] At the habeas trial, the following colloquy occurred between the petitioner's habeas counsel and Bansley IV:

"Q. . . . And there was no motion to suppress identifications filed in this case. Do you know why that is?

"A. To the best of my recollection, we did not think that it would be successful.

* * *

"Q. Okay. And I believe you testified to the reasons that you did not file a motion to suppress. Were there any other reasons besides what you said earlier?

"A. I think I said that reasons why I might not have, because I don't recall the exact reason why I didn't in this case.

"Q. Okay. But those would be the type of reasons why you would decide not to?

"A. Sure, there could be many, many reasons."

In making this determination, the court considered the testimony presented at the habeas trial, including the testimony of the police officers who had administered the photographic arrays, and the opinions of Kovera and Carlow, concerning the suggestibility of the arrays.

Captain Richard Davis of the Middletown Police Department testified that, in preparing the array, he included "filler" photographs of men who looked similar to the petitioner, the photographs were randomly placed within the array, and the petitioner's photograph was neither the first nor the last in the sequence. Chief Denise LaMontagne of the Cromwell Police Department testified that she followed generally accepted guidelines when administering the array to Lowe. She testified that, at the time she administered the array to Lowe, she was aware that the petitioner was a suspect but did not recall making any statements to Lowe other than providing the printed instructions.

Kovera testified concerning her expertise in the area of the psychology of eyewitness identification evidence and memory. She testified that the array in the present case deviated from pristine conditions in several ways, including that it was not double blind, the petitioner stood out from the other images included in the array because he was closest to the frame, one of the individuals in the filler photographs had a darker skin complexion than the petitioner, other fillers did not fit the suspect's description, and the petitioner's photograph was placed at the interior top of the array.

Finally, Carlow testified that, on the basis of his review of the criminal trial materials and the then-recent decision of *State* v. *Marquez*, supra, 291 Conn. 122, the petitioner's trial counsel should have filed a motion to suppress. He testified that trial counsel should have presented the testimony of any witness who had chosen

a photograph of someone other than the petitioner from the array in order to challenge the eyewitness identification. He also testified that, apart from observing their files and the trial transcript, he was not familiar with the basis for the decision of trial counsel.

In evaluating the photographic array, the habeas court considered the following factors as set forth in *State* v. *Marquez*, supra, 291 Conn. 122: "(1) the degree of likeness shared by the individuals pictured . . . (2) the number of photographs included in the array . . . (3) whether the suspect's photograph prominently was displayed or otherwise was highlighted in an impermissible manner . . . (4) whether the eyewitness had been told that the array includes a photograph of a known suspect . . . (5) whether the eyewitness had been presented with multiple arrays in which the photograph of one suspect recurred repeatedly . . . and (6) whether a second eyewitness was present during the presentation of the array." (Internal quotation marks omitted.) Id., 161.

It is a basic tenet of habeas jurisprudence that, in adjudicating an ineffective assistance of counsel claim regarding the prejudice prong of the *Strickland* test, a petitioner cannot successfully show prejudice by reason of the failure of trial counsel to pursue a motion to suppress a pretrial identification unless the petitioner can show a reasonable probability that an attack on the reliability of the identifications would have been successful. See *Velasco* v. *Commissioner of Correction*, supra, 119 Conn. App. 170. "To prevail on a motion to suppress a pretrial identification, a defendant must prevail on a two-pronged inquiry. [F]irst, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances. . . . An identification procedure is unnecessarily suggestive only if it

gives rise to a very substantial likelihood of irreparable misidentification. . . . The defendant bears the burden of proving both that the identification procedures were unnecessarily suggestive and that the resulting identification was unreliable." (Internal quotation marks omitted.) Id., 170–71.

On the basis of our review of the record, we find no disagreement with the habeas court's conclusion that the "petitioner failed to present credible evidence to demonstrate that the photographic array eyewitness identification procedures used in this case were so flawed as to present a very substantial likelihood of irreparable misidentification of the petitioner." First, although Kovera opined that one of the filler photographs depicted an individual with a darker complexion than the petitioner, the habeas court found that the photographs in the array appeared consistent with the petitioner's description. Second, although the habeas court credited the testimony of Kovera that an array should have at least five filler photographs, it is undisputed that the array in the present case contained a total of eight photographs. Third, the court determined that the petitioner's photograph was not prominently displayed or otherwise highlighted within the array. Fourth, although Lowe was aware that the petitioner was a suspect and chose his photograph from the array, there was no evidence presented to the habeas court that LaMontagne influenced Lowe's identification of the petitioner in the array. Fifth, the array remained the same for all eyewitnesses, meaning that Lowe and Diaz were not presented with multiple arrays that contained reoccurring photographs of the petitioner. Finally, there was no evidence presented at the habeas hearing that there was another eyewitness present when Lowe and Diaz were presented with the array.

On the basis of the evidence presented at the habeas trial, we find no fault with the habeas court's determination that the "procedures employed in this case, although

not ideal, were within the acceptable parameters of effective and fair police work, and satisfy the requirements of due process." (Internal quotation marks omitted.) Accordingly, the habeas court properly determined that the petitioner failed to demonstrate that he was prejudiced by the performance of his trial counsel, and his claim must fail.

3

The petitioner's final contention with respect to his claim of ineffective assistance of counsel is that trial counsel failed to present favorable evidence that would have undermined the reliability of the eyewitness identifications. Specifically, the petitioner asserts that "[trial] counsel should have presented evidence about . . . Henton's photo[graphic] array to show the jury that at least one witness who was present at the time of the shooting chose a filler rather than [the petitioner]. . . . Henton's testimony would have been favorable, and counsel had no explanation for not presenting his testimony." He claims that he was prejudiced because this evidence would have had an impact on the jury's verdict.

The following additional facts are relevant to our resolution of this claim. In Henton's written statement to the police, he stated that the shooting victims were "[two to three] feet away from each other and [he] was close enough that [he] had blood spatter on [his] shirt." He was shown a photographic array from which he identified a "filler" photograph as depicting the shooter, rather than the photograph of the petitioner, and stated that he was 50 percent sure. At the petitioner's criminal trial, counsel attempted to introduce testimony through the cross-examination of LaMontagne concerning Henton's identification of a filler photograph from the photographic array but were unsuccessful because the court ruled that it was inadmissible hearsay. As pre-

viously noted in this opinion, Henton did not testify at the criminal trial, and we determined in part I A 2 of this opinion that it was not deficient performance for trial counsel to decide not to present Henton as a third-party culpability witness at the petitioner's criminal trial.

With respect to this claim, the habeas court concluded: "The petitioner failed to present credible evidence as to how the evidence of Henton choosing a filler should have been presented at trial. . . . The petitioner's argument that [trial counsel] should have presented Henton's testimony seeks to have this court substitute the petitioner's opinion with that of the . . . assessment [by trial counsel] of Henton as a potential witness contemporaneous to the underlying trial. . . . [T]his court finds that the petitioner failed to present credible evidence that Henton was available and willing to testify at the petitioner's underlying criminal trial. . . . The petitioner only presented the fact that Henton chose a filler photograph from the photographic array and that he noted a 50 percent confidence level. Thus, the court is left without an evidentiary basis for concluding that Henton's testimony would have been beneficial to the petitioner's defense. Therefore, the court finds that the petitioner failed to present sufficient credible evidence to rebut the presumption that [his trial counsel] employed reasonable trial strategy in choosing not to present Henton's testimony."

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions

were outside the wide range of professionally competent assistance." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 513, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). "In its analysis, a reviewing court may look to the performance prong or the prejudice prong first." *Quint* v. *Commissioner of Correction*, 211 Conn. App. 27, 36, 271 A.3d 681, cert. denied, 343 Conn. 922, 271 A.3d 681 (2022).

We agree with the habeas court's conclusion. First, "[a] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." (Internal quotation marks omitted.) *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 112, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009). As the habeas court properly determined, the petitioner did not meet his burden to show that the decision of his trial counsel not to present Henton as a witness was not sound trial strategy. Given that Henton's statement did not explicitly identify Walls and that Henton stated that he was only 50 percent sure of his choice in the photographic array and that, ultimately, because he was not emphatic in his knowledge of the shooter's identity, he could have testified at trial that the petitioner was the shooter and hurt the petitioner's defense, the failure of trial counsel to call Henton was not outside the "wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 627. As we noted in part I A 2 of this opinion, Henton's statement identified the shooter as having "curly brown hair," not cornrows, but the presence of cornrows was the main physical characterization on which the petitioner relied in arguing that Walls was the shooter. In sum, Henton's statement tended to undermine the petitioner's third-party culpability defense

that Walls was the shooter. Therefore, we agree with the habeas court's conclusion that the petitioner failed to establish that his trial counsel performed deficiently by failing to call and question Henton concerning his response to the photographic array.

Moreover, even if trial counsel were deficient in that regard, the record supports the conclusion of the habeas court that Henton's testimony would not have changed the outcome of the petitioner's trial. The record contains substantial other evidence[13] concerning the petitioner's identity as the shooter to support the jury's guilty verdict.

Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to this issue.

II

The petitioner next claims that the habeas court erred in rejecting his claim that his right to due process under

[13] This court set forth that evidence as follows in the petitioner's direct appeal: "Brothers Maurice Overton and Andre Overton were at the club at all relevant times. Maurice Overton testified at trial that he saw the [petitioner] holding a gun at the time of the shooting. Andre Overton similarly testified that when the gunshots rang out, he turned and saw the [petitioner] holding a chrome gun in his hand. Andre Overton was approximately five feet behind the [petitioner] at that time. [Lowe] also identified the [petitioner] as the shooter at trial. She testified that, at the time of the shooting, she was two feet from the [petitioner] and 'looked right in his face.' [Diaz] testified that at the time of the shooting, he was approximately five feet from the person holding the gun and was 'confident' in his identification of the [petitioner] as the shooter. Dana Middleton was socializing with Lockhart at the club and witnessed the [petitioner] antagonizing Lockhart prior to the shooting. He testified that the [petitioner] was approximately ten feet away and 'kept dancing around and pointing his fingers and . . . making gestures like he was making . . . threats, basically.' . . . Moments later as Middleton and Lockhart were leaving the bar, Middleton heard gunshots and then saw Lockhart on the ground with a hole in his head and brain matter on the floor. Middleton then saw the [petitioner] approximately five feet away holding a gun that was pointed in his direction." *State* v. *Inglis*, supra, 151 Conn. App. 286–87 n.6.

article first, §§ 8 and 9, of the Connecticut constitution was violated by the admission of both out-of-court and in-court identifications, made by Lowe and Diaz, that were obtained as a result of unnecessarily suggestive identification procedures. The petitioner makes two arguments in support of this claim. First, he argues that, contrary to the holding of the habeas court, his state constitutional claim was not procedurally defaulted because he can show cause and prejudice for his failure to raise this claim at his criminal trial and on direct appeal. He contends that just months before his criminal trial in September and October, 2009, our Supreme Court in *State* v. *Marquez*, supra, 291 Conn. 122, reaffirmed the principle that our state constitution affords no greater protection than the United States constitution as to eyewitness identifications, and, therefore, any such claim raised on direct appeal would have been futile. Second, he argues that, nine years after his criminal trial, our Supreme Court in *State* v. *Harris*, supra, 330 Conn. 91, concluded for the first time that the due process guarantee of the state constitution in article first, § 8, "provides somewhat broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony . . . ."[14] He

[14] The habeas court did not reach the merits of the claim regarding the retroactivity of *Harris* but, rather, disposed of this claim on procedural grounds because it determined that the petitioner had not properly raised the claim. The petitioner claims that the habeas court improperly concluded that he had conceded that a retroactivity issue was not raised in the pleadings and, accordingly, denied the claim on that ground. He argues that this was in error because, (1) to the extent that retroactivity, or its lack thereof, must be pleaded, it is the respondent's burden to raise it, (2) his pleading implied a retroactivity claim, and (3) he made clear on the first day of trial that he sought to claim that *State* v. *Harris*, supra, 330 Conn. 91, applied retroactively to his case. In response, the respondent contends that the habeas court properly declined to reach the issue of whether *Harris* applied retroactively because (1) the petitioner's habeas petition made no mention of *Harris*, and (2) his mention of *Harris* in his reply and his argument at the habeas trial were insufficient to properly plead this claim. We conclude that the petitioner's *Harris* claim properly was raised, and, accordingly, we address it on the merits.

argues that *Harris* applies retroactively to his case because it is a watershed rule of criminal procedure.[15] We disagree with both assertions.

We begin by setting forth the relevant standard of review and governing law. "A party in a habeas appeal procedurally defaults on a claim when he raises issues on appeal that were not properly raised at the criminal trial or the appeal thereafter. . . . Habeas, as a collateral form of relief, is generally available to litigate constitutional issues only if a more direct route to justice

The petitioner's reply to the respondent's return stated: "To the extent that [the third] claim [in the third amended habeas petition] is based on the petitioner's due process rights pursuant to [the] Connecticut constitution, claim three is not subject to procedural default because the Connecticut Supreme Court has only recently recognized that the Connecticut state constitution affords greater protection than the federal constitutional standard against the admission of unreliable eyewitness identification evidence or testimony. See [id., 130–31] . . . ." (Internal quotation marks omitted.) He also made the same argument as to the fourth claim in his habeas petition, which alleged a violation of his constitutional right to present a defense. His reply is in compliance with Practice Book § 23-31 (b), which provides that "[t]he reply shall admit or deny any allegations that the petitioner is not entitled to relief," and with Practice Book § 23-31 (c), which provides in relevant part that "[t]he reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. . . ." In addition, on the first day of the habeas trial, counsel for the petitioner explicitly stated that "[o]ur argument is that *Harris* applies retroactively . . . . We are alleging in part that there is cause . . . to overcome the procedural default or that procedural default doesn't apply because any attempt to raise these claims at the time of the petitioner's trial would've been futile."

On the basis of the petitioner's reply, in which he explicitly cites to *Harris* and makes the argument that is now before this court, as well as the arguments of habeas counsel at the habeas trial, we conclude that the petitioner properly preserved the issue concerning the retroactivity of *State* v. *Harris*, supra, 330 Conn. 91.

[15] "[I]f the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding." (Citation omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

has been foreclosed through no fault of the petitioner. . . . The reviewability of habeas claims not properly pursued on appeal is subject to the cause and prejudice standard." (Citation omitted; internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 511.

"In order for a habeas court to decide the merits of a petitioner's procedurally defaulted claim, the petitioner must typically demonstrate cause and prejudice for his failure to preserve that claim. . . . Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . .

"The cause and prejudice standard is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . . [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. . . . Cause and prejudice must be established conjunctively. . . . If the petitioner fails to demonstrate either one, a trial court will not review the merits of his habeas claim." (Citation omitted; internal quotation marks omitted.) *Sinchak* v. *Commissioner of Correction*, 173 Conn. App. 352, 365–66, 163 A.3d 1208, cert. denied, 327 Conn. 901, 169 A.3d 796 (2017).

For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . would constitute cause under this standard." (Internal quotation marks omitted.) *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 273, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021). We exercise plenary review to determine whether the

court properly determined that the petitioner's claim is procedurally defaulted. See *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 10, 272 A.3d 169 (2022).

The petitioner argues that good cause existed for the failure of his trial counsel to raise the issue at his criminal trial or on direct appeal given that the established law at the time would have made that argument futile. The petitioner relies on *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016), in which this court examined the parameters of cause and prejudice within the procedural default doctrine. In *Hinds*, the petitioner failed to challenge our courts' long-standing interpretation of this state's kidnapping statutes at his criminal trial or on direct appeal but claimed that a new interpretation first set forth after his trial should be applied retroactively. After a thorough canvass of the decisional law expounding on procedural default, this court stated that, "we believe that counsel's failure to raise an issue for which there was no reasonable basis may, indeed, satisfy the cause requirement." Id., 854. Our Supreme Court, in affirming this court's decision; see *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 67–68, 136 A.3d 596 (2016); noted that it had iterated its position numerous times prior to the petitioner's criminal trial that the interpretation of the kidnapping statute adopted after the petitioner's criminal trial in that case was foreclosed and appeared to foreclose the possibility that movement of a sexual assault victim from one room in her home to another room could constitute a situation that was "absurd and unconscionable . . . [and] that would render the statute unconstitutionally vague as applied." Id. Our Supreme Court concluded that the petitioner's claim was not procedurally defaulted, stating: "Not only was there a three decades long history preceding the petitioner's criminal trial of rejecting such

a challenge, but mere months after the petitioner's trial, the court . . . again rejected such a challenge." Id., 76.

In the present case, we conclude that, unlike in *Hinds*, the petitioner had a reasonable basis to claim at his criminal trial and on direct appeal that the identification procedures at issue were unnecessarily suggestive under the Connecticut constitution. Specifically, we find unpersuasive the petitioner's argument that both *State* v. *Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005) (overruled in part by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), and *State* v. *Marquez*, supra, 291 Conn. 122, each of which were decided prior to his criminal trial, establish the futility of his argument that the state constitution is more protective than the federal constitution.

In *State* v. *Ledbetter*, supra, 275 Conn. 560, our Supreme Court addressed a constitutional challenge to eyewitness identifications made in that case. The defendant argued, inter alia, that the court should replace the factors set forth in *Neil* v. *Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), used in determining the reliability of identifications, on state constitutional grounds. The court recognized that "in some instances, our state constitution provides protections beyond those provided by the federal constitution . . . ." *State* v. *Ledbetter*, supra, 560. Accordingly, the court undertook an analysis to determine whether the *Biggers* factors should be replaced, specifically, whether our state constitution provides greater protection than the federal constitution on this issue. After a thorough survey of each of those factors under the framework set forth in *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992),[16] the court concluded:

[16] "In *State* v. *Geisler*, [supra, 222 Conn. 672, our Supreme Court] enumerated the following six factors to be considered in construing the state constitution: (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of

"Despite the fact that [the] last [*Geisler*] factor [contemporary understandings of economic and sociological considerations] favors the defendant, we are unpersuaded that article first, § 8, of the constitution of Connecticut provides greater protection than the federal constitution in this area. The scientific studies are not definitive. . . . In light of the factors that weigh in favor of the state, the scientific studies are insufficient to tilt the balance of the *Geisler* analysis in favor of the defendant. Thus, our state constitution does not require that we abandon the *Biggers* factors as the appropriate factors for consideration in determining whether an unnecessarily suggestive identification procedure is, nevertheless, reliable, and we decline to do so." (Citations omitted.) *State* v. *Ledbetter*, supra, 568–69.

In *State* v. *Marquez*, supra, 291 Conn. 122, the defendant challenged the reliability of eyewitness identifications. Our Supreme Court "reaffirm[ed] the congruence between the protections afforded by our state constitution and the federal constitution in the area of pretrial identification . . . ." Id., 135–36. The court stated: "[T]he judgment of the relevant scientific community with respect to eyewitness identification procedures is far from universal or even well established, and . . . the research is in great flux. Indeed, when the reported research was seemingly more uniform, we still found that [t]he scientific studies are not definitive. *State* v. *Ledbetter*, supra, 275 Conn. 568. The more recent research offered by the state muddies the water further . . . . [U]ntil the scientific research produces more definitive answers with respect to the effects of various

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. . . . The *Geisler* analysis applies to cases . . . in which the claim is that the state constitution provides greater protection than does the federal constitution." (Internal quotation marks omitted.) *State* v. *Jose A. B.*, 342 Conn. 489, 507–508, 270 A.3d 656 (2022).

procedures, [d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Marquez*, supra, 155–56.

Although, in the present case, the petitioner argues that the decisional law at the time of his criminal trial—namely, *Ledbetter* and *Marquez*—foreclosed the argument that he now raises, we are not persuaded that asserting a state constitutional claim in this regard would have been futile. Our reading of both *Ledbetter* and *Marquez* leaves ample room for counsel to have made arguments at the time of the petitioner's criminal trial akin to those that were later adopted in *Harris*. Specifically, in determining that our state constitution does not provide greater protection than the federal constitution, both cases relied heavily on the scientific studies available at the time but did not explicitly foreclose arguments such as the court did in *Hinds*. In fact, our jurisprudence specifically left room for new arguments to be made congruently with rapidly changing science. "Indeed, we repeatedly have insisted that this inquiry be made on an ad hoc basis, and we affirm that *the courts of this state should continue to evaluate whether individual identification procedures are unnecessarily suggestive on the basis of the totality of the circumstances surrounding the procedure . . . .*" (Emphasis added; internal quotation marks omitted.) Id., 156. Thus, rather than foreclosing the possibility of making similar arguments in the future, the court explicitly invited continued challenges to identification procedures on the basis of the circumstances of a particular case.

On this basis, we conclude that the habeas court properly determined "that the petitioner [failed to satisfy] the cause and prejudice standard so as to cure the alleged procedural default." The petitioner's due

process argument would not have been futile given the law at the time, and, thus, the petitioner has failed to establish good cause for his failure to make his constitutional arguments at his criminal trial and on direct appeal, and actual prejudice resulting from that failure.[17]

[17] Even if we assume, arguendo, that the petitioner could show cause and prejudice to overcome procedural default, we reject his second argument that *Harris*, decided nine years after the conclusion of his criminal trial, applies retroactively because it is a watershed rule of criminal procedure.

It is well settled that courts apply the rule promulgated in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), when considering whether a new rule of criminal procedure applies retroactively. "If the rule is substantive, it generally applies retroactively. . . . A procedural rule, on the other hand, is only retroactive if it is considered watershed." (Citation omitted; internal quotation marks omitted.) *Garcia* v. *Commissioner of Correction*, 147 Conn. App. 669, 677, 84 A.3d 1, cert. denied, 312 Conn. 905, 93 A.3d 156 (2014). "The watershed exception [to *Teague* v. *Lane*, supra, 311] is reserved for those rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. . . . Beyond fundamental fairness, the new rule also must constitute a procedure without which the likelihood of an accurate conviction is seriously diminished." (Citation omitted; internal quotation marks omitted.) *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 181–82, 151 A.3d 1247 (2016).

The petitioner concedes that the rule promulgated in *State* v. *Harris*, supra, 330 Conn. 91, is a new rule and that it is procedural in nature. Specifically, the petitioner argues that "*Harris* is specifically directed toward ensuring an accurate determination of a defendant's innocence or guilt and constitutes a watershed rule that applies retroactively on collateral review."

In September, 2018, our Supreme Court in *Harris* replaced the *Biggers* factors, which Connecticut courts had been employing to analyze claims concerning unnecessarily suggestive eyewitness identifications, with the *Guilbert* factors. Nevertheless, the court expressly stated that the new factors are "generally comparable to the *Biggers* factors and are merely intended to more precisely define the focus of the relevant inquiry." (Internal quotation marks omitted.) Id., 136.

This court has had recent occasion to address the issue of whether *Harris* applies retroactively. In *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 272 A.3d 218 (2022), petition for cert. filed (Conn. April 27, 2022) (No. 210408), this court undertook a thorough analysis concerning whether *State* v. *Guilbert*, supra, 306 Conn. 218, promulgated a watershed rule and, as such, could be applied retroactively. This court in *Tatum* held: "[O]ur Supreme Court [in *Harris*] essentially treated *Guilbert* as creating a new state constitutional rule of criminal procedure that safeguards the due process protection against the admission of an unreliable identification. Even if we were to construe *Guilbert*, through the lens of *Harris*, as a new

The habeas court, therefore, did not abuse its discretion in denying the petition for certification to appeal with respect to this issue.

The appeal is dismissed.

In this opinion the other judges concurred.

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constitutional rule of criminal procedure, this rule still would not apply on collateral review. . . . [W]e conclude that the *Guilbert* framework for evaluating the reliability of an identification that is the result of an unnecessarily suggestive identification procedure, which was adopted by our Supreme Court in *Harris*, does not fall within the narrow watershed exception pursuant to *Teague* because . . . (1) this rule is prophylactic and a violation of the rule does not necessarily rise to the level of a due process violation, and (2) the rule amounts to an incremental change in identification procedures." (Citations omitted; internal quotation marks omitted.) *Tatum* v. *Commissioner of Correction*, supra, 65–67.

Because the rule adopted in *Harris* is a mere "incremental change in identification procedures"; id., 67; and decidedly not a watershed rule, there is no basis in the present case for retroactive application.

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Negligence; recklessness; respondeat superior liability; motion for summary judgment; claim that trial court erred in granting defendants' motions for summary judgment; claim that trial court improperly failed to view evidence in light most favorable to plaintiffs; whether trial court properly determined that defendant public school employees and board of education were protected by statutory (§ 10-222l) immunity with respect to negligence allegations premised on their failure to comply with safe school climate plan following reports of bullying; whether trial court properly determined that defendants were protected by governmental immunity pursuant to applicable statute (§ 52-557n (a) (2) (B)) with respect to negligence claims involving their discretionary acts taken in response to reports of bullying; claim that trial court improperly rendered summary judgment in favor of individual defendants with respect to recklessness claim; claim that trial court improperly granted defendants' motions for summary judgment with respect to respondeat superior liability claim against town and its board of education; claim that trial court improperly granted motions for summary judgment with respect to claims alleging that superintendent of school and board of education retaliated against plaintiffs for reporting instances of bullying.
Dolan *v.* Dolan 112
Dissolution of marriage; motion to modify unallocated alimony and child support; whether trial court abused its discretion by modifying definition of "pre-tax compensation from employment" in parties' separation agreement; whether trial court's modification of definition of term in separation agreement conflicted with Supreme Court's decision in Gay *v.* Gay *(266 Conn. 641).*
Highland Street Associates *v.* Commissioner of Transportation. 426
Declaratory judgment; action seeking declaratory judgment, pursuant to statute (§ 4-175), overturning decision of defendant Department of Transportation denying application for permission to replace existing support structure of highway billboard; whether trial court erred in concluding that replacement of billboard's existing support structure constituted maintenance and repair pursuant to Highway Beautification Act of 1965 (23 U.S.C. § 131 et seq.) and relevant state statute (§ 13a-123); claim that trial court's reliance on zoning statute (§ 8-2) was misplaced.
Inglis *v.* Commissioner of Correction 496
Habeas corpus; whether habeas court abused its discretion in denying petitioner certification to appeal from judgment denying habeas petition; claim that habeas court improperly determined that petitioner was not prejudiced by trial counsel's failure to cite certain evidence in request for jury instruction on third-party culpability; claim that trial counsel rendered ineffective assistance in failing to present testimony of certain eyewitnesses in support of identification defense; claim that trial counsel rendered ineffective assistance by declining to pursue motion for expenses to retain and, ultimately, not to call, eyewitness identification expert to testify; claim that trial counsel rendered ineffective assistance by failing to move to suppress eyewitness identifications of petitioner; claim that trial counsel performed deficiently by not presenting evidence that eyewitness to shooting had chosen photograph other than that of petitioner from array of photographs prepared by police; whether habeas court properly determined that

petitioner did not establish cause and prejudice for failure to claim at criminal trial and on direct appeal that admission into evidence of eyewitness identifications of him violated right to due process (article first, §§ 8 and 9) under state constitution.

In re Madison C. 164
Termination of parental rights; petition for new trial; whether trial court properly granted motion to strike petition for new trial filed by Commissioner of Children and Families; whether respondent mother's allegations concerning events that occurred after trial constituted newly discovered evidence within meaning of statute (§ 52-270).

Jefferson Solar, LLC *v.* FuelCell Energy, Inc. 288
Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); motion to dismiss; whether trial court properly granted motion to dismiss; claim that trial court improperly concluded that plaintiff lacked standing to maintain action under CUTPA; whether trial court properly concluded that plaintiff's claims were remote and indirect.

Lavette *v.* Stanley Black & Decker, Inc. 463
Intentional tort; motion to strike; whether plaintiff employee's pleading was legally sufficient to bring claim within intentional tort exception to exclusivity provision (§ 31-284) of Workers' Compensation Act (§ 31-275 et seq.); whether plaintiff's allegations were legally sufficient to establish that supervisory employee acted as defendant employer's alter ego; claim that Appellate Court should reconsider its jurisprudence regarding alter ego exception to workers' compensation exclusivity provision, particularly with respect to large corporations; reviewability of plaintiff's claim that alleged intentional tort had been directly committed or authorized by defendant, providing alternative means to bypass workers' compensation exclusivity provision.

Meriden *v.* AFSCME, Local 1016 184
Arbitration; whether trial court properly denied defendant's application to vacate arbitration award; claim that trial court applied incorrect legal standard on basis of claim that arbitration award was procured by corruption, fraud or undue means pursuant to applicable statute (§ 52-418 (a) (1)); claim that trial court erred in determining that arbitration procedure was fair and impartial; claim that trial court erred by overlooking arbitration panel's reliance on investigation that was not fair and impartial.

Milford *v.* Recycling, Inc. 306
Foreclosure; motion to open judgment of foreclosure; whether trial court abused its discretion by denying defendant's motion to open judgment of foreclosure; claim that trial court erred in concluding that balancing of equities relating to motion to open judgment of foreclosure and to extend sale date favored plaintiff.

One Elmcroft Stamford, LLC *v.* Zoning Board of Appeals 200
Zoning; claim that defective legal notice of public hearing deprived defendant zoning board of appeals of jurisdiction to consider application for approval of location for operation of automotive repair business; claim that board violated plaintiff's right to fundamental fairness because legal notice of public hearing did not sufficiently describe intended use of property; whether board applied incorrect legal standard in ruling on location approval application; whether board mistakenly believed it could not deny location approval application when proposed use was permitted in zone at issue; whether board committed error under "impotent to reverse" rule by failing to distinguish denial by different municipal entity seven years earlier of location approval application of different entity to operate used car dealership on property at issue.

Oral Care Dental Group II, LLC *v.* Pallet 389
Administrative appeal; employment based sexual harassment and discrimination; claim that trial court erred when it vacated damages award granted by Commission on Human Rights and Opportunities' human rights referee to sexual harassment complainant after concluding that her former employer was prejudiced by her failure to produce certain of her medical records; whether complainant was required to disclose medical records to prove damages for garden-variety emotional distress.

Parrott *v.* Colon 375
Housing code enforcement; whether action for housing code enforcement brought pursuant to statute (§ 47a-14h) alleging breaches of lease in violation of statute (§ 47a-7) required plaintiffs to prove by fair preponderance of evidence that their

allegations constituted violations of applicable housing code or materially affected health, safety, and habitability of premises.

Pointe Residential Builders BH, LLC *v.* TMP Construction Group, LLC 445
Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); claim that there was insufficient evidence of intentional, reckless, unethical or unscrupulous conduct to establish violation of CUTPA; whether trial court's finding of ascertainable loss was clearly erroneous; whether trial court abused its discretion in awarding plaintiff punitive damages; whether trial court abused its discretion in awarding attorney's fees.

Russbach *v.* Yanez-Ventura 77
Uninsured motorist coverage; whether trial court improperly concluded that defendant insurance company's failure to comply with requirements of applicable statute (§ 38a-336 (a) (2)) was excused; claim that Frantz *v.* United States Fleet Leasing, Inc. *(245 Conn. 727)*, Kinsey *v.* Pacific Employers Ins. Co. *(277 Conn. 398)*, *and* McDonald *v.* National Union Fire Ins. Co. of Pittsburgh, PA *(79 Conn. App. 800)*, *created exception to statutory requirements of § 38a-336 (a) (2) for every case that involved commercial fleet or garage insurance policy; whether trial court improperly determined that automobile policy provided for standard, rather than conversion, uninsured motorist insurance coverage.*

Santiago *v.* Commissioner of Correction 358
Habeas corpus; whether habeas court abused its discretion in denying certification to appeal; claim that habeas court's conclusion that petitioner was not denied effective assistance of trial counsel rested on clearly erroneous factual findings concerning trial counsel's representations during sentencing proceeding; claim that habeas court erred in concluding that representation by petitioner's trial counsel was not deficient and therefore that petitioner failed to satisfy performance prong of Strickland *v.* Washington *(466 U.S. 668).*

Sessa *v.* Reale 151
Probate appeal; motion to dismiss; subject matter jurisdiction; claim that Superior Court had subject matter jurisdiction over plaintiff's probate appeal; whether Probate Court denied plaintiff's application to hear and decide rejected claim or decided merits of rejected claim underlying application; whether statute (§ 45a-364 (b)) required plaintiff to commence suit following Probate Court's denial of his application to hear and decide rejected claim rather than to file probate appeal; claim that Superior Court improperly granted motion to dismiss when defendant raised alleged failure to satisfy time requirement for filing suit under § 45a-364 (b) in motion to dismiss instead of by special defense.

Sokolovsky *v.* Mulholland 128
Administrative appeal; discrimination; motion to dismiss; subject matter jurisdiction; claim that trial court erred in concluding that statutory (§ 46a-101) ninety day limitation period for commencing action in Superior Court pursuant to statute (§ 46a-100) was subject matter jurisdictional; claim that trial court improperly dismissed plaintiff's action; claim that trial court erred by not considering action commenced on date that plaintiff filed his application for waiver of fees; whether trial court erred in concluding that plaintiff was required to plead continuing course of conduct doctrine in his complaint.

State *v.* Norris 253
Risk of injury to child; assault in third degree; breach of peace in second degree; interfering with officer; motion for joinder; claim that trial court improperly failed to conduct adequate inquiry into defendant's competency to stand trial and to order competency hearing at start of trial; whether trial court abused its discretion in denying motion for competency evaluation; whether trial court abused its discretion in granting state's motion to join two informations for trial; whether defendant demonstrated that joinder resulted in substantial prejudice; whether trial court's explicit instructions to jury to consider each charge separately in reaching verdict cured risk of substantial prejudice to defendant.

State *v.* Russaw 311
Conspiracy to commit murder; unpreserved claim that defendant was deprived of right to due process because it is legally impossible to conspire to kill unintended victim; claim that state relied on doctrine of transferred intent for conspiracy charge; whether trial court improperly denied motion to suppress certain incriminating statements defendant made to police during custodial interrogation; whether trial court properly determined that defendant voluntarily and intelligently waived rights under Miranda *v.* Arizona *(384 U.S. 436).*

Swain *v.* Swain 411
Dissolution of marriage; postjudgment motion to modify custody, child support, visitation and parental access schedule; claim that trial court erred in modifying orders as to visitation, parental access plan and child support because defendant's motion sought to modify only custody.
Szymonik *v.* Szymonik 421
Dissolution of marriage; motion for contempt; motion for sanctions; whether trial court erred in granting motions for contempt; whether trial court erred in granting plaintiff's motion for sanctions; whether trial court erred in awarding plaintiff attorney's fees; whether trial court's factual findings were clearly erroneous.
U.S. Bank Trust, N.A. *v.* Dallas 483
Foreclosure; motion for summary judgment; claim that trial court improperly granted plaintiff's motion for summary judgment as to liability; whether trial court erred in determining that there were no genuine issues of material fact as to defendant's special defenses of residential mortgage fraud and fraud in inducement; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.
Wine *v.* Mulligan 298
Alleged deprivation of plaintiff inmate's constitutional rights; motion to strike; motion for judgment; claim that trial court erred in granting defendants' motion to strike; claim that plaintiff's complaint adequately stated claim that defendants violated his constitutional right of access to courts.

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-0022: July HCPCS Updates and Other Changes

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, SPA 22-0022 will amend Attachment 4.19-B of the Medicaid State Plan to make the reimbursement updates detailed below.

First, this SPA incorporates various July 2022 federal Healthcare Common Procedure Coding System (HCPCS) billing code updates (additions, deletions and description changes) to the physician office and outpatient fee schedule. Newly added codes are being priced using a comparable methodology to other codes in the same or similar category. The purpose of this change is to ensure that this fee schedule remains compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Second, this SPA adds the following procedure codes to the physician surgical and physical therapy fee schedules to bill for dry needling services: code 20560 (needle insertions without injections; 1 or 2 muscles) and 20561 (needle insertions without injections; 3 or more muscles). These codes are priced at 57.5% of the 2022 Medicare physician fee schedule rate. The purpose of this change is to increase access to alternative pain treatments for HUSKY Health members.

Third, this SPA increases the rates for the professional components of the following procedure codes for mammograms, code 77065 (Dx mammo incl cad uni) and 77067 (scr mammo bi incl cad) on the physician radiology fee schedule to $32.00. In order to retain internal consistency within the fee schedule, the technical component of those codes is reduced by the same amount that the professional component is being increased in order to ensure that the technical and professional components combined continue to equal the rate for the global fee that includes both professional and technical components. Based on negligible past utilization of the technical component of these codes, DSS anticipates that the overall change will result in a significant increase in expenditures, as summarized below. The purpose of these changes is to help ensure sufficient access to mammography professional services.

Fourth, this SPA adds procedure codes G8431 (screening for depression is documented as positive, and a follow-up plan is documented) and G8510 (screening for depression is documented as negative, a follow-up plan is not required) for depression screenings to the physician office and outpatient fee schedule. These codes are being priced at the same rate as code 96127, a similar type of screening that is already on the fee schedule. The purpose of adding these codes is to enable more detailed billing for depression screenings, indicating that there is either a positive or negative result for each screen.

Lastly, this SPA increases the rates by 5.2% for the following home health aide services: Healthcare Common Procedure Coding System (HCPCS) codes T1004 (Services of a qualified nursing aide, up to 15 minutes) and T1021 (Home Health aide or certified nurse assistant, per visit) provided by licensed home health agencies. The purpose of this change is to reflect that home health agencies have increased costs in paying higher wages to home health aides in order to comply with the July 1, 2022 increase in the state's minimum wage.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that the HIPAA compliant updates to the physician office and outpatient fee schedule will increase annual aggregate expenditures by $14,053 in State Fiscal Year (SFY) 2023 and $15,790 in SFY 2024.

DSS estimates the rate increases on the mammogram codes detailed above will increase annual aggregate expenditures by $284,354 in SFY 2023, $319,510 in SFY 2024, and $329,096 in SFY 2025.

DSS estimates that by adding dry needling codes to the physician surgical fee schedule will increase annual aggregate expenditures by $53,373 in SFY 2023 and $59,972 in SFY 2024.

DSS estimates that adding procedure codes for depression screening will not change annual aggregate expenditures because utilization of the added procedure codes is anticipated to replace utilization for existing procedure codes for similar services.

DSS estimates that the home health aide rate increases will increase annual aggregate expenditures by $1,275,405 in SFY 2023 and $1,433,091 in SFY 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA CT 22-0022 July HCPCS Updates and Other Changes''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 13, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-W: Dental Services – Rate Increases for Adult Dental and Endodontic Services

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, SPA 22-W will amend Attachment 4.19-B of the Medicaid State Plan in order to increase rates for endodontic services for children and adults as detailed below and increase adult dental rates by 25%. The purpose of this SPA is to expand access to dental services for Medicaid members, especially adult Medicaid members.

The following endodontic procedure codes are being increased:

		Current Dental Fee		Proposed Dental Fee	
Procedure Code	Description	Children	Adult	Children	Adult
D3310	Endodontic Therapy, Anterior Tooth (excluding final restoration)	$577.22	$306.28	$600.00	$600.00
D3320	Endodontic Therapy, Premolar Tooth (excluding final restoration	$742.84	$394.16	$775.00	$775.00
D3330	Endodontic Therapy, Molar Tooth (excluding final restoration	$857.50	$455.00	$900.00	$900.00

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'' Accept or Decline the Terms and Conditions and go to the Adult or Children's Dental Fee Schedule, as applicable.

Fiscal Impact

DSS estimates the proposed rate increases for endodontic services will increase annual aggregate expenditures by $4,278,621 in State Fiscal Year (SFY) 2023 and $4,807,614 in SFY 2024.

DSS estimates the proposed increase for adult dental rates will increase annual aggregate expenditures by $15,813,686 in SFY 2023 and $17,768,833 in SFY 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-W: Dental Services – Rate Increases for Adult Dental and Endodontic Services''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 13, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-Y: Clinic Reimbursement Update – Medical Clinics, Rehabilitation Clinics, and Family Planning Clinics

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, SPA 22-Y will amend Attachment 4.19-B of the Medicaid State Plan to revise various clinic fee schedules as detailed below.

First, this SPA adds the following procedure codes for depression screenings to the medical clinic and family planning clinic schedules: procedure codes G8431 (screening for depression is documented as positive, and a follow-up plan is documented) and G8510 (screening for depression is documented as negative, a follow-up plan is not required). These codes are being priced at the same rate as code 96127, a similar type of screening that is already on each of those fee schedules. The purpose of adding these codes is to enable more detailed billing for depression screenings, indicating that there is either a positive or negative result for each screen.

Second, this SPA adds the following procedure codes to the rehabilitation clinic fee schedule for dry needling services: code 20560 (needle insertions without injections; 1 or 2 muscles) and 20561 (needle insertions without injections; 3 or more muscles). These codes are priced at 57.5% of the 2022 Medicare physician fee schedule rate. The purpose of this change is to increase access to alternative pain treatments for HUSKY Health members.

Finally, this SPA increases the rates of the following procedure codes on the Family Planning fee schedule:

Procedure Code	Description
99202	Office o/p new sf 15-29 min
99203	Office o/p new low 30-44 min
99204	Office o/p new mod 45-59 min
99205	Office o/p new hi 60-74 min
99211	Off/op est may x req phy/qhp
99212	Office o/p est sf 10-19 min
99213	Office o/p est low 20-29 min
99214	Office o/p est mod 30-39 min
99215	Office o/p est hi 40-54 min
99384	Prev visit new age 12-17
99385	Prev visit new age 18-39
99386	Prev visit new age 40-64
99394	Prev visit est age 12-17
99395	Prev visit est age 18-39
99396	Prev visit est age 40-64

Specifically, these procedure codes are being rebased to increase the reimbursement these select evaluation and management services to be 90% of the obstetrics and gynecology (OBS) rate type on the Connecticut Medical Assistance Program Physician Office and Outpatient Services fee schedule. The purpose of this change is to help ensure sufficient access to these services.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download,'' then select the applicable fee schedule.

Fiscal Impact

DSS estimates that the updates to the medical clinic fee schedule and the addition of the depression screening codes to the family planning clinic fee schedule will not change annual aggregate expenditures because utilization of the added procedure codes is anticipated to replace utilization for existing procedure codes for similar services.

DSS estimates that the updates to the rehabilition clinic fee schedule will increase annual aggregate expenditures by $49,397 in State Fiscal Year (SFY) 2023 and $55,504 in SFY 2024.

DSS estimates that the rate increases on the family planning clinic fee schedule will increase gross costs by $1,289,589 in SFY 2023 and $1,449,030 in SFY 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please

reference ''SPA 22-Y: Clinic Reimbursement Update – Medical Clinics, Rehabilitation Clinics, and Family Planning Clinics''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 13, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-Z: Nursing Facility Reimbursement – Transition to Acuity-Based Reimbursement System

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, SPA 22-Z will amend Attachment 4.19-D of the Medicaid State Plan to implement an acuity-based reimbursement methodology for nursing facilities as detailed below, in accordance with state statute in section 17b-340b of the Connecticut General Statutes, as amended by section 319 of Public Act 21-2 of the June special session.

The acuity-based reimbursement system will make quarterly case-mix adjustments to the direct care component of the per diem rate, which will be based on Minimum Data Set resident assessment data, all of which is described in more detail in the draft SPA pages. This process includes rebasing nursing home costs to the fiscal year ending September 30, 2019.

The transition to the full implementation of the acuity-based reimbursement system will span a three-year period, which will include stop-loss and stop-gain provisions in each of the first two years. The year one, State Fiscal Year (SFY) 2023 stop gain will limit the per diem rate increases to $6.50 and the stop-loss will be $0.00, meaning no provider will experience a rate decrease due to the quarterly case-mix adjustments during year one. The stop-gain in year two (SFY 2024) will limit the per diem rate increases to $20.00, and the stop-loss is increased to $5.00. There will be no stop-gain or stop-loss provisions in year three (SFY 2025).

Additionally, Medicaid reimbursement rates will be subject to a case mix growth limitation set forth below. The statewide average Medicaid case mix index for the July 1, 2022 reimbursement rates will serve as the baseline to determine growth. The statewide average Medicaid case mix index will be subject to the following maximum growth limits: 0.75% for SFY 2023, 1.51% for SFY 2024, and 2.27% for SFY 2025. Any calendar quarter in which the statewide average Medicaid case mix index exceeds the allowed maximum growth limit will result in all facility Medicaid case mix indices being reduced by a uniform percentage until the statewide average Medicaid case mix index is equal to the maximum growth limit.

The purpose of this SPA is to comply with section 17b-340d of the Connecticut General Statutes, as amended, and to modernize the nursing facility reimbursement methodology.

Fiscal Impact

DSS estimates the transition to acuity-based reimbursement will increase annual aggregate expenditures by approximately $25.6 million in SFY 2023 and $59.2 million in SFY 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-Z: Nursing Facility Reimbursement – Transition to Acuity Based Reimbursement System''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 28, 2022.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-AA: Chronic Disease Hospitals - Rate Increase for Ventilation Beds

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective from July 1, 2022 through June 30, 2023, this SPA will amend Attachment 4.19-A of the Medicaid State Plan in order to increase the reimbursement rate provided to chronic disease hospitals, as defined in section 19a-550 of the general statutes, by $500.00 per day for beds provided to patients on ventilators.

The purpose of this change is to comply with state law in section 238 of Public Act No. 22-118, An Act Adjusting the State Budget for the Biennium Ending June 30, 2023. Specifically, that public act requires DSS to make the rate change set forth above effective during State Fiscal Year (SFY) 2023.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $2,053,792 in SFY 2023 and $186,708 in SFY 2024.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 22-AA: Chronic Disease Hospitals – Rate Increase for Ventilation Beds''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than July 28, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-AB: Community First Choice – Reimbursement Updates to Implement Collective Bargaining Agreement – Personal Care Attendant Per Diem Rate Increase

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, this SPA will amend Attachments 3.1-K and 4.19-B of the Medicaid State Plan to update the provisions for Community First Choice (CFC) pursuant to section 1915(k) of the Social Security Act as detailed below. The purpose of this SPA is to update the Medicaid state plan provisions for CFC to implement specified provisions of the collective bargaining agreement between the state and the union representing personal care attendants (PCAs), which was updated based on an agreement that was recently ratified by the Connecticut General Assembly. Specifically, this SPA implements the increases in the wages paid to PCAs and updates the state plan language that incorporates rates by reference as set forth in any future collective bargaining agreement. This SPA also makes a technical correction to the provision regarding worker's compensation coverage for PCAs in Attachment 3.1-K to align with the approved reimbursement provisions in Attachment 4.19-B.

This SPA does not address the increases to the hourly wages paid to PCAs because the current approved state plan provisions for CFC already incorporate changes to the minimum hourly payment rates based on the collective bargaining agreement in effect at the time services are provided. Thus, a SPA is not necessary to implement those changes, which are already built into the approved state plan and in effect automatically. This SPA also does not address the remaining elements of the updated collective bargaining agreement related to payment to PCAs, specifically paid time off, stipend for a portion of attendants' health insurance premium expenses, and lump sum supplemental payment, which are being addressed in a separate SPA.

Fee schedules are posted to https://www.ctdssmap.com. From this web page, go to ''Provider'' then to ''Provider Fee Schedule Download'', then select the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate Medicaid expenditures by approximately $206,265 in State Fiscal Year (FFY) 2023 and $208,329 in State Fiscal Year (FFY) 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-AB: Community First Choice – Reimbursement Updates to Implement Collective Bargaining Agreement – Personal Care Attendant Per Diem Rate Increase''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 28, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-AG: Private Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective from July 1, 2022 through June 30, 2023, this SPA will amend Attachment 4.19-D of the Medicaid State Plan to make the following changes to the reimbursement methodology for private ICF/IIDs. Note that approved SPA 21-0027 made similar changes for State Fiscal Year (SFY) 2022; this SPA makes the applicable changes to the Medicaid State Plan for SFY 2023.

For SFY 2023, this SPA implements a rate increase for the purpose of wage and benefit enhancements for ICF/IID employees. Facilities that receive a rate adjustment for the purpose of wage and benefit enhancements but do not provide employee salary increases on or before July 31, 2022, may be subject to a rate decrease in the same amount as rate increase.

For SFY 2023, the minimum per diem, per bed rate for each private ICF/IID increases to $501. Any private ICF/IID with a rate below such amount will be increased to that rate for SFY 2023.

For SFY 2023, rates shall not exceed those in effect for SFY 2022, except that DSS may, in the commissioner's discretion and within available appropriations, provide pro rata fair rent increases to facilities which have documented fair rent additions placed in service in the cost report year ending September 30, 2021, that are not otherwise included in rates issued. For SFY 2023, a facility may receive a rate increase for a capital improvement approved by the Department of Developmental Services, in consultation with DSS, for the health or safety of the residents during SFY 2023, only to the extent such rate increases are within available appropriations.

For SFY 2023, DSS may provide fair rent increases to any facility that has undergone a material change in circumstances related to fair rent and has an approved certificate of need.

The purpose of this SPA is to comply with sections 320 and 325 of Public Act 21-2 of the June special session of the Connecticut General Assembly, An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023. Section 325 requires DSS to increase the minimum per diem rate for private ICF/IIDs to $501. Section 356, which was codified as section 17b-340(h) of the Connecticut General Statutes, provides for the other changes described above. In addition, the requirement for DSS to increase the minimum per diem rate for private ICF/IIDs to $501 was repeated in section 230 of Public Act 22-118, An Act Adjusting the State Budget for the Biennium Ending June 30, 2023, Concerning Provisions Related to Revenue, School Construction and Other Items to Implement the State Budget and Authorizing and Adjusting Bonds of the State.

DSS is currently analyzing the projected Upper Payment Limit (UPL) demonstration for SFY 2023. In general, the UPL is a federally required limit on Medicaid payment, which is a calculated amount using federally specified Medicare cost principles, above which Medicaid federal financial participation (FFP) is not available. Depending on the specific results of the UPL demonstration, one or more portions of this SPA may be modified or removed to the extent necessary to reflect that Medicaid payments to ICF/IIDs remain within the UPL.

Fiscal Impact

Based on the information that is available at this time, DSS anticipates that this SPA will increase annual aggregate Medicaid expenditures by approximately $4,697,798 in SFY 2023 and $427,073 in SFY 2024.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference: ''SPA 22-AG: Private ICF/IID Reimbursement''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 28, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-AJ: Section 1915(i) Portion of the Connecticut Home Care Program for Elders – Rate Increases Related to Increase in State Minimum Wage

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, SPA 22-AJ will amend Attachment 4.19-B of the Medicaid State Plan to increases the rates by 5.2% for the following Healthcare Common Procedure Coding System (HCPCS) codes within the state plan home and community-based services option under section 1915(i) of the Social Security Act portion of the Connecticut Home Care Program for Elders (CHCPE): 1021Z, 1022Z, 1023Z, 1200Z, 1201Z, 1202Z, 1206Z, 1210Z, 1213M, 1213M, 1214Z, 1225Z, 1226Z, 1228Z, 1230Z, 1232Z, 1244Z, 1430Z, 1431Z, 1432Z, 1433Z, 1434Z, 3022Z, 3024Z, 3025Z, 3026Z, 3027Z, 3027Z, and 3028Z. The purpose of this SPA is to reflect that providers of specified section 1915(i) CHCPE services have increased costs in paying higher wages to certain staff in order to comply with the July 1, 2022 increase in the state's minimum wage.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download,'' then select the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by $168,508 in State Fiscal Year (SFY) 2023 and $183,827 in SFY 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-AJ: Section 1915(i) Portion of the Connecticut Home Care Program for Elders – Rate Increases Related to Increase in State Minimum Wage''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 28, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-AK: Community First Choice – Reimbursement Updates to Implement Personal Care Attendant Collective Bargaining Agreement – Paid Time Off, Stipend for Portion of Attendants' Health Insurance Premium Expenses, and One-Time Lump Sum Payment

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after October 1, 2022, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to update the provisions for Community First Choice (CFC) pursuant to section 1915(k) of the Social Security Act as detailed below. The purpose of this SPA is to update the Medicaid state plan provisions for CFC to implement the provisions of the collective bargaining agreement between the state and the union representing personal care attendants, which was updated based on an agreement that was recently ratified by the Connecticut General Assembly.

This SPA sets forth the payment methodology for PCA paid time off for eligible PCAs and a stipend to assist eligible PCAs with a portion of the expenses of paying for their health insurance premiums, each which will be paid to the extent provided and in accordance with the collective bargaining agreement in effect at the time services are provided. If no collective bargaining agreement is in effect at the time services are provided, then those payments will be made in accordance with the agreement that was most recently in effect immediately prior to its expiration.

This SPA also sets forth the payment methodology for a one-time lump sum payment to be paid to PCAs in an amount calculated at 6% of total earnings for providing PCA services in CFC for dates of service from April 1, 2021 through March 31, 2022.

This SPA does not address the portion of the reimbursement methodology that includes wages paid to the PCAs because the current approved state plan provisions for CFC already incorporate changes to the minimum hourly payment rates based on the collective bargaining agreement in effect at the time services are provided and a proposed SPA with an earlier effective date (SPA 22-AB) addresses hourly payment rates. Thus, it is not necessary for this SPA to address those changes.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate Medicaid expenditures by approximately $13,661,007 in State Fiscal Year (FFY) 2023 and $9,983,100 in State Fiscal Year (FFY) 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-AK: Community First Choice – Reimbursement Updates to Implement Personal Care Attendant Collective Bargaining Agreement – Paid Time Off, Stipend for Portion of Attendants' Health Insurance Premium Expenses, and One-Time Lump Sum Payment''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 28, 2022.

PERSONNEL NOTICE

(Affirmative Action/Equal Opportunity Employer)

DIVISION OF CRIMINAL JUSTICE

(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF DANBURY

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Danbury (PCN 4866). The successful applicant shall hold office from the date of appointment through June 30, 2026, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $185,570. 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-Danbury JD (PCN 4866) and must be postmarked no later than **July 12, 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

Notice of Certification as Authorized House Counsel

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

Certified as of May 10, 2022:

Kevin O. Tarsa	Point 72, L.P.

Certified as of May 24, 2022:

Michael J. Lopes	Hubbell Inc.

Certified as of May 26, 2022:

Laura B. Weinblum	Exela Enterprise Solutions, Inc.

Certified as of June 2, 2022:

Jessica E. Feldman	CVS Health
Torsten M. Marshall	GE Energy Financial Services

Certified as of June 8, 2022:

Renee J. Levine	W.R. Berkley Corp.

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Inactive Status of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on May 20, 2022, in Docket Number HHD-CV 08-4037896S, Kevin Lynch (Juris# 408203) of West Hartford, CT was placed on inactive status until further order of this court due to his incapacity to practice law.

Pursuant to Practice Book Section § 2-64, Attorney Marc N. Needleman, Juris No. 042420, 800 Cottage Grove Road, Suite 313, Bloomfield, CT 06002, is appointed Trustee to take such steps as necessary to protect the interests of the Respondent's clients, inventory the client files, receive business mail, and take control of Respondent's clients' funds, IOLTA, and all fiduciary accounts. **The Trustee shall not make any disbursements from said accounts without prior authorization of the Court.** The Trustee shall notify all active clients of the Respondent's inactive status and the need to arrange for their self-representation or successor counsel, if necessary.

The Trustee shall take control of any and all clients' funds, IOLTA, and fiduciary accounts(s) by coordinating with the bank(s) to remove the Respondent as an authorized signatory on the account(s), and adding the Trustee as the sole signatory.

The respondent shall not deposit to, or disburse any funds from, withdraw any funds from, or transfer any funds from, any clients' funds, IOLTA, or fiduciary accounts.

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

Susan Quinn Cobb
Presiding Judge