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CONNECTICUT REPORTS

Vol. 344

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

INTERNATIONAL INVESTORS *v.* TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD ET AL.
(SC 20579)

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

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant plan and zoning commission, which granted extensions of the approvals of a special permit and coastal site plan review to the defendant F Co.

in connection with F Co.'s proposed construction of a retail building on its property, which abuts the plaintiff's property. The commission had approved F Co.'s application for a special permit and site plan review in 2006, and the special permit became effective in April, 2009. Under the applicable zoning regulations in effect in April, 2009, approval of special permits was conditioned on the completion of the proposed use within two years of the date of approval, subject to up to five years of extensions, and failure to complete the proposed use by the deadline would void the approval. The statute (§ 8-3 (i)) governing F Co.'s site plan in April, 2009, required work to be completed within five years of the approval of the site plan, subject to up to ten years of extensions, and failure to complete the proposed work by the deadline would result in the automatic expiration of the approval of the site plan. In February, 2011, the commission repealed the zoning regulation that prescribed the two year time limit for completing the proposed use authorized by a special permit and amended another regulation to require the commission to "proceed in accordance with the requirements of the . . . General Statutes" for applications that require a public hearing, including special permit applications. F Co. thereafter obtained confirmation from the commission that, pursuant to the 2011 amendment to the zoning regulations and § 8-3 (i), its special permit and site plan approvals would expire in April, 2014. In May, 2011, the legislature amended § 8-3 (m) to extend the time limitation for which site plans remain valid to nine years, which extended the deadline for the completion of work under F Co.'s site plan to April, 2018. In March, 2018, F Co.'s property remained undeveloped, and the commission granted F Co.'s request for a five year extension, to April, 2023, to complete work in connection with F Co.'s site plan and special permit. The trial court sustained the plaintiff's appeal from that extension insofar as the plaintiff challenged the commission's authority to extend the expiration date of the special permit to April, 2023. The trial court further concluded, however, that its decision to uphold the plaintiff's challenge to the extension of the expiration date of the special permit approval did not operate to invalidate the special permit because special permits attach to the property and run with the land and, therefore, could not be temporally limited. Accordingly, the trial court declined to conclude that the permit had expired or was otherwise invalid. The plaintiff then appealed to the Appellate Court, which concluded that the trial court had incorrectly determined that the special permit was valid indefinitely and could not be subject to a temporal limitation. The Appellate Court further concluded that, once the special permit became effective in April, 2009, F Co. had two years, subject to any granting of extensions, to complete its development of the property and that, because F Co. failed to complete its development of the property or to request any extensions within that two year period, F Co.'s special permit expired in April, 2011. The Appellate Court thus reversed the trial court's judgment in part and remanded the case with direction to render judgment

sustaining the plaintiff's appeal as to the plaintiff's claim that the special permit had expired in April, 2011. On the granting of certification, F Co. appealed to this court, claiming that the Appellate Court had incorrectly concluded that the commission was authorized by statute (§ 8-2 (a)) to condition the approval of a special permit on the completion of development within a specified time period and that the special permit issued to F Co. expired in April, 2011, two years after its April, 2009 effective date, because construction had not been completed by that deadline. *Held* that the Appellate Court incorrectly concluded that F Co.'s special permit expired in April, 2011, and, accordingly, this court reversed the Appellate Court's judgment, remanded the case, and directed that the trial court deny the plaintiff's appeal: a zoning agency has the authority under § 8-2 (a) to adopt a regulation pursuant to which a special permit will expire if construction is not completed within a specified period of time, but, if a zoning agency exercises such authority, the time limitation imposed cannot conflict with the time limitation prescribed in § 8-3 (i) and (m); moreover, in light of the statutory amendments to § 8-3 extending the time limits for site plans, the statutory period governing the completion of development in connection with F Co.'s site plan had not yet expired when F Co. requested an extension of time in 2018, and, therefore, F Co.'s special permit could not have expired on the basis of its failure to complete its work within that time; accordingly, the commission properly granted F Co.'s request for an extension of time from April, 2018, to April, 2023.

Argued December 13, 2021—officially released July 19, 2022

Procedural History

Appeal from the decision of the named defendant extending its approvals of a special permit and a coastal site plan review granted to the defendant Fairfield Commons, LLC, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Radcliffe*, *J.*; judgment sustaining the appeal in part, from which the plaintiff, on the granting of certification, appealed to the Appellate Court, *Prescott*, *Elgo* and *Moll*, *Js.*, which reversed in part the trial court's judgment and remanded the case to that court with direction to render judgment sustaining the plaintiff's appeal with respect to its claim that the special permit approval granted to the defendant Fairfield Commons, LLC, expired, and the defendant Fairfield Commons, LLC, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Timothy S. Hollister, with whom were *Andrea L. Gomes* and *John F. Fallon*, for the appellant (defendant Fairfield Commons, LLC).

Charles J. Willinger, Jr., with whom, on the brief, were *Ann Marie Willinger* and *James A. Lenes*, for the appellee (plaintiff).

Pascal F. Naples, *Joseph P. Williams* and *Joette Katz* filed a brief for the National Association of Home Builders as amicus curiae.

John P. Casey and *Evan J. Seeman* filed a brief for the Connecticut Association of Realtors, Inc., as amicus curiae.

Amy E. Souchuns filed a brief for the Home Builders & Remodelers Association of Connecticut, Inc., as amicus curiae.

Opinion

D'AURIA, J. This certified appeal concerns whether a local zoning authority may, by regulation, condition the continuing validity of a special permit[1] on completing development in connection with the permitted use within a specified period of time. The defendant Fairfield Commons, LLC, appeals from the judgment of the Appellate Court, which (1) affirmed the trial court's judgment insofar as the trial court concluded that the named defendant, the Town Plan and Zoning Commission of the Town of Fairfield (commission), improperly granted Fairfield Commons' request for an extension of its special permit deadline to complete development, and (2) reversed the judgment insofar as the trial court concluded that the special permit could not be subject to a temporal limitation as a matter of law. See *International Investors* v. *Town Plan & Zoning Commission*,

[1] General Statutes § 8-2 (a) provides in relevant part that zoning regulations "may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit . . . ."

202 Conn. App. 582, 606–607, 246 A.3d 493 (2021). With regard to the latter determination, the Appellate Court concluded that the commission had authority to adopt a regulation prescribing a temporal condition for special permits; see id., 599; and that a temporal condition does not violate the tenet that special permits run with the land. See id., 606. We agree with those conclusions subject to an important—and, in this case, determinative—limitation that the Appellate Court did not recognize: such a special permit regulation may not prescribe a shorter time limitation for completing development than the statutory period prescribed for completion of development in connection with an accompanying site plan under General Statutes § 8-3 (i) and (m). Because the statutory period governing completion of development in connection with Fairfield Commons' coastal area management site plan (site plan)[2] had not expired, Fairfield Commons' special permit could not have expired for failure to satisfy that condition by force of a municipal regulation. We therefore reverse the Appellate Court's judgment.

The record reflects the following undisputed facts, either reflected in the trial court's memorandum of decision or otherwise reflected in the record. Fairfield Commons is the owner of a 3.6 acre undeveloped parcel of land located in a design commercial district in the town of Fairfield. Sometime before April 11, 2006, Fairfield Commons applied to the commission for a special permit and site plan review for the purpose of constructing a 36,000 square foot retail building, as required by Fairfield zoning regulations. On April 11, 2006, the commis-

[2] The plaintiff has suggested in its brief to this court that a coastal area management site plan is not a site plan, as that term is used in § 8-3. At oral argument before this court, Fairfield Commons asserted that the former serves the same function as the latter but is subject to additional requirements. The plaintiff effectively conceded this point in its reply brief to the trial court, and we therefore treat Fairfield Commons' coastal management site plan as a site plan subject to § 8-3, as did the trial court.

sion voted to approve the special permit, subject to several conditions, as well as the accompanying site plan. The approval did not actually take effect until April 8, 2009, however, when an appeal from that decision, unrelated to the present matter, was resolved. See Fairfield Zoning Regs., § 2.23.6 (a) (2009).

At the time the approval took effect in April, 2009, the Fairfield zoning regulation governing special permits conditioned approval on "completion of the proposed use" within two years from the date of approval. Id., § 2.23.5. The regulations provided that the commission may grant extensions of time to complete work, up to five years from the date of approval. Id., § 2.23.6 (a). Failure to complete the proposed use within the specified period would render the approval "null and void . . . ." Id.

The statute governing Fairfield Commons' site plan provides that "all work in connection with [the] site plan shall be completed within five years after the approval of the plan." General Statutes § 8-3 (i). "Work" is defined to mean "all physical improvements required by the approved plan."[3] General Statutes § 8-3 (i). The statute permits the local zoning authority to grant one or more extensions of time to complete the work, provided that the total of the extension(s) did not exceed ten years from the date of the site plan approval. General Statutes § 8-3 (i). The statute further provides that "[f]ailure to complete all work within [the specified] period shall result in automatic expiration of the approval of such site plan . . . ." General Statutes § 8-3 (i).

[3] Although "all physical improvements" reflected in the site plan (the statutory term) and those matters necessary for "completion of the proposed [special permit] use" (the regulatory term) may not be entirely coextensive, the parties in the present case have not argued that these terms are materially different in scope as these terms bear on the issues before us. We therefore treat the conditions as effectively governing the same matter.

Thus, under the statutes and regulations initially governing Fairfield Commons' development plans, its special permit would be rendered void if the proposed development was not completed by April, 2011, in the absence of a grant of an extension of time. Fairfield Commons' site plan would automatically expire if all work was not completed by April, 2014, unless the commission granted an extension of time.

In February, 2011, the commission amended its zoning regulations. As relevant to the present case, the commission repealed the regulation prescribing the time limit for completing the use authorized by a special permit. It simultaneously amended another regulation to provide that, for applications that require a public hearing (as do special permits under General Statutes § 8-3c (b)), "the [c]ommission shall proceed in accordance with the requirements of the . . . General Statutes." Fairfield Zoning Regs., § 2.23 (2011). Shortly thereafter, Fairfield Commons requested and obtained written confirmation from the commission that the expiration date of both its special permit and site plan was April 8, 2014.

Due to an economic downturn that had stalled development across the state, in May, 2011, the legislature amended statutes governing land use permits and approvals to extend the time limitations to complete development. See Public Acts 2011, No. 11-5 (P.A. 11-5). Site plans that had not yet expired, like that of Fairfield Commons, were provided a nine year period from the plan's approval date to complete the work, with authority for the local zoning agency to grant extensions of time not to exceed fourteen years from the date of approval. P.A. 11-5, § 1, codified at General Statutes (Supp. 2012) § 8-3 (m). This change extended the time limitation in Fairfield Commons' site plan until April, 2018, by operation of law.

In March, 2018, the parcel at issue remained undeveloped.[4] Fairfield Commons therefore requested from the commission a five year extension of the time limit to complete work in connection with its site plan and its special permit—from April 8, 2018, to April 8, 2023. At the hearing on the request, James R. Wendt, the town planning director, explained the intention and effect of the 2011 amendment to the zoning regulations, namely, to ensure that the commission's regulatory time limits would conform to statutory time limits as they may change, and stated that it applied retroactively to Fairfield Commons' unexpired special permit and site plan approvals. Commission members expressed agreement with this view and voted to grant Fairfield Commons' extension request.

The plaintiff, an owner of property abutting the parcel at issue, appealed to the Superior Court from the commission's decision granting the extension. See General Statutes § 8-8 (a) (1) and (b) (designating abutting property owner as aggrieved person for purposes of right to appeal). The trial court first addressed the plaintiff's challenge to the commission's authority to extend the time limitation attached to the special permit. The court concluded that the 2011 amendment to the town's zoning regulation providing that the commission would proceed "in accordance with the requirements of the . . . General Statutes"; Fairfield Zoning Regs., § 2.23 (2011); was irrelevant because no statute addressed time limits applicable to special permits. It rejected Fairfield Commons' position, jointly adopted by the commission, that the time limitations for completing work in connection with a "site plan" established by § 8-3 (i) and (m) encompass both the special permit and the site plan because they must be viewed as a

[4] In 2017, the commission approved a change in use for the subject parcel from a retail building to a medical office. The parties do not argue that this change is material to any issue on appeal.

single, integrated application and approval. The court reasoned that the two matters have materially distinguishing characteristics and functions. The court therefore sustained the plaintiff's appeal insofar as it challenged the commission's authority to extend the special permit approval in 2018.

The court then considered whether it was legally permissible for the special permit to be subject to a time limitation in the first instance. Relying on the view contained in Attorney Robert A. Fuller's treatise on Connecticut land use law, the court concluded that a duly recorded special permit; see General Statutes § 8-3d; runs with the land and, as such, is valid indefinitely in the absence of statutory authority allowing revocation or expiration of special permits. See R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 50:1, pp. 161–62.[5] The trial court therefore concluded that the commission's 2018 decision had no impact on the validity of Fairfield Commons' special permit, assuming it was otherwise valid. Accordingly, the court sustained the plaintiff's appeal "to the extent that it challenge[d] the authority of the [commission] to extend the expiration date of the special permit until April 8, 2023," but declined to conclude that the permit had expired or was otherwise invalid.

The plaintiff appealed to the Appellate Court, which reversed the trial court's judgment in part.[6] See *Interna-*

[5] The treatise provides in relevant part that, "[w]hen a special permit is issued by the zoning commission . . . it remains valid indefinitely since the use allowed under it is a permitted use subject to conditions in the zoning regulations. . . . The agency cannot put an expiration date on and require renewal of special permits . . . because that automatically would turn a permitted use into an illegal use after the time period expired. . . . If the conditions of the special permit are violated, the remedy is a zoning enforcement proceeding since there is no statutory provision allowing revocation or expiration of special permits." (Footnotes omitted.) 9B R. Fuller, supra, § 50:1, pp. 162–63.

[6] The commission declined to file an appellate brief and instead notified the Appellate Court that it was adopting Fairfield Commons' brief. The commission filed a similar notice with this court.

tional Investors v. *Town Plan & Zoning Commission*, supra, 202 Conn. App. 606–607. The Appellate Court concluded that the commission had statutory authority to impose a time limitation as a condition of the continuing validity of a special permit under General Statutes § 8-2 (a), which authorizes special permit "conditions necessary to protect the public health, safety, convenience and property values . . . ." See *International Investors* v. *Town Plan & Zoning Commission*, supra, 594–99. The Appellate Court reasoned that a temporal limitation on completing the development connected to the specially permitted use advances these interests by preventing the permit holder from unduly delaying the commencement of the permitted use to a time when the surrounding circumstances may no longer support it. See id., 596–97. It dismissed Fairfield Commons' contention that the statutorily prescribed time limitation on the completion of development for the site plan under § 8-3 (i) and (m) would provide an opportunity to address these concerns, noting the ministerial nature of that approval process. See id., 597 n.18.

The Appellate Court further concluded that the trial court had incorrectly interpreted the tenet that special permits run with the land to compel the conclusion that special permits, once duly recorded, cannot be temporally restricted. See id., 600. The Appellate Court examined the case law cited by the trial court and Fuller's treatise and concluded that these cases did not support their position. See id., 601–602. Rather, those cases stood for an entirely distinct proposition, namely, that special permits "are not personal to the applicant and remain valid notwithstanding a change in the ownership of the land." (Emphasis omitted.) Id., 601.

The Appellate Court then connected this error in the trial court's analysis to the ultimate issue of whether Fairfield Commons' special permit had, in fact, expired: "[T]he [trial] court incorrectly determined that the spe-

cial permit granted to Fairfield Commons, once recorded, was valid indefinitely and could not be subject to a temporal condition, such as a condition requiring the completion of development attendant to the permitted use by a date certain. Thus, the court committed error in concluding that the special permit had not expired. Once the special permit became effective in 2009, Fairfield Commons had two years, subject to any additional extensions granted, to complete development on the property. Fairfield Commons failed to complete development or request any extensions of the special permit approval within that time frame, and, therefore, the special permit expired in 2011. We leave undisturbed the [trial] court's conclusion that the commission's decision extending the special permit was improper." Id., 606–607. The Appellate Court accordingly reversed the trial court's judgment in part and remanded the case with direction to sustain the plaintiff's appeal as to its claim that Fairfield Commons' special permit had expired. See id., 607. It affirmed the judgment in all other respects. See id.

We granted Fairfield Commons' petition for certification to appeal with respect to the issues of whether the Appellate Court correctly concluded (1) that § 8-2 (a) provides authority for a municipal zoning commission to condition approval of a property owner's special permit on the completion of development within a specified time period, subject to extensions, and (2) that the special permit approval issued to Fairfield Commons to construct a retail building expired in 2011, two years after the effective date, because construction had not been completed, and, therefore, the extension of the special permit and site plan the commission granted in 2018, under § 8-3 (m), was invalid. See *International Investors* v. *Town Plan & Zoning Commission*, 336 Conn. 928, 247 A.3d 577 (2021).

Not long after this court granted Fairfield Commons' petition, the state enacted legislation relevant to the issue in this appeal. See Public Acts 2021, No. 21-34 (P.A. 21-34); Public Acts 2021, No. 21-163 (P.A. 21-163). In response to executive orders issued by Governor Ned Lamont to mitigate the economic impact of the COVID-19 pandemic, the 2021 public acts extended expiration dates for completing work in land use approvals that had not expired prior to the July, 12, 2021 effective date of P.A. 21-163.[7] The 2021 public acts not only extended deadlines previously imposed by statute, such as the one for site plans, but also added a new provision extending deadlines imposed as a condition of special permit approval. Section 8-3 (m), as amended by P.A. 21-34, § 3, and P.A. 21-163, § 1, provides in relevant part: "[A]ny site plan approval made under this section prior to July 1, 2011, that has not expired prior to July 12, 2021 . . . shall expire not less than fourteen years after the date of such approval and the commission may grant one or more extensions of time to complete all or part of the work in connection with such site plan, provided no approval, including all extensions, shall be valid for more than nineteen years from the date the site plan was approved." General Statutes (Supp. 2022) § 8-3 (m) (1). Section 8-3c, as amended by P.A. 21-163, § 5, provides in relevant part: "[A]ny special permit or special exception approval made under this section prior to July 1, 2011, that has

[7] See Executive Order No. 7JJ, § 3 (May 6, 2020), available at https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7JJ.pdf (last visited July 13, 2022) ("Tolling of Land Use and Building Permits. In order to ensure that land use and building permit holders may continue to diligently pursue permitted activities after the state of emergency, an approval or permit issued by a municipal land use agency or official pursuant to the 'Covered Laws' as defined in Section 19 of Executive Order 7I, or by a municipal building official pursuant to Connecticut General Statutes Chapter 541 and valid as of March 10, 2020, shall not lapse or otherwise expire during the state of emergency, and the expiration date of the approval shall toll during the state of emergency.").

not expired prior to July 12, 2021, and that specified a deadline by which all work in connection with such approval is required to be completed, shall expire not less than nineteen years after the date of such approval and the commission may grant one or more extensions of time to complete all or part of the work in connection with such special permit or special exception."[8] General Statutes (Supp. 2022) § 8-3 (c) (1).

In its appeal to this court, Fairfield Commons, joined by the commission,[9] makes two overarching legal arguments. First, they claim that the Appellate Court failed to recognize that site plan expiration dates for completion of construction, as dictated by § 8-3 (i) and (m), control the duration of a special permit because the permit and site plan are inextricably linked and cannot be subject to different time limits.[10] Second, they reiterate the trial court's view that special permits run with the land and cannot be subject to time limitations in the absence of statutory authority to impose such limitations. The defendants contend that the Appellate Court incorrectly found authority in § 8-2 (a) that sets up a conflict with § 8-3 (i) and (m). The defendants characterize the 2021 public acts as an endorsement of their

[8] "The terms 'special exception' and 'special permit' are synonymous and have been used interchangeably." *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 623 n.4, 711 A.2d 675 (1998); see also 2 P. Salkin, American Law of Zoning (5th Ed. 2011) § 14:1, p. 14-5 (noting general view that special permit, special exception, and conditional use permit are synonymous terms).

[9] We hereafter refer to Fairfield Commons and the commission collectively as the defendants.

[10] The plaintiff contends that this claim is unpreserved for appellate review because the defendants did not raise this issue in the Appellate Court. Although the plaintiff is technically correct, review of the submissions in the proceedings below reveals that § 8-3 (i) and (m) has been an integral part of the defendants' position from the outset of this litigation. The question of the commission's authority to impose a time limitation on special permits, which is properly before us, requires consideration of the time limitation in the site plan statute, § 8-3, especially in light of P.A. 21-163. We therefore conclude that the defendants properly may advance this argument.

position, namely, that "special permits should endure on a long-term, uniform, statewide basis, for a time period consistent with the site plan statutes and other collateral permits." In addition to these legal arguments, they claim that the Appellate Court made an erroneous "finding" that the special permit expired in 2011, due to the absence of any request by Fairfield Commons for an extension of time.

Conversely, the plaintiff agrees in full with the Appellate Court's reasoning. With regard to the import of the 2021 public acts, the plaintiff views Fairfield Commons' special permit as falling outside of the operative dates therein but contends that the public acts undermine every argument the defendants advance.

We agree with the Appellate Court insofar as it concluded that a temporal limitation on a special permit does not violate the tenet that special permits run with the land and falls within the authority granted under § 8-2 (a), but we conclude that the Appellate Court incorrectly failed to consider the effect of § 8-3 on the exercise of that authority. We hold that the commission lacked authority to condition the continuing validity of the special permit on completion of development within a specified period that conflicted with the period prescribed for satisfying the same condition in the statute governing the site plan.

Except insofar as the defendants challenge a purported "finding" by the Appellate Court, an issue that we need not reach, all of the issues before us are questions of law. We therefore exercise plenary review and apply well established rules of statutory construction. See, e.g., General Statutes § 1-2z ("[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes"); *Kuchta* v. *Arisian*, 329 Conn. 530, 534–35, 187 A.3d 408 (2018) ("[w]hen a statute is not plain and

unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter" (internal quotation marks omitted)). Statutory text does not unambiguously resolve the issues before us—the parties do not contend otherwise—and we therefore consult extratextual sources to the extent that they are illuminating.

I

We begin with general land use principles and their relationship to the concept of land use permits running with the land. A special permit "authorizes those uses that are explicitly permitted in the [zoning] regulations (albeit subject to certain conditions not applicable to other uses in the district)." (Emphasis omitted; internal quotation marks omitted.) *Grasso* v. *Zoning Board of Appeals*, 69 Conn. App. 230, 243, 794 A.2d 1016 (2002); see *Rhine* v. *Bizzell*, 311 Wis. 2d 1, 16, 751 N.W.2d 780 (2008) (special permits are required "for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner"). "The basic rationale for the special permit [is] . . . that while certain [specially permitted] land uses may be generally compatible with the uses permitted as of right in [a] particular zoning [district], their nature is such that their precise location and mode of operation must be [individually] regulated because of the [particular] topography, traffic problems, neighboring uses, etc., of the site. . . . T. Tondro, [Connecticut Land Use Regulation (2d Ed. 1992) p. 175]. *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, 222 Conn. 607, 612–13, 610 A.2d 1205 (1992)." (Internal quotation marks omitted.) *Center Shops of East Granby, Inc.* v. *Planning & Zoning Commission*, 253 Conn. 183, 191–92, 757 A.2d 1052

(2000). "The proposed use, [therefore], must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values." (Internal quotation marks omitted.) *Heithaus* v. *Planning & Zoning Commission*, 258 Conn. 205, 215–16, 779 A.2d 750 (2001); see also *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 627, 711 A.2d 675 (1998) ("general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit").

A special permit, like a variance, must be recorded in the land records to be effective.[11] General Statutes § 8-3d. "[I]f the zoning regulations change before the copy [is] recorded, the property owner may lose the benefit of the variance or special permit."[12] 9 R. Fuller,

[11] A variance permits the owner to use the property in a manner forbidden by the zoning regulations, upon a showing of hardship, whereas a special permit authorizes a use that is explicitly permitted in the regulations without any such evidence. See, e.g., *Grasso* v. *Zoning Board of Appeals*, supra, 69 Conn. App. 243. Variances do, however, have certain features in common with special permits: a variance also may be subject to reasonable conditions; see, e.g., *Vaszauskas* v. *Zoning Board of Appeals*, 215 Conn. 58, 64, 574 A.2d 212 (1990); and, as we explain in part I of this opinion, runs with the land. We rely on authority addressing variances solely to illustrate that this common feature of running with the land does not equate, as a matter of law, to indefinite duration. We have no occasion to express an opinion as to whether those features that distinguish a variance from a special permit would preclude a local zoning authority from imposing an expiration date on a variance or a time limitation on satisfaction of a variance condition.

[12] Although the legislative history of § 8-3d makes clear that recording serves two purposes—effectuating the permit and providing notice of a conditional privilege—one of the sponsors of the legislation explained that recording was not intended to guarantee the validity of the permit and that a title searcher would need to investigate whether permit requirements had been met. See 18 H.R. Proc., Pt. 9, 1975 Sess., pp. 4104–4105, remarks of Representative Richard C. Willard. Noncompliance with permit conditions may result in revocation of the permit. See 2 P. Salkin, American Law of Zoning (5th Ed. 2011) § 14:34, p. 14-160.

A Massachusetts statute illustrates that the recording of a special permit does not necessarily render the permit of infinite duration by providing both that a special permit must be recorded to take effect and that a special

supra, § 24:7, p. 777. Although the recording provides notice of the conditional privilege to successors in interest (as well as other interested parties); see 18 S. Proc., Pt. 4, 1975 Sess., p. 1846, remarks of Representative Louis Ciccarello; 18 H.R. Proc., Pt. 9, 1975 Sess., pp. 4088–89, remarks of Representative Richard C. Willard; 18 H.R. Proc., Pt. 9, 1975 Sess., p. 4103, remarks of Representative Richard O. Belden; it is not the act of recording that determines that the special permit runs with the land. That consequence flows from the nature of the permit and more fundamentally the nature of zoning law itself.

"[T]he identity of a particular user of the land is irrelevant to zoning." (Internal quotation marks omitted.) *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 857, 670 A.2d 1271 (1996). "Since land use regulation is concerned with the use of the land and not its ownership, a change in ownership of land for which vested rights exist . . . does not affect the right to continue the same use or use the same approvals and permits, and the new owner stands in the same position as the prior owner. . . . A special permit . . . run[s] with the land, so a transferee can complete any conditions imposed on the prior approval and then use the land as allowed by the special permit." (Footnotes omitted.) 9B R. Fuller, supra, § 53:8, pp. 280–81; see *TWK, LLC* v. *Zoning Board of Appeals*, Docket No. CV-97-400324-S, 1999 WL 30815, *4 (Conn. Super. January 8, 1999) ("Like a variance, a special permit . . . is a legal status granted to a certain parcel of realty without regard to ownership. . . . A successor in interest to such realty succeeds to the benefits and to the conditions of a land use permit to which the realty is subject." (Internal

permit shall lapse if a "substantial use" has not commenced within a certain period of years after the permit was granted. Mass. Gen. Laws Ann. c. 40A, § 9 (LexisNexis 2018); see also *McDermott* v. *Board of Appeals*, 59 Mass. App. 457, 457–58, 796 N.E.2d 455 (2003).

quotation marks omitted.)); 3 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 61:50 (4th Ed. 2011) p. 61-136 ("The [special] permit is not, and cannot be, personal to the applicant, but runs with the land. A transferee of the land succeeds to any benefits that the original grantee of the permit enjoyed, as well as being subject to its conditions." (Footnote omitted.)).

Because ownership is irrelevant to the status of a special permit, time limitations on the permit that are tied to the lifetime of the original grantee or to the original grantee retaining title to the property are invalid. See 2 P. Salkin, American Law of Zoning (5th Ed. 2011) § 14:32, p. 14-151 ("a special permit may not be conditioned to terminate when the title to the land is conveyed to one other than the applicant"); see, e.g., *Gozzo* v. *Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-07-4015865-S (July 24, 2008) (46 Conn. L. Rptr. 110, 113–14); *Beeman* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Haven, Docket No. CV-99-0427275 (April 27, 2000) (27 Conn. L. Rptr. 77, 79–80). That this prohibition is the *sole* defining feature of running with the land is plainly reflected in the variance statute codifying this common-law rule: "Any variance granted by a zoning board of appeals shall run with the land and shall not be personal in nature to the person who applied for and received the variance. A variance shall not be extinguished solely because of the transfer of title to the property or the invalidity of any condition attached to the variance that would affect the transfer of the property from the person who initially applied for and received the variance."[13] General Statutes § 8-

[13] Long before enactment of this provision in 1993, this court had acknowledged that variances run with the land, although we did not employ that specific phrase. See, e.g., *Garibaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 239, 303 A.2d 743 (1972) ("By its very definition, a variance is granted with respect to a particular piece of property; it can be enjoyed not only by the present owner but by all subsequent owners. . . . It follows then that a variance is not a personal exemption from the enforcement of zoning

6 (b); see 36 S. Proc., Pt. 5, 1993 Sess., pp. 1507–1508, remarks of Senator George Jepsen (explaining ban on personal conditions); 36 H.R. Proc., Pt. 31, 1993 Sess., pp. 11,106–107, remarks of Representative Jefferson B. Davis (same).

Nothing, however, in the codification of this tenet or our appellate case law addressing it suggests that this tenet would render a temporal condition unrelated to ownership invalid per se.[14] Cf. *Appeal of Barefoot*, 437 Pa. 323, 325, 263 A.2d 321 (1970) ("[w]hen a special [permit] is granted, the use becomes a conforming use, and such use [i]nures to the benefit of a subsequent owner of the land and is not abandoned *in the absence of a time limitation in the* [*permit*] *itself or in the zoning ordinance*" [emphasis added]); 2 P. Salkin, supra, § 13-40, pp. 13-110 through 13-111 ("A variance

regulations. It is a legal status granted to a certain parcel of realty without regard to ownership." (Citation omitted.)); see also *Reid* v. *Zoning Board of Appeals*, supra, 235 Conn. 859–60 ("the legislature was well aware that this court has consistently stated that a variance must run with the land and not with the individual property owner"). We do not draw any particular significance from the absence of a similar statute applicable to special permits. At the time the legislature adopted § 8-6 (b), only a trial court decision had extended this tenet to special permits. See *Bosley* v. *Zoning Board of Appeals*, Docket No. 0290506, 1990 WL 276387, *4 (Conn. Super. September 17, 1990). Although this view has since been reiterated in many trial court cases, no appellate decision has discussed this tenet as applied to special permits until the present case.

[14] We observe that our trial courts have long been in agreement that the previously discussed land use principles compel the conclusion that site plans, subdivision plans, and wetlands permits—all of which are subject to statutory time limitations; see General Statutes §§ 8-3 (i) and (m), 8-26c and 22a-42a; also run with the land. See, e.g., *Madore* v. *Zoning Board of Appeals*, Superior Court, judicial district of Middlesex, Docket No. CV-11-6005648-S (August 21, 2012) (54 Conn. L. Rptr. 519, 523); *N & L Associates* v. *Planning & Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-04-0093492 (June 8, 2005) (39 Conn. L. Rptr. 466, 468); *Brentwood Extension, LLC* v. *Planning & Zoning Commission*, Docket No. CV-98-0354488, 2004 WL 203153, *10 (Conn. Super. January 20, 2004); *Griswold Hills of Newington Ltd. Partnership* v. *Town Plan & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-95-0705701 S (June 9, 1995) (14 Conn. L. Rptr. 405, 407).

runs with the land; *absent a specific time limitation*, it continues until properly revoked. . . . A variance . . . may be conditioned to expire within a certain time, so that it does not continue to subsequent owners." (Emphasis added; footnotes omitted.)).[15]

Temporal limitations on special permits have been deemed proper if they relate to the *use* of the property. See 2 P. Salkin, supra, § 14:31, p. 14-147 (special permit conditions "must relate directly to, and be incidental

[15] In his treatise, Fuller expresses the concern that "put[ting] an expiration date on and requir[ing] renewal of special permits . . . automatically would turn a permitted use into an illegal use after the time period expired." 9B R. Fuller, supra, § 50:1, pp. 162–63. This concern appears to relate to durational limits unconnected to permit conditions (e.g., a one year permit) because the permit holder could use the permit in conformity with zoning requirements and permit conditions and, yet, the permit would expire by a set date. If a permit holder violates a permit condition requiring performance within a specified time, however, the permit holder would not be in compliance with the law. See T. Tondro, supra, p. 522.

Another Connecticut land use treatise expresses support for special permit durational limits when renewal is available. See id., p. 461 ("The reasons for limiting the duration of a special permit are to provide an effective means of enforcing a condition, and to give the commission an opportunity to review the activity after a period of time to determine whether circumstances have changed sufficiently to warrant a changed decision. Therefore, a renewal application could properly consider afresh whether the use belongs at the site, but only to the extent that new developments have occurred—in effect, a change or mistake rule should be applied in order to protect the permittee from abuses of discretion, yet give a commission the opportunity to balance the owner's interest (including the investment already made based on the initial permit) with the commission's responsibility for ensuring a balanced land use plan for the community."); see also *Dil-Hill Realty Corp.* v. *Schultz*, 53 App. Div. 2d 263, 267, 385 N.Y.S.2d 324 (1976) ("The purpose for imposing a time limitation in the grant of a special permit or variance, it would seem, is to [e]nsure that in the event conditions have changed at the expiration of the period prescribed the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances if the latter still desires to proceed. However, such a time limitation imposed for its own sake unrelated to the purposes of zoning has no apparent rationale and its strict application as the sole basis for a denial of an extension effects an unreasonable restriction [on] the permission previously found to be warranted." (Internal quotation marks omitted.)).

to, the proposed use of the real property and not to the manner of the operation of the enterprise conducted on the premises which are subject to the special permit" (internal quotation marks omitted)); id., § 14:33, pp. 14-158 through 14-159 ("[a] time limitation [in a special permit] will be disapproved if it is unrelated to the use of the land"); see also, e.g., *Gozzo* v. *Zoning Commission*, supra, 46 Conn. L. Rptr. 110, 113 (The court distinguished time limitations in a special permit for gravel excavation and a special permit for a furniture restoration business on residential property, insofar as the latter "is not a project that progresses until it is finished. It is more perpetual in nature and does not require the town to monitor its progression."); *Whittaker & Gooding Co.* v. *Scio*, 122 Mich. App. 538, 544, 332 N.W.2d 527 (1983) ("[T]he policy considerations justifying a time limitation . . . are much more compelling . . . where the proposed use is temporary in nature at the outset . . . . Further, a limitation on the length of time one may extract sand and gravel from the ground is definitely related to the use of the land, whereas limitation on the use of a building already constructed on the land is a limitation on the use of the building.").[16]

[16] Special permits for excavation and other uses that, by their nature, result in physical changes to the property or effects on other properties often have been time limited. See, e.g., *Cioffoletti* v. *Planning & Zoning Commission*, 24 Conn. App. 5, 6–8, 584 A.2d 1200 (1991) (time limitation on special permit for commercial sand and gravel removal operation was deemed valid); *Kobyluck* v. *Planning & Zoning Commission*, Superior Court, Docket No. CV-00-121562-S, 2003 WL 283832, *5–6 (Conn. Super. January 27, 2003) (time limitation on excavation was deemed valid), rev'd in part on other grounds, 84 Conn. App. 160, 852 A.2d 826, cert. denied, 271 Conn. 923, 859 A.2d 579 (2004); see also *Rockford Blacktop Construction Co.* v. *Boone*, 263 Ill. App. 3d 274, 280, 635 N.E.2d 1077 ("The [five year] restriction would allow the [c]ounty to evaluate the use of the property as a quarry in light of any changes during the [five year] period, including whether the residential use has expanded. This factor suggests that the [five year] restriction is reasonable."), appeal denied, 157 Ill. 2d 522, 642 N.E.2d 1303 (1994); *Houdaille Construction Materials, Inc.* v. *Board of Adjustment*, 92 N.J. Super. 293, 303–304, 223 A.2d 210 (App. Div. 1966) (concluding that five year limitation on special use permit for operation of bituminous

The temporal condition at issue in the present case does not violate any of the principles discussed previously. The condition is not tied to ownership. It does not even limit the duration of the permit. Cf. General Statutes § 22a-42a (g) (prescribing period of years after which wetlands permit expires). Rather, it is a time limitation on the performance of a condition of the permit. If the condition—completion of the proposed use—is timely performed, then the permit would continue indefinitely. The condition relates to the use of the property at its most elemental level; the property cannot be put to the use for which the permit was granted until the proposed construction and development have been at least substantially completed.

The question we must answer, then, is not whether a time limitation on the performance of a permit condition (completing construction) violates the tenet that special permits run with the land. The Appellate Court correctly concluded that it does not. The question is whether local zoning agencies have authority to adopt a regulation that imposes such a condition.

II

The defendants claim that the authority to adopt regulations imposing the temporal limitation at issue in the present case does not exist for two reasons. First, they contend that the legislature has dictated the time limit allowed to complete construction in the site plan statute. See General Statutes § 8-3 (i) and (m). They contend that this time limitation necessarily controls the special permit because special permits are inextricably linked to site plans. Second, they contend that the grant of municipal authority relating to special permits under

concrete plant was valid because court "regard[ed] the power to impose the limitation as reasonably incident to the [zoning] board's responsibility to see to it, among other things, that the use not be attended by any substantial detriment to the public good").

§ 8-2 (a) does not authorize zoning agencies to impose time limitations and cannot provide authority to impose a time limitation that conflicts with § 8-3 (i) and (m).

The plaintiff contends that authority to impose time limitations exists in § 8-2 (a). It further contends that the time limitation for completing construction that applies to site plans under § 8-3 is no impediment to the exercise of that authority because site plans and special permits serve entirely different functions.

We do not entirely agree with either of these views of the law. Insofar as the defendants appear to suggest that § 8-3 imposes its time limitation on special permits by operation of law, we disagree. We conclude that zoning agencies have authority under § 8-2 (a) to adopt a regulation under which a special permit would expire if construction for the proposed use is not completed within a specified period of time. We also conclude, however, that, if this authority is exercised, the time limitation cannot conflict with the deadline prescribed in § 8-3 (i) and (m).

Our analysis begins with the different purposes of, and relationship between, the special permit and the site plan. As we previously indicated, a special permit authorizes use of the property for a specific purpose, subject to conformance with zoning regulations and any other conditions necessary to vindicate the general purposes of zoning (protecting public health, safety, convenience, and property values). See, e.g., *Torrington* v. *Zoning Commission*, 261 Conn. 759, 769, 806 A.2d 1020 (2002); see also General Statutes § 8-2 (a). A public hearing is required before a special permit may be approved. See General Statutes § 8-3c (b); *Center Shops of East Granby, Inc.* v. *Planning & Zoning Commission*, supra, 253 Conn. 194. The special permit process involves the exercise of discretion. See *Irwin* v. *Planning & Zoning Commission*, supra, 244 Conn. 626.

Approval confers a right, albeit one that may be subject to conditions.

A site plan is a document that reflects, among other things, the location and dimension of buildings, structures, development features, and uses of the subject property. See *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 613–14; see also General Statutes § 8-3 (g). If the plan conforms with zoning and wetlands regulations, it must be approved; see General Statutes § 8-3 (g); and, thus, the issuance of a certificate of approval is "a mere ministerial act . . . ." *Kosinski* v. *Lawlor*, 177 Conn. 420, 427, 418 A.2d 66 (1979). No public hearing is required. Cf. *Center Shops of East Granby, Inc.* v. *Planning & Zoning Commission*, supra, 253 Conn. 186 n.2.

Despite (or perhaps because of) the different functions zoning agencies serve, it is a common practice among them to review site plans in connection with special permit applications, as the Fairfield zoning regulations required in the present case.[17] See, e.g., *Yagemann* v. *Planning & Zoning Commission*, 92 Conn. App. 355, 362–64, 886 A.2d 437 (2005) (addressing similar Greenwich regulations); *Kobyluck* v. *Planning & Zoning Commission*, 84 Conn. App. 160, 173, 852 A.2d 826 (addressing similar Montville regulations), cert. denied, 271 Conn. 923, 859 A.2d 579 (2004). This court explained the reason for this practice in *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 607: "[B]efore the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns, such as parking or traffic congestion, would

[17] In his treatise, Tondro suggests that efforts of zoning treatises to draw a clear distinction between special permits and site plans are not entirely successful and that, in practice, the distinction is not always clear-cut. See T. Tondro, supra, pp. 181–87.

adversely impact the surrounding neighborhood. The commission, therefore, must be allowed to examine the suggested proposal closely. The details of the proposal are laid out in the site plan, which is a physical plan showing the layout and the design of the site of a proposed use . . . . It generally should indicate the proposed location of all structures, parking areas and open spaces on the plot and their relation to adjacent roadways and uses. . . . As used in § 8-3 (g), a site plan is a general term which is used in a functional sense to denote a plan for the proposed use of a particular site, purporting to indicate all the information required by the regulations for that use. . . .

"When considering an application for a special permit, the commission is called [on] to make a decision as to whether a particular application . . . would be compatible with the particular zoning district, under the circumstances then existing. That determination can . . . be made [only] after a thorough examination of the specific site plan submitted. . . . [R]eview of a special permit application is necessarily dependent on a thorough review of the proposed site plan because, in fact, the grant of the special permit is usually contingent [on] approval of the site plan." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 613–14; see *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 641, 203 A.3d 645 (quoting *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 620), cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019).

Modifications to a site plan may be necessary to reflect the conditions imposed on the special permit use following the public hearing. Cf. *Garden Homes Management Corp.* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-07-4015729-S (November 3, 2009) (48 Conn. L. Rptr. 743, 750) (in affordable housing appeal, court remanded

case to zoning commission with direction to approve site plan and zoning permit applications "subject to reasonable and necessary conditions, not inconsistent with" court's decision, for specified physical improvements); *Ruggiero* v. *Zoning Commission*, Docket No. CV-00-0340891-S, 2001 WL 1178801, *1 (Conn. Super. September 5, 2001) (appeal from decision granting "a 'special permit/site plan amendment' to the defendant . . . for structural changes to one of its existing buildings" in case in which hearing was held on "amended special permit and attendant site plan"); *Mailloux* v. *Planning & Zoning Commission*, Docket No. 318723, 1995 WL 784981, *4–6 (Conn. Super. December 21, 1995) (reciting testimony at public hearing on application to revise/amend special exception permit, which included plans for construction of addition to current structure and creation of additional off-street parking spaces, as to whether off-street parking spaces were sufficient in number to meet zoning regulation's requirements). It is entirely proper, therefore, for the defendants to characterize the site plan and special permit as inextricably linked when both are required due to physical changes on or to the land to implement the permitted use. As we explain subsequently in this opinion, this close relationship would require the governing law to be in harmony. This relationship does not dictate, however, that every condition attached to one applies by operation of law to the other.

This court previously concluded that, even when zoning regulations required the special permit application to contain a site plan, that requirement does not render the site plan and permit legally inseparable. See *Center Shops of East Granby, Inc.* v. *Planning & Zoning Commission*, supra, 253 Conn. 191 ("unless otherwise set forth in the relevant town regulations, the special permit and the site plan are not inseparable and, therefore, do not meld into a single entity"). The court concluded in

Center Shops of East Granby, Inc., that the statutes prescribing automatic approval of a site plan when the zoning authority fails to issue a decision within the prescribed time limit; see General Statutes §§ 8-3 (g) and 8-7d; did not apply to a special permit that was jointly submitted with its related site plan. See *Center Shops of East Granby, Inc.* v. *Planning & Zoning Commission*, supra, 194. The court distinguished a prior case in which it had reached a contrary conclusion on its unique facts; see id., 189–91; and held that §§ 8-3 and 8-7d would apply to a special permit only "when the application for the special permit is integral to and virtually indistinguishable from the application for the site plan, and when the use sought is a permitted use such that a public hearing is not required . . . ." Id., 191. The court in *Center Shops of East Granby, Inc.*, emphasized the significance of the fact that, in the prior case, the parties had stipulated at trial that the site plan and special permit were inseparable. See id., 189.

Applying this logic to the present case, we see no basis to conclude that the time limit to complete construction in § 8-3, governing site plans, would apply by operation of law to special permits. There is no textual basis to draw this inference. The absence of a parallel condition on special permits would not impede operation of the time limitation in § 8-3. Although, as we explain subsequently in this opinion, there is a strong policy justification for imposing a similar time limitation as a condition of the related special permit, we cannot conclude that such a condition must arise by operation of law.

We therefore turn to the question of whether § 8-2 (a) grants zoning agencies the authority to adopt a regulation conditioning the validity of a special permit on completion of construction within a specified time period. Examination of this provision reveals no express authority to impose a time limit on the performance of

a permit condition, by regulation or otherwise. Cf. Mass. Gen. Laws Ann. c. 40A, § 9 (LexisNexis 2018) ("[z]oning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than 3 years . . . from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause"); Mass. Gen. Laws Ann. c. 40A, § 9 (LexisNexis 2018) ("[special] permits may also impose conditions, safeguards and limitations on time or use"). Nor, however, is there text from which we can infer a prohibition on the exercise of such authority. Cf. *Builders League of South Jersey, Inc.* v. *Burlington County Planning Board*, 353 N.J. Super. 4, 21–22, 801 A.2d 380 (App. Div. 2002) (holding that local zoning authority lacked authority to mandate by regulation that site plan approval and subdivision approval expire after three years when statute provided that " 'standards shall be limited to' " five enumerated requirements and other statute provided that " 'procedures and standards shall be limited to' " five enumerated requirements, all specific in nature and none of which related to duration).

Section 8-2 (a) instead provides in general terms, consistent with the broad aims of zoning law, that zoning regulations may require a special permit to be "subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values." See *Irwin* v. *Planning & Zoning Commission*, supra, 244 Conn. 627 (citing "general considerations such as public health, safety and welfare" as relevant to special permit conditions). Because the grant of municipal authority to enact zoning regulations is in derogation of the common law, this court has held that "this grant of authority should receive a strict construction and is not to be extended,

modified, repealed or enlarged in its scope by the mechanics of [statutory] construction." (Internal quotation marks omitted.) *Kuchta* v. *Arisian*, supra, 329 Conn. 535; see, e.g., *Lord Family of Windsor, LLC* v. *Planning & Zoning Commission*, 288 Conn. 730, 739, 954 A.2d 831 (2008) (commission lacked authority to adopt regulation under which proposed development that satisfies district's land use regulations governing type and density of activity may be subject to additional regulations as a distinct " 'use of land' " because of its particular size).

In considering whether the temporal condition at issue advances the purposes of zoning laws as contained in § 8-2 (a), we return to the point that, "[w]hen considering an application for a special permit, the commission is called [on] to make a decision as to whether a particular application . . . would be compatible with the particular zoning district, *under the circumstances then existing*." (Emphasis altered.) *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 614. Those circumstances are not only the facts as they then exist but also the zoning laws then in effect. The greater the delay between approval and implementation of the permitted use, the greater the possibility that the circumstances and the zoning regulations will have materially changed. Although this possibility exists even when the property is timely put to the permitted use, the property owner's vested right in such cases must prevail.

The Appellate Court concluded in the present case that the temporal condition at issue vindicated the concerns in § 8-2 (a) because it would prevent the permit holder from unduly delaying the commencement of the use to a time when the surrounding circumstances may no longer support it. See *International Investors* v. *Town Plan & Zoning Commission*, supra, 202 Conn. App. 596–97. The defendants contended at oral argu-

ment before this court that the failure to timely complete construction is the result of economic conditions outside the control of developers, not *undue* delay. We note, however, that Tondro's treatise endorses a rationale similar to the Appellate Court's reasoning with respect to the statutory time limits to complete subdivision developments: "These provisions are designed to prevent landowners from securing development approval under one set of regulations several years in advance of actual construction, and avoid a more contemporary and potentially more demanding set of regulations which might be in place when the project is commenced."[18] T. Tondro, supra, pp. 520–21; see also *848, LLC* v. *Zoning Board of Appeals*, Superior Court, judicial district of New Haven, Docket No. CV-15-6055150-S (June 6, 2016) (62 Conn. L. Rptr. 550, 553) ("Allowing stale permits to vest years later would undermine the effectiveness and benefits of engaging in contemporary special permit review. Although special permits are not personal to the owner of the subject property they are issued based on the particular circumstances presented to the [planning and zoning commission] at the hearing.").

Other jurisdictions have endorsed similar logic. See, e.g., *Lobisser Building Corp.* v. *Planning Board*, 454 Mass. 123, 127, 132, 907 N.E.2d 1102 (2009) (acknowledging concern that "a special permit should not ordinarily be warehoused indefinitely" and that preventing warehousing was aim of statute requiring zoning regulations to "provide that a special permit . . . shall lapse within a specified period of time, not more than two years . . . if a substantial use thereof has not sooner commenced except for good cause or, in the case of [a] permit for construction, if construction has not begun by such date except for good cause" (internal

[18] One treatise cites an extreme example of this problem in a case in which the permit holder proposed to build the development thirty years after it had secured subdivision approval. See T. Tondro, supra, p. 521 n.39.

quotation marks omitted)); *Bernstein* v. *Chief Building Inspector*, 52 Mass. App. 422, 428, 754 N.E.2d 133 (2001) ("[a] developer's mischief may run rampant absent the imposition of some time limits in the grant of a special permit"); *D.L. Real Estate Holdings, LLC* v. *Point Pleasant Beach Planning Board*, 176 N.J. 126, 136, 820 A.2d 1220 (2003) ("The time frame advances the public interest in prompt development of land in a manner consistent with the grant of preliminary approval . . . . It prevents the possibility that a future tentative 'potential' development, based on an earlier preliminary subdivision approval, would forever affect planning decisions concerning development in other areas." (Citation omitted.)).

Several other jurisdictions have treated similar temporal conditions as proper, at least if prescribed by regulation. See, e.g., *Cobbossee Development Group* v. *Winthrop*, 585 A.2d 190, 193–94 (Me. 1991) (town zoning ordinance providing that special permit "shall expire if the work or change involved is not commenced within one year of the date on which the . . . [c]onditional [u]se is authorized, or change is not substantially completed within [two] years" was proper exercise of authority because "use should be either acted [on] diligently or eliminated because of the nature of permits to build in areas that require special protection" (internal quotation marks omitted)); *Petrocci* v. *Zoning Board of Appeals*, 42 App. Div. 2d 676, 676, 344 N.Y.S.2d 291 (1973) (upholding denial of extension of two year time limit to complete project authorized by special permit); *Lucia* v. *Zoning Hearing Board*, 63 Pa. Commw. 272, 274, 437 A.2d 1294 (1981) (concluding that permit holder could not obtain extension of conditional use permit because permit had expired under ordinance providing that, "[i]f the work described in any application for zoning approval has not begun within six months from the date of issuance thereof, said permit shall expire

and it shall be cancelled by the [z]oning [a]dministrator" (internal quotation marks omitted)); see also *Roy* v. *Kurtz*, 357 So. 2d 1354, 1356 (La. App.) (considering whether actions taken by holder of variance were sufficient to satisfy ordinance providing that variance shall not be valid unless substantial construction has commenced in accordance with plans for which variance was authorized), writ denied, 359 So. 2d 1307 (La. 1978); *Kolt* v. *Zoning Board of Appeals*, 159 App. Div. 2d 625, 626, 553 N.Y.S.2d 24 (1990) (upholding dismissal of variance holder's appeal from zoning board's determination that variance had lapsed under ordinance providing that variance shall become null and void if work has not been "commenced and diligently prosecuted within one (1) year" after granting of variance (internal quotation marks omitted)); cf. *Demonbreun* v. *Metropolitan Board of Zoning Appeals*, 206 S.W.3d 42, 48–49 (Tenn. App. 2005) (The court concluded that the time limitation for the special permit was permissible because "[t]he governing ordinance authorizes the [Board of Zoning Appeals] to establish permit expiration dates. . . . The [board] has an interest in ascertaining whether a permit holder is abiding by its standards and conditions. Furthermore, nothing in the applicable zoning law precludes the [board's] establishment of a permit expiration date solely for the purpose of review and enforcement purposes." (Citation omitted.)), appeal denied, Tennessee Supreme Court (June 26, 2006).

Connecticut zoning regulations reproduced in the plaintiff's appendix to its brief to this court also demonstrate the ubiquity of the exercise of this authority by municipal zoning agencies all across this state.[19] When

[19] In addition to the type of temporal condition at issue in present case, the appendix to plaintiff's brief to this court reveals that many municipalities across the state have adopted regulations that impose other types of time-limited conditions relating to putting the property to the use for which the permit was issued. Some of the most common conditions provide that a permit will be extinguished if development has not commenced or if substantial development has not occurred by a specified period, if necessary zoning,

the legislature adopted the 2021 public acts extending deadlines for special permits that had not yet expired; see P.A. 21-34, § 7; P.A. 21-163, § 5; it necessarily manifested both its awareness and ratification of this practice.[20] Thus, whatever doubts might exist as to the validity of the exercise of this authority under § 8-2 (a), the pertinent text of which is unchanged since the effective date of Fairfield Commons' special permit, are dispelled by adoption of the 2021 public acts. Cf. *Pollio* v. *Planning Commission*, 232 Conn. 44, 56, 652 A.2d 1026 (1995) (concluding that planning commission had authority under General Statutes § 8-1c to adopt ordinance in light of subsequent amendment to another related statute that clarified legislature's original intent).

We therefore agree with the Appellate Court that the adoption of regulations conditioning the validity of special permits on completion of construction within a certain period falls within the commission's regulatory authority under § 8-2 (a). The Appellate Court's misstep was its failure to consider the effect of the statute prescribing the time limitation for completion of develop-

building, or other permits are not acquired by a specified period, or if the permitted use has been abandoned for a specified period of time.

[20] There is a scant legislative record relating to the emergency legislation that adopted the 2021 land use approval extensions. The first extensions proposed were added to the bill that was to become P.A. 21-34 after public hearings were held, and no public hearings were held on P.A. 21-163. The background section of the bill analysis for what became P.A. 21-34 does, however, note the Appellate Court's decision in the present case recognizing municipal authority to impose time limits on special permits. See Office of Legislative Research, Bill Analysis for Substitute House Bill No. 6531 (as amended by House "A" and Senate "A"), An Act Concerning the Right to Counsel in Eviction Proceedings, the Validity of Inland Wetlands Permits in Relation to Certain Other Land Use Approvals, and Extending the Time of Expiration of Certain Land Use Permits, p. 10, available at https://www.cga.ct.gov/2021/BA/PDF/2021HB-06531-R02-BA.PDF (last visited July 13, 2022). That decision had been issued a few months before the emergency legislation was proposed. Fairfield Commons acknowledged at oral argument before this court that the provision extending special permit deadlines was likely a reaction to that decision.

ment as a condition of the continuing validity of the site plan.

We agree with the defendants that the legislature has manifested a clear intention to afford property owners a substantial period of years to complete development necessary to put a plan or permit into effect. At the time the commission granted Fairfield Commons' special permit, this intention was reflected in the statutory scheme then in effect, which provided no less than five years but no more than ten years to complete work. See General Statutes (Rev. to 2005) § 8-3 (i). The legislature prescribed the same period of years to complete work in connection with subdivision plans as well as for the validity of wetlands permits; see General Statutes (Rev. to 2005) §§ 8-26c and 22a-42a (d) (2); and this consistency has continued to be reflected in increasingly longer extensions of time since provided to respond to economic downturns, including, in the most recent public acts, for special permits. See Public Acts 2009, No. 09-181; P.A. 11-5; P.A. 21-34; P.A. 21-163. A uniform time limitation not only aids enforcement of the plans and permits but also ensures notice to interested parties in the absence of any requirement that the nullification of a special permit must be recorded on the land records.[21] See General Statutes § 8-3 (i) ("[t]he certifi-

[21] Among the numerous municipal zoning regulations addressing special permits that the plaintiff has reproduced in the appendix to its brief, we found only two that provided for the expiration or nullification of the special permit to be recorded. See Derby Zoning Regs., § 195-47 C (2) ("[f]ailure to complete all work as approved under the granting of the special exception within five years from the date of approval or a lesser time period if so specified by the [Planning and Zoning] Commission shall result in the automatic expiration of the approval, provided that the [Planning and Zoning] Commission files notice of such expiration on the city land records"); East Hartford Zoning Regs., § 207.7 (a) ("Any *person*, firm or corporation having obtained approval of a special permit application under this section shall complete all work and comply with all conditions of approval of said site plan approval within two (2) years after said approval. In the event that all such work and/or all such conditions are not completed within said time, the approval granted shall become null and void. The Planning and Zoning Commission may file statement to that effect upon the land records if it deems necessary in its best interest." (Emphasis in original.)).

cate of approval of such site plan shall state the date on which such five-year period shall expire").

Providing in the special permit a shorter time limitation to satisfy the same condition attached to the site plan does not result in a mere lack of harmony with this statutory scheme. It would conflict with, and thereby impede operation of, the site plan statute, § 8-3. Invalidation of Fairfield Commons' special permit for failure to complete construction within the regulatory period in effect upon its April, 2009 approval (two years from approval) would effectively invalidate the site plan because the latter would have no operative effect in the absence of a valid special permit. Yet, the site plan statute then in effect provided a minimum of at least three more years to satisfy that condition.

Under preemption principles, "[a] local ordinance is preempted by a state statute . . . whenever the local ordinance irreconcilably conflicts with the statute. . . . Whether an ordinance conflicts with a statute or statutes can . . . be determined [only] by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives. . . . [T]hat a matter is of concurrent state and local concern is no impediment to the exercise of authority by a municipality through [local regulation], so long as there is not conflict with the state legislation. . . . Where the state legislature has delegated to local government the right to deal with a particular field of regulation, the fact that a statute also regulates the same subject in less than full fashion does not, ipso facto, deprive the local government of the power to act in a more comprehensive, but not inconsistent, manner. . . . A regulation is not necessarily inconsistent because it imposes standards additional to those required by a statute addressing the same subject matter. . . . Where local regulation merely enlarges on the provisions of a statute

by requiring more than a statute, there is no conflict unless the legislature has limited the requirements for all cases. . . . As long as the local regulation does not attempt to authorize that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict." (Citations omitted; internal quotation marks omitted.) *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 295–96, 105 A.3d 857 (2015).

There can be no question that, if a regulation provided for the expiration of a *site plan* for failure to complete work within a shorter period of time than that prescribed under § 8-3 (i) and (m), the regulatory time limitation would be preempted; the site plan statute confers discretion on zoning agencies to extend that deadline, not to shorten it. The statutorily guaranteed minimum period of validity assures a developer that it will not be required to comply with subsequent changes to zoning regulations, as long as the project is completed within that period. If a zoning regulation prescribes a shorter period of time to complete that same work as a condition of the validity of the special permit, the regulation effectively reduces the time limitation prescribed in § 8-3.[22] Cf. *Modern Cigarette, Inc.* v. *Orange*, 256 Conn. 105, 106–108, 127–31, 774 A.2d 969 (2001) (town ordinance banning all cigarette vending machines within its borders was not preempted by statute limiting placement of machines because both statute and ordi-

[22] Although the defendants emphasize that the time limits cannot differ, they do not elaborate on the practical implications of different time limitations; nor does the plaintiff. Nonetheless, it seems self-evident that, once the special permit is rendered null and void, the site plan has no practical effect. The property owner would be free, of course, to apply for another special permit, but there is no guarantee that the permit would be granted or would be granted subject to conditions acceptable to the owner, and a new site plan may be required. Zoning regulations may have changed in the intervening period. Even if the zoning authority grants the special permit and the owner can rely on the original site plan, construction could be delayed until a decision has been rendered on the special permit application.

nance were prohibitory, ordinance went further in its prohibition but neither authorized what legislature had forbidden nor forbid what legislature had authorized, and ordinance furthered legislative purpose of preventing minors access to cigarettes). Although there may be scenarios under which this effect could be avoided; see footnote 22 of this opinion; it is evident that the statutory scheme is intended to provide predictability when development plans are proposed.[23] Accordingly, a regulation that would impose a shorter time limit to satisfy the same condition thereby "frustrates the achievement of the state's objectives"; (internal quotation marks omitted) *Rocky Hill* v. *SecureCare Realty, LLC*, supra, 315 Conn. 295; and would be preempted.

In light of this conclusion, we need not consider the defendants' challenge to the propriety of the Appellate Court's "finding" that Fairfield Commons failed to request an extension of time before the original two year time limitation in its special permit expired in April, 2011. Even if the Appellate Court were correct, the two year time limitation in the regulation would not have been enforceable because the statutory site plan deadline for construction had not yet expired. The record indicates that the February, 2011 amendment to Fairfield's zoning regulations was an attempt to remedy this defect.

The only question remaining is whether the special permit regulation in effect in April, 2009, when Fairfield Commons' special permit and site plan approval went

[23] The 2021 public acts reflect this predictability and reinforce the conclusion that the legislature did not intend to confer unfettered discretion on local zoning agencies to impose time limits to complete construction as a special permit condition. Those acts extended special permit construction deadlines for a set period of years from the permit approval date, not from the construction deadline imposed by the local zoning authority. Special permits governed by the special act, consequently, would be subject to the same deadline regardless of whether the municipality's zoning regulation provided two years or ten years to complete construction.

into effect, should be deemed invalid or whether we should apply a judicial gloss to avoid the conflict with the site plan statute, § 8-3. We conclude that the latter course of action is more consistent with the commission's intent, as expressed in its 2011 zoning amendments and its 2018 decision granting Fairfield Commons' request for a five year extension of time for both the special permit and the site plan. See *Commissioner of Public Health* v. *Freedom of Information Commission*, 311 Conn. 262, 275–76, 86 A.3d 1044 (2014) ("In order to construe the regulations consistently . . . we would need to either treat as superfluous the language in [one federal] regulation referring to records created from a party's own files or engraft such language as a judicial gloss onto [another federal] regulation. . . . [T]here are strong indications that the latter is consistent with the intent of Congress and the federal agency implementing the federal acts." (Footnote omitted.)).

Because the statutory period governing development in connection with the defendant's site plan had not expired when Fairfield Commons requested an extension of time in 2018, the defendant's special permit could not have expired on that basis. Accordingly, the Appellate Court incorrectly concluded that Fairfield Commons' special permit expired in April, 2011. In accordance with the statutory amendments extending the time limits for site plans, the commission properly granted Fairfield Commons' request for an extension of time until April, 2023.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case to the trial court with direction to deny the plaintiff's appeal.

In this opinion the other justices concurred.

USSBASY GARCIA *v.* ROBERT COHEN ET AL.
(SC 20585)

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

Submitted on briefs May 4—officially released July 19, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where certain counts of the complaint were withdrawn; thereafter, the case was tried to the jury before *Dubay*, *J.*; verdict and judgment for the defendants, from which the plaintiff appealed to the Appellate Court, *Lavine*, *Prescott* and *Bishop*, *Js.*, which affirmed the trial court's judgment; subsequently, the plaintiff, on the granting of certification, appealed to this court, which reversed the Appellate Court's judgment and remanded the case to that court for further proceedings; subsequently, the Appellate Court, *Prescott* and *Bishop*, *Js.*, with *Lavine*, *J.*, dissenting, reversed the trial court's judgment and remanded the case to that court for a new trial, and the defendants, on the granting of certification, appealed to this court. *Appeal dismissed.*

Keith S. McCabe submitted a brief for the appellants (defendants).

John Serrano submitted a brief for the appellee (plaintiff).

Opinion

PER CURIAM. The plaintiff, Ussbasy Garcia, filed a premises liability action against the defendants, Robert Cohen and Diane Cohen, alleging, in relevant part, that their negligent maintenance of an exterior staircase caused the plaintiff to slip, fall, and sustain physical injuries. The jury found in favor of the defendants, and

the plaintiff appealed, claiming that the trial court improperly had denied her request for a jury instruction on the nondelegable duty doctrine, pursuant to which property owners are held vicariously liable for the tortious conduct of their independent contractors. A majority of the Appellate Court agreed, holding that "[t]he proposed nondelegable duty charge was relevant to the issues in this case, was an accurate statement of the law, and was reasonably supported by the evidence adduced at trial." *Garcia* v. *Cohen*, 204 Conn. App. 25, 35, 253 A.3d 46 (2021).[1] The Appellate Court further determined that the instructional impropriety was not harmless in light of our reasoning in *Garcia* v. *Cohen*, 335 Conn. 3, 23–24, 225 A.3d 653 (2020),[2] that "the jury could have concluded that the [independent contractors], rather than

[1] Judge Lavine issued a dissenting opinion, in which he expressed his view that "this case falls outside the purview of the nondelegable duty doctrine" because the defendants did not "attempt to dodge or to deny responsibility for the condition of the stairway on which the plaintiff fell." *Garcia* v. *Cohen*, supra, 204 Conn. App. 39 (*Lavine*, *J.*, dissenting).

[2] In *Garcia* v. *Cohen*, supra, 335 Conn. 3, we addressed whether the Appellate Court properly declined to review the plaintiff's instructional claim under the general verdict rule "because the plaintiff had failed to object when the trial court denied her request to submit her proposed interrogatories to the jury"; id., 5; rendering it unclear whether the jury's verdict was predicated on a finding that the defendants were not negligent or on a finding that the plaintiff was contributorily negligent. See *Garcia* v. *Cohen*, 188 Conn. App. 380, 386, 204 A.3d 1245 (2019) (in light of defendants' special defense of contributory negligence, it was unclear whether jury "found that the defendants were not negligent or that the plaintiff was more than 50 percent negligent"), rev'd, 335 Conn. 3, 225 A.3d 653 (2020). We held that the general verdict rule did not bar appellate review of the plaintiff's claim "because the plaintiff had requested that the trial court submit her properly framed interrogatories to the jury and had objected when it denied her request." *Garcia* v. *Cohen*, supra, 335 Conn. 6. Additionally, the plaintiff's cause of action and the defendants' special defense were " 'intertwined' " such that the jury's "negligence determinations may have been different if the jury had been instructed that any negligence by the [independent contractors] should have been attributed to the defendants, a difference that could have tipped the balance in the defendants' favor." Id., 26. Accordingly, we reversed the judgment of the Appellate Court and "remanded the case to that court with direction to consider the plaintiff's claim of instructional error." Id., 28.

the defendants, acted negligently, and for that reason found that the defendants had *not* acted negligently or had acted less negligently than the plaintiff . . . [leaving the jury with] no untainted route to the verdict." (Emphasis in original; internal quotation marks omitted.) *Garcia* v. *Cohen*, supra, 204 Conn. App. 36–37. We granted the defendants' petition for certification to appeal to determine whether "the Appellate Court correctly conclude[d] that the trial court had committed reversible error by not giving the nondelegable duty charge . . . ." *Garcia* v. *Cohen*, 336 Conn. 944, 249 A.3d 737 (2021).

After examining the entire record on appeal and considering the parties' briefs,[3] we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

MALISA COSTANZO, ADMINISTRATRIX (ESTATE OF ISABELLA R. COSTANZO), ET AL. *v.* TOWN OF PLAINFIELD ET AL.
(SC 20537)

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

Syllabus

Pursuant to statute (§ 52-572h (o)), there shall be no apportionment claims between a party liable for negligence and a party liable on any basis other than negligence, including "liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence . . . ."

Pursuant further to statute (§ 52-557n (b)), "a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person

[3] The parties agreed to waive oral argument and to have this appeal decided on the basis of the record and briefs.

or property resulting from . . . (8) failure to make an inspection or making an inadequate or negligent inspection of any property . . . to determine whether the property complies with or violates any law or contains a hazard to health or safety, unless the political subdivision had notice of such a violation of law or such a hazard . . . ."

The named plaintiff, as the administratrix of her daughter's estate, sought to recover damages from the defendants, a town and two of its employees, in connection with her daughter's drowning in a privately owned swimming pool. The plaintiff was a tenant of the property on which the incident occurred. The pool did not have a self-closing and self-latching gate or a pool alarm, both of which were required by the state building code. The plaintiff alleged, inter alia, that the defendants had issued a building permit for the pool prior to inspecting it to ensure that the mandated safety features were installed. The defendants thereafter filed a notice of intent to seek apportionment of liability against the owners of the property and an apportionment complaint against the former tenants of the property, who had the pool constructed. The plaintiff objected to the defendants' efforts to seek apportionment, claiming that her complaint set forth a cause of action alleging recklessness or an intentional act under § 52-557n (b) (8), rather than negligence and, therefore, that apportionment was precluded under § 52-572h (o). The trial court agreed and issued orders sustaining the plaintiff's objections and dismissing the defendants' apportionment complaint and notice of intent to seek apportionment. The defendants appealed to the Appellate Court, which reversed the trial court's orders. The Appellate Court determined that § 52-572h (o) did not prohibit the defendants from seeking apportionment in the present case, reasoning that the plaintiff set forth allegations in her complaint that fell within the first exception to municipal immunity in § 52-557n (b) (8), which subjects a municipality to liability for injuries that occur as a result of a failure to inspect or the inadequate or negligent inspection of a property to determine whether the property complies with or violates any law or contains a health or safety hazard when the municipality had notice of such a violation of law or such a hazard, and that that exception incorporated a negligence standard. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The trial court's orders dismissing the defendants' apportionment complaint and notice of intent to seek apportionment constituted a final judgment permitting interlocutory appellate review; the decisions of the trial court sustaining the plaintiff's objections to the defendants' apportionment complaint and notice of intent to seek apportionment resulted in judgment on the defendants' entire apportionment complaint and notice of intent to seek apportionment and, therefore, were appealable under the rule of practice (§ 61-2) providing that a judgment rendered on an entire complaint constitutes an appealable final judgment.
2. The Appellate Court correctly concluded that the trial court had improperly sustained the plaintiff's objections to the defendants' apportionment

complaint and notice of intent to seek apportionment, as the defendants should have been permitted to seek apportionment because the plaintiff alleged, at least in part, a cause of action created by statute based on negligence for purposes of § 52-572h (o): the plaintiff's cause of action against the defendants under § 52-557n (b) (8) was created by statute for purposes of § 52-572h (o), as this court previously had held that a municipality can be held liable under § 52-557n (b) (8) in the inspection context when it has notice of a hazardous condition; moreover, this court determined that the phrase "cause of action . . . based on negligence" in § 52-572h (o) means a cause of action that derives from a claim alleging that the defendant failed to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, and, in light of the absence of any reference to recklessness or a reference to the terms "intentional," "wilful," or "wanton" in the first exception to municipal immunity in § 52-557n (b) (8) for the failure to inspect or the inadequate or negligent inspection when the municipality has notice of a violation of law or hazard, this court concluded that the legislature intended for a claim under that exception to be based on the negligence concepts; furthermore, the terms "failure," "inadequate," and "negligent" in that first exception also supported the conclusion that the conduct giving rise to a claim under that exception is based on negligence; in the present case, the plaintiff alleged that the defendants were liable under § 52-557n (b) (8) in part because the defendant town employees had notice of the pool, notice that it did not have a self-closing and self-latching gate, and notice that it did not have a pool alarm, and, because those allegations stated a cause of action created by statute based on negligence, § 52-572h (o) did not preclude the defendants from seeking apportionment of liability from the owners of the property and the former tenants who had the pool constructed.

Argued December 17, 2021—officially released July 19, 2022

Procedural History

Action to recover damages for the alleged failure to conduct a proper inspection of a pool, brought to the Superior Court in the judicial district of Windham at Putnam, where the defendants filed an apportionment complaint and a notice of intent to seek apportionment; thereafter, the court, *Hon. Leeland J. Cole-Chu*, judge trial referee, sustained the plaintiffs' objections to the defendants' apportionment complaint and the notice of intent to seek apportionment and dismissed the apportionment complaint and the notice of intent to seek apportionment, and the defendants appealed to the

Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Keller*, *Js.*, which reversed the trial court's decisions and remanded the case to that court with direction to overrule the plaintiffs' objections and for further proceedings; subsequently, the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Stephen M. Reck, for the appellants (plaintiffs).

Ryan J. McKone, for the appellees (defendants).

Opinion

MULLINS, J. The apportionment statute, General Statutes § 52-572h, allows a party sued for damages resulting from personal injury, death or property damage caused by that party's negligence to file an apportionment complaint against additional parties, not named as defendants in the plaintiff's lawsuit, whose negligence caused the alleged losses. The statute expressly prohibits apportionment claims between a party liable for negligence and a party liable, among other things, "pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence . . . ." General Statutes § 52-572h (o).[1] The central issue in this certified appeal is whether the apportionment statute, by this language, permits municipal defendants whose liability is based on General Statutes § 52-557n (b) (8) to file an apportionment complaint sounding in negligence. Section 52-

[1] General Statutes § 52-572h (o) provides in relevant part that "there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555 or an action for injuries caused by a motor vehicle owned by the state pursuant to section 52-556."

557n (b) (8) renders municipal actors liable for damages and injuries that occur due to the failure to inspect or the negligent or inadequate inspection of property if (1) the municipality had notice of a hazard or violation of law (first exception), or (2) the act or omission "constitutes a reckless disregard for health or safety under all the relevant circumstances" (second exception).

Resolution of this appeal thus requires us to consider whether a claim brought under § 52-557n (b) (8) is a "cause of action created by statute based on negligence," such that apportionment is allowed under § 52-572h (o). As we explain herein, because § 52-557n (b) (8) expressly abrogates the common-law doctrine of municipal immunity, and because the first exception thereunder allows for a cause of action that we determine is based on negligence, we conclude that claims brought pursuant to that exception do qualify for apportionment.

The named plaintiff, Malisa Costanzo, the administratrix of the estate of the decedent, Isabella R. Costanzo, brought claims against the defendants, the town of Plainfield (town), and two of its employees, Robert Kerr and D. Kyle Collins, Jr., under § 52-557n (b) (8), stemming from the drowning of the decedent in a pool located on privately owned property in the town.[2] Thereafter, the defendants filed a notice of intent to seek apportionment against the owners of the property where the pool was located and an apportionment complaint against the former tenants of the property, who had the pool constructed. The plaintiff objected to the defendants' efforts to seek apportionment, claiming

[2] Malisa Costanzo also brought claims of bystander emotional distress in an individual capacity and as parent and next of friend to her four children, Felicity Costanzo, Gabriel Costanzo, Xavier Costanzo and Giovanni Costanzo. Those claims are not the subject of this appeal. Therefore, we refer to Malisa Costanzo, in her capacity as the administratrix of the estate of the decedent, as the plaintiff.

that her complaint set forth a cause of action alleging recklessness or an intentional act under § 52-557n (b) (8), rather than negligence, and, therefore, that the apportionment statute did not apply. The trial court agreed and concluded that, "[i]f the defendants are found liable to the [plaintiff] on [the basis of] the [plaintiff's operative] revised complaint, it will be for reckless disregard for health [or] safety under all relevant . . . circumstances, not for negligence." (Internal quotation marks omitted.) Therefore, the trial court issued orders sustaining the plaintiff's objections and dismissing the defendants' apportionment complaint and notice of intent to seek apportionment. The defendants appealed to the Appellate Court, and that court reversed the orders of the trial court, concluding that the plaintiff's claims under § 52-557n (b) (8) fell within the first exception, which it held to incorporate a negligence standard. See *Costanzo* v. *Plainfield*, 200 Conn. App. 755, 770, 239 A.3d 370 (2020). Consequently, the Appellate Court determined that § 52-572h (o) authorizes apportionment in connection with such claims. See id. We agree with the Appellate Court and, accordingly, affirm its judgment.

The following facts and procedural history, as set forth in the opinion of the Appellate Court; see id., 757–63, 769–70; are relevant to this appeal. "The plaintiff alleged the following facts in her revised complaint dated August 28, 2018. The decedent drowned in an aboveground pool located at 86 Glebas Road in [the town] on June 22, 2016. At all relevant times, the town employed Kerr as a licensed building official and Collins as a licensed assistant building [official]. One of their employment duties was to inspect all pools constructed in the town to ensure compliance with the [Connecticut] State Building Code [building code]. See, e.g., General Statutes § 29-261 [b].[3] The defendants issued a building

[3] General Statutes § 29-261 (b) provides: "The building official or assistant building official shall pass upon any question relative to the mode, manner

permit for this aboveground swimming pool on July 25, 2013; however, Kerr and Collins, in violation of General Statutes § 29-265a,[4] issued that permit without having determined if a pool alarm had been installed. The plaintiff further alleged that the [building code][5] required the installation of a self-closing and self-latching gate for all new pools and that Kerr and Collins had failed to ensure the installation of such a gate prior to issuing the building permit. The purpose of these safety features was to prevent children from drowning." (Footnotes in original.) *Costanzo* v. *Plainfield*, supra, 200 Conn. App. 757–58. The plaintiff also alleged that "Kerr and Collins were aware that a pool had been constructed at 86 Glebas Road," that the pool could be seen from the public road that Kerr and Collins travelled on frequently, and that "they could see that a self-closing and self-latching gate had not been installed . . . ." Id., 769–70.

"The plaintiff further alleged that Kerr and Collins were aware of these requirements and that they knew,

of construction or materials to be used in the erection or alteration of buildings or structures, pursuant to applicable provisions of the State Building Code and in accordance with rules and regulations adopted by the Department of Administrative Services. They shall require compliance with the provisions of the State Building Code, of all rules lawfully adopted and promulgated thereunder and of laws relating to the construction, alteration, repair, removal, demolition and integral equipment and location, use, accessibility, occupancy and maintenance of buildings and structures, except as may be otherwise provided for."

[4] General Statutes § 29-265a provides: "(a) As used in this section, 'pool alarm' means a device which emits a sound of at least fifty decibels when a person or an object weighing fifteen pounds or more enters the water in a swimming pool.

"(b) No building permit shall be issued for the construction or substantial alteration of a swimming pool at a residence occupied by, or being built for, one or more families unless a pool alarm is installed with the swimming pool."

[5] See 2012 International Residential Code for One- and Two-Family Dwellings, app. G, § AG105.2 (8), p. 830 (adopted by the 2016 building code pursuant to General Statutes (Rev. to 2015) § 29-252, as amended by Public Acts 2016, No. 16-215, § 5) (aboveground swimming pools must have self-closing and self-latching gate installed).

or should have known, that an inspection of new pools was necessary to ensure compliance with these safety requirements. Finally, the plaintiff alleged that neither Kerr nor Collins had inspected or attempted to inspect the property to ensure that a pool alarm and a self-closing and self-latching gate had been installed.

"On July 27, 2018, prior to the filing of the [plaintiff's] revised complaint, the defendants moved for an order directing the plaintiff's counsel to provide a copy of the release agreement between the plaintiff and the owners of 86 Glebas Road, Jeanna Prink and Bruce Prink (Prinks).[6] The [trial] court, *Auger*, *J.*, granted the defendants' motion on August 23, 2018.

"On October 19, 2018, the defendants filed a notice of their intent to claim that the negligence of the Prinks was a proximate cause of the injuries claimed in the plaintiff's action against the defendants. See General Statutes § 52-102b (c).[7] Specifically, the defendants maintained that, as the owners of the property, the Prinks bore the responsibility for ensuring compliance with any requirements of the [building code], and that the Prinks had failed (1) to schedule an inspection of the pool by the defendants, (2) to obtain a certificate of occupancy for the pool, and (3) to prevent their tenants from using the pool [in the absence of] a certificate of occupancy.

[6] The plaintiff's claim against the Prinks resulted in a settlement and a release agreement.

[7] General Statutes § 52-102b (c) provides in relevant part: "If a defendant claims that the negligence of any person, who was not made a party to the action, was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released the plaintiff's claims against such person, then a defendant may cause such person's liability to be apportioned by filing a notice specifically identifying such person by name and last-known address and the fact that the plaintiff's claims against such person have been settled or released. Such notice shall also set forth the factual basis of the defendant's claim that the negligence of such person was a proximate cause of the plaintiff's injuries or damages. No such notice shall be required if such person with whom the plaintiff settled or whom the plaintiff released was previously a party to the action."

The defendants further noted that the plaintiff had rented the property in November, 2014, and that the Prinks knew that four minor children would be living on the property. [In addition], the defendants set forth the instances of the Prinks' negligence, including the failure to notify the town of the [completed] construction of the pool, the failure to seek an inspection, the failure to obtain a certificate of occupancy and the failure to warn the plaintiff of these omissions. Finally, the defendants contended that the Prinks could be liable for a proportionate share of the damages alleged in the [revised] complaint.

"A few days later, the defendants filed an apportionment complaint, pursuant to § 52-102b [a],[8] against Eric Guerin and Merissa Guerin (Guerins), former tenants of the Prinks who occupied the property in 2013 at the time the pool was built. In this one count apportionment complaint, the defendants alleged that the Guerins had prepared and submitted the application for the construction of the aboveground pool to the town. The defendants further claimed that the Guerins specifically were advised that the pool was required to have a self-closing and self-latching gate, that an inspection was necessary at the completion of the construction and that Eric Guerin had submitted an affidavit '[in which]

[8] General Statutes § 52-102b (a) provides: "A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. Any such writ, summons and complaint, hereinafter called the apportionment complaint, shall be served within one hundred twenty days of the return date specified in the plaintiff's original complaint. The defendant filing an apportionment complaint shall serve a copy of such apportionment complaint on all parties to the original action in accordance with the rules of practice of the Superior Court on or before the return date specified in the apportionment complaint. The person upon whom the apportionment complaint is served, hereinafter called the apportionment defendant, shall be a party for all purposes, including all purposes under section 52-572h."

he attested that he would install a [pool alarm].' The defendants alleged that the Guerins failed to notify them that the pool had been constructed and thus that an inspection was needed. The defendants alleged that these actions amounted to negligence and, additionally, the Guerins negligently failed to obtain a certificate of occupancy for the aboveground pool and failed to notify the Prinks that (1) the aboveground pool did not comply with the requirements of the building code, (2) the town and its officials had not been notified of its [completed] construction or the need for an inspection, and (3) there was no certificate of occupancy. In conclusion, the defendants claimed that the Guerins could be liable for a proportionate share of the damages alleged in the plaintiff's complaint.

"On October 22, 2018, the plaintiff filed an objection to the defendants' notice of intent to seek apportionment as to the Prinks. The plaintiff argued that her [revised] complaint set forth a statutory cause of action pursuant to . . . § 52-557n (b) (8) alleging recklessness [or intentional conduct], and that the apportionment statute . . . § 52-572h (o) . . . applied only to claims of negligence. On October 25, 2018, the plaintiff filed a similar objection to the defendants' apportionment complaint directed against the Guerins.

"The court, *Cole-Chu*, *J.*, held a hearing on November 19, 2018. At the outset, it noted that the objection to the apportionment complaint 'could reasonably be construed as a motion to strike.' In his argument, the plaintiff's counsel stated that he had not pleaded a negligence cause of action in the revised complaint but rather an intentional or reckless tort pursuant to § 52-557n (b) (8), and, as a result, the apportionment statute was inapplicable. He also indicated that the [plaintiff's] complaint was based on the second exception to municipal immunity contained in § 52-557n (b) (8) with respect to property inspections. The defendants' counsel took

the position that the [plaintiff's] complaint alleged negligence and not recklessness; he acknowledged that claims of recklessness are not subject to apportionment.

"On March 19, 2019, the court issued an order sustaining the plaintiff's objection to the defendants' notice of intent to pursue apportionment as to the Prinks. Specifically, it agreed with the plaintiff's contention that [her] complaint did not allege negligence such that the apportionment statute did not apply. The court stated that, '[i]f the defendants are found liable to the [plaintiff] on [the basis of] the revised complaint, it will be for reckless disregard for health [or] safety under all relevant [alleged] circumstances, not for negligence.' . . . In a separate order, the court dismissed the defendants' notice [of intent] to seek apportionment, stating that, in sustaining the plaintiff's objection, it had essentially [concluded] 'that it has no subject matter jurisdiction over the proceedings the defendants attempted . . . to set in motion.'

"The court also sustained the plaintiff's objection to the apportionment complaint filed against the Guerins. It again concluded that the plaintiff had alleged recklessness against the defendants and [therefore that] the apportionment statute was inapplicable. The court also issued a separate order dismissing the apportionment complaint against the Guerins on the basis of the lack of subject matter jurisdiction." (Footnotes in original; footnote omitted.) *Costanzo* v. *Plainfield*, supra, 200 Conn. App. 758–62.

The defendants appealed from the decisions of the trial court to the Appellate Court. On appeal, the defendants claimed that the trial court improperly had precluded them from seeking apportionment because, they claimed, the plaintiff's revised complaint asserted claims under both exceptions to municipal immunity

contained in § 52-557n (b) (8). See id., 762–63. The defendants further contended that, because the first exception to municipal immunity contained in § 52-557n (b) (8) employs a negligence standard, apportionment was not prohibited pursuant to § 52-572h (o).[9] See id., 763.

The Appellate Court agreed with the defendants, concluding that "the plaintiff's revised complaint sets forth allegations that fall within the first exception [in] § 52-557n (b) (8) and that that exception contains a negligence standard." Id. Accordingly, the Appellate Court concluded that the trial court improperly "sustain[ed] the plaintiff's objections to the defendants' efforts to seek apportionment." Id.

The plaintiff filed a petition for certification to appeal from the judgment of the Appellate Court, which we granted, limited to the following issues: (1) "Did the trial court's order dismissing the defendants' apportionment complaint constitute a final judgment permitting interlocutory appellate review?" And (2) "[i]f the answer to the first question is in the affirmative, did the Appellate Court correctly conclude that the trial court had improperly dismissed the defendants' apportionment complaint because the [plaintiff's] complaint was based in part on a claim of negligence against the defendants, and, therefore, the defendants were entitled, under . . . § 52-572h, to [file] an apportionment complaint sounding in negligence against additional parties not named in the

[9] General Statutes § 52-572h (o) provides: "Except as provided in subsection (b) of this section, there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555 or an action for injuries caused by a motor vehicle owned by the state pursuant to section 52-556."

[plaintiff's] lawsuit?" *Costanzo* v. *Plainfield*, 335 Conn. 976, 242 A.3d 104 (2020).

I

The first issue in this appeal is whether the trial court's orders dismissing the defendants' apportionment complaint and notice of intent to seek apportionment constitute a final judgment permitting interlocutory appellate review. We agree with both parties that the orders constitute an appealable final judgment.

We begin by setting forth the applicable standard of review. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review [as to whether the Appellate Court had jurisdiction] is plenary." (Internal quotation marks omitted.) *Rockstone Capital, LLC* v. *Sanzo*, 332 Conn. 306, 312–13, 210 A.3d 554 (2019). "Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Internal quotation marks omitted.) *Halladay* v. *Commissioner of Correction*, 340 Conn. 52, 57, 262 A.3d 823 (2021).

In the present case, the parties agree that the trial court's interlocutory orders sustaining the plaintiff's objections to the defendants' apportionment complaint and notice of intent to seek apportionment are appealable under Practice Book § 61-2. That rule of practice provides that, "[w]hen judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment." Practice Book § 61-2. We have explained that, "[w]hen [the rule set forth in Practice Book § 61-2] applies, there is no need to turn to the alternative, as set forth in [*State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)], for establishing the finality

of the judgment, even though some aspects of the case remain interlocutory." *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 593, 239 A.3d 1162 (2020).

We agree with the parties that the orders of the trial court sustaining the plaintiff's objections to the defendants' apportionment complaint and notice of intent to seek apportionment resulted in judgment on the defendants' entire apportionment complaint and notice of intent to seek apportionment. Accordingly, we agree that the trial court's dismissal of the defendants' apportionment complaint and notice of intent to seek apportionment constitutes a final judgment for purposes of this appeal.

II

The plaintiff claims that the Appellate Court incorrectly concluded that the trial court should not have sustained the plaintiff's objections to the defendants' apportionment complaint and notice of intent to seek apportionment. Specifically, the plaintiff asserts that the apportionment statute, § 52-572h (o), allows for apportionment in connection with complaints that are based on a statute only if the statute creates a claim that is substantially similar to a common-law negligence claim and does not create additional statutory elements. The plaintiff further asserts that a cause of action under § 52-557n (b) (8) is not subject to apportionment because the two exceptions contained in the statute provide for claims based on either intentional or reckless conduct. The plaintiff argues that her revised complaint alleged claims under both the first and second exceptions contained in § 52-557n (b) (8), but she asserts that neither exception creates a cause of action based on negligence.

In response, the defendants assert that the Appellate Court correctly concluded that the trial court should not have sustained the plaintiff's objections to the

apportionment complaint and notice of intent to seek apportionment because the two exceptions in § 52-557n (b) (8) allow for two types of claims—one that employs a negligence standard and one that employs a recklessness standard. Therefore, the defendants assert, to the extent that the plaintiff's revised complaint stated a claim under the negligence standard, it satisfies the requirements of the apportionment statute because it is a "cause of action created by statute based on negligence . . . ." General Statutes § 52-572h (o). We agree with the defendants.

We begin by noting the applicable standard of review. The resolution of whether § 52-572h (o) allows for apportionment as to the plaintiff's claims under § 52-557n (b) (8) presents an issue of statutory construction. "In conducting this analysis, we are guided by the well established principle that [i]ssues of statutory construction raise questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, 322 Conn. 828, 833–34, 144 A.3d 373 (2016). "It is well settled that we follow the plain meaning rule in General Statutes § 1-2z in construing statutes to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Edge Fitness, LLC*, 342 Conn. 25, 32, 268 A.3d 630 (2022). "In interpreting statutes, words and phrases not otherwise defined by the statutory scheme are construed according to their 'commonly approved usage . . . .' General Statutes § 1-1 (a) . . . . In determining the commonly approved usage of the statutory language at issue, we consult dictionary definitions." (Citation omitted.) *Commission on Human Rights & Opportunities* v. *Edge Fitness, LLC*, supra, 32.

The language of the apportionment statute, § 52-572h (o), provides in relevant part that "there shall be no apportionment of liability or damages between parties

liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555 or an action for injuries caused by a motor vehicle owned by the state pursuant to section 52-556."[10]

[10] This court previously has explained the history of § 52-572h (o). Specifically, in *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 756 A.2d 237 (2000), this court explained that subsection (o) was added to § 52-572h in 1999 through No. 99-69, § 1, of the 1999 Public Acts (P.A. 99-69). See id., 801. This court further explained that "[t]he general effect of P.A. 99-69, § 1 . . . was to make clear that the apportionment principles of § 52-572h do not apply [when] the purported apportionment complaint rests on any basis other than negligence . . . . The legislative history of P.A. 99-69 makes clear that its principal purpose was to overrule legislatively a portion of this court's decision in *Bhinder* v. *Sun Co.*, 246 Conn. 223, 717 A.2d 202 (1998)." (Footnote omitted; internal quotation marks omitted.) *Allard* v. *Liberty Oil Equipment Co.*, supra, 801.

In *Bhinder* v. *Sun Co.*, supra, 246 Conn. 223, this court allowed a defendant in a wrongful death action to apportion its liability to an apportionment defendant whose conduct was wilful and wanton. See id., 225–26, 234. In doing so, this court concluded that, "as a matter of common law, [this court] should extend the policy of apportionment to permit a defendant in a negligence action to cite in as an apportionment defendant a party whose conduct is alleged to be reckless, wilful and wanton." Id., 234.

In amending the apportionment statute, after this court issued its decision in *Bhinder*, to preclude apportionment on any basis other than negligence, the legislature "accomplished three purposes. First, the legislature reaffirmed that, as a matter of statutory interpretation, only negligent persons may be cited in as apportionment defendants pursuant to the statute. . . . Second, the legislature made clear its intent that apportionment principles would not apply [when] the basis of liability of the purported apportionment defendant was based on conduct 'other than negligence,' including but not limited to intentional, wanton or reckless misconduct, strict liability, and liability pursuant to any cause of action created by statute. Thus, in this respect, the legislature made clear its intent to overrule the common-law portion of *Bhinder*. It went beyond the facts of *Bhinder*, however, which had been limited to allegations of common-law intentional, wanton and reckless misconduct. The legislature also included a specific bar to appor-

In resolving the plaintiff's claim, the first question that we must address is whether the plaintiff's complaint is based on a "cause of action created by statute . . . ." General Statutes § 52-572h (o). In interpreting § 52-557n (b) (8), we do not write on a clean slate. This court previously has concluded that § 52-557n (b) (8) affirmatively creates a cause of action against a municipality in two enumerated circumstances. See *Ugrin* v. *Cheshire*, 307 Conn. 364, 378, 379, 54 A.3d 532 (2012) (rejecting claim of town that "§ 52-557n (b) (8) creates no cause of action because it is limited to defining the circumstances in which there is no municipal liability"). In doing so, this court expressly determined that "§ 52-557n (b) (8) abrogates the traditional common-law doctrine of municipal immunity, now codified by statute, in the two enumerated circumstances." Id., 382. This court explained that "the qualifying language in subsection (b) (8), beginning with the word 'unless,' describes two specific circumstances in which a municipality is not shielded from liability." Id., 385. This court further explained: "[I]f the town is not shielded from liability in the inspection context when it has notice of a hazardous condition or has engaged in conduct that constitutes reckless disregard [for] public health [or] safety, the lack of protection must mean that it is subject to liability in those circumstances. Accordingly, we conclude that

tionment principles [when] the apportionment defendant's purported misconduct was based on strict liability or on a statutory cause of action. Third, the legislature made clear its intent that, despite the specific bar to apportionment regarding statutory actions, liability may be apportioned among parties liable for negligence in statutory actions based on negligence, such as wrongful death actions and actions for injuries caused by [state owned] motor vehicles. Thus, the legislature in effect anticipated, and made clear its rejection of, a potential argument that statutory actions should not be considered to be actions 'based on negligence,' which is ordinarily understood to be a common-law, and not a statutory, concept, and also made clear that, [when] the statutory action in question is based on allegations of negligence, apportionment principles would apply." (Emphasis omitted.) *Allard* v. *Liberty Oil Equipment Co.*, supra, 253 Conn. 803–804.

the plaintiffs are not precluded from bringing a cause of action against the town under § 52-557n (b) (8) . . . .'' (Emphasis omitted.) Id., 387. On the basis of this court's conclusion in *Ugrin*, we conclude that the plaintiff's cause of action under § 52-557n (b) (8) is ''created by statute'' for the purposes of § 52-572h (o). Indeed, the parties do not dispute that the plaintiff's complaint is based on a ''cause of action created by statute . . . .'' General Statutes § 52-572h (o). Therefore, the only question we address is whether the cause of action created by § 52-557n (b) (8) is based on negligence.[11]

Section 52-572h (o) does not define the phrase ''based on negligence,'' and that phrase is not defined elsewhere in the statutes. Therefore, we turn to the dictionary definition. Black's Law Dictionary defines the term ''based on'' as ''[d]erived from, and therefore similar to . . . .'' Black's Law Dictionary (10th Ed. 2014) p. 180. Black's Law Dictionary defines the term ''negligence'' as ''[t]he failure to exercise the standard of care that a

[11] In her brief to this court, the plaintiff asserts that the defendants cannot apportion liability in light of her complaint due to their apportionment complaint not being '' 'in relative pari materia' '' because the apportionment complaint is based on common-law negligence and the plaintiff's claim under § 52-557n (b) (8) is based on either a statutory recklessness requirement or an intentional disregard of the law. In support of her position, the plaintiff points to *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 805–806, 756 A.2d 237 (2000). We disagree.

First, we disagree that the plaintiff's complaint and the defendants' apportionment complaint are not ''in relative pari materia . . . .'' Id. As we explained in this opinion, we conclude that the first exception in § 52-557n (b) (8) creates a statutory cause of action based in negligence. Therefore, the plaintiff's complaint and the defendants' apportionment complaint would be ''in relative pari materia,'' at least insofar as the plaintiff alleges a cause of action under the first exception in § 52-557n (b) (8).

Second, in *Allard*, this court concluded that the defendant could not apportion a cause of action based on product liability because such claims are based on strict liability, and the legislature specified that causes of action based on strict liability are not subject to apportionment. See *Allard* v. *Liberty Oil Equipment Co.*, supra, 253 Conn. 803–804; see also General Statutes § 52-572*l*. That conclusion has no applicability to whether a cause of action under the first exception in § 52-557n (b) (8) may be apportioned.

reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or [wilfully] disregardful of others' rights." Id., p. 1196. Accordingly, we conclude that the phrase "cause of action created by statute based on negligence" in § 52-572h (o) means a cause of action that derives from a claim alleging that the defendant failed to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.

With this understanding of § 52-572h (o), we turn to § 52-557n (b) (8) to determine whether it created a cause of action derived from negligence. Section 52-557n (b) provides in relevant part: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (8) failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, *unless* the political subdivision had notice of such a violation of law or such a hazard or *unless* such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances . . . ." (Emphasis added.)

In *Ugrin*, this court specified that "[t]he word 'unless' before each of these two exceptions unmistakably sets them apart from the preceding language that otherwise protects municipalities from liability for failure to make an inspection or for making an inadequate inspection

because it describes conditions under which there is no protection from liability." (Emphasis omitted.) *Ugrin* v. *Cheshire*, supra, 307 Conn. 382; see also, e.g., *Williams* v. *Housing Authority*, 327 Conn. 338, 356, 174 A.3d 137 (2017) ("[T]he municipal liability statute carves out two distinct exceptions to municipal immunity for failure to inspect: [1] when a political subdivision has notice of a violation or hazard, and [2] when it demonstrates a reckless disregard for health or safety under all the relevant circumstances. See General Statutes § 52-557n (b) (8)."). Accordingly, there are two distinct claims available under § 52-557n (b) (8)—one that requires notice of a violation or hazard and one that requires a reckless disregard for health or safety.

Bearing in mind that § 52-557n (b) (8) sets forth two distinct exceptions to municipal immunity and that the plaintiff in the present case has alleged alternative claims under each exception, we must determine whether either of the exceptions is "based on negligence" for purposes of the apportionment statute. The Appellate Court in the present case opined that "[t]he second exception set forth in § 52-557n (b) (8) indisputably requires recklessness." *Costanzo* v. *Plainfield*, supra, 200 Conn. App. 767. We agree. In fact, none of the parties in this case disputes that § 52-557n (b) (8) clearly requires a plaintiff to prove "reckless disregard for health or safety" in order to bring a claim under the second exception.

This court has explained that "the type of conduct that constitutes reckless disregard for purposes of § 52-557n (b) (8) is more egregious than mere negligence and requires that health and safety inspectors disregard a substantial risk of harm." *Williams* v. *Housing Authority*, supra, 327 Conn. 366. Section 52-572h (o) explicitly provides in relevant part that "there shall be no apportionment of liability or damages between . . . parties liable on any basis other than negligence including, but not limited to . . . reckless misconduct

. . . .'' Accordingly, we agree with the Appellate Court that the defendants are not entitled to apportionment for any aspect of the plaintiff's complaint that is based on the second exception in § 52-557n (b) (8). Nevertheless, as we explained, there are two explicit exceptions to municipal immunity under § 52-557n (b) (8). Therefore, we must consider whether the first exception is based on negligence.

As we examine this question, it is helpful to look at § 52-557n as a whole. ''As a matter of Connecticut's common law, the general rule . . . is that a municipality is immune from liability for negligence unless the legislature has enacted a statute abrogating that immunity.'' (Internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 334, 984 A.2d 684 (2009). ''The tort liability of a municipality has been codified in § 52-557n.'' (Internal quotation marks omitted.) *Borelli* v. *Renaldi*, 336 Conn. 1, 11, 243 A.3d 1064 (2020). Section 52-557n (a) (1) provides in relevant part that, ''[e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . .'' ''Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.'' (Internal quotation marks omitted.) *Borelli* v. *Renaldi*, supra, 11. ''Subsection (b) [of § 52-557n] . . . should be generally understood to define various circumstances in which a municipality is not subject to liability.'' *Ugrin* v. *Cheshire*, supra, 307 Conn. 381. In other words, ''[s]ubsection (a) [of

§ 52-557n] sets forth general principles of municipal liability and immunity, [whereas] subsection (b) sets forth [ten] specific situations in which both municipalities and their officers are immune from tort liability." (Internal quotation marks omitted.) *Elliott* v. *Waterbury*, 245 Conn. 385, 395, 715 A.2d 27 (1998).

Thus, § 52-557n, as a whole, is designed to set forth the circumstances in which municipalities and their employees are immune from liability for their negligent acts or omissions and creates certain exceptions to that immunity for some of their negligent acts, omissions and criminal or reckless conduct. See, e.g., *Ugrin* v. *Cheshire*, supra, 307 Conn. 387 (§ 52-557n does not shield municipality from "liability in the inspection context when it has notice of a hazardous condition or has engaged in conduct that constitutes reckless disregard [for] public health [or] safety, [and therefore] the lack of protection must mean that it is subject to liability in those circumstances" (emphasis omitted)); *Grady* v. *Somers*, supra, 294 Conn. 335 (§ 52-557n "permits a tort claimant to bring a direct cause of action in negligence against a municipality" in some circumstances (internal quotation marks omitted)). Indeed, the fact that § 52-557n is contained in chapter 925 of the General Statutes, which, in turn, contains numerous statutes providing for liability and statutory rights of action for injuries in some circumstances and defenses and immunity from liability in other circumstances, indicates that § 52-557n delineates the circumstances in which municipalities and their employees are immune from liability and the circumstances in which municipalities and their employees are liable, pursuant to an exception.

Returning to the specific provision at issue in the present case, we observe that the first exception contained in § 52-557n (b) (8) imposes liability if a party suffered damages to his or her person or property because the municipality, after having notice of the haz-

ard or a violation of law, "fail[ed] to make an inspection or ma[de] an inadequate or negligent inspection of any property . . . ."

Although we acknowledge that the second exception is based on this same negligent behavior, we emphasize that it also expressly provides that, in order to be actionable, the behavior must "[constitute] a reckless disregard for health or safety under all the relevant circumstances . . . ." General Statutes § 52-557n (b) (8). As the Appellate Court correctly pointed out, unlike the second exception in § 52-557n (b) (8), the first exception contained in that provision "does not contain any reference to recklessness." [12] *Costanzo* v. *Plainfield*, supra, 200 Conn. App. 768. We also observe that the legislature did not include the terms "intentional," "wilful," or "wanton" in the first exception. Instead, the first exception only requires notice of the violation or hazard. "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Citation omitted; internal quotation marks omitted.) *Stafford* v. *Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014).

Therefore, if the legislature intended the first exception contained in § 52-557n (b) (8) to require something

[12] The plaintiff asserts that this court's discussion in *Williams* v. *Housing Authority*, supra, 327 Conn. 366, regarding what constitutes "reckless disregard" demonstrates that claims under § 52-557n (b) (8) may not be based on negligence and that the statute requires a plaintiff instead to show reckless disregard. In support of her claim, the plaintiff points to our conclusion in *Williams* that "the type of conduct that constitutes reckless disregard for purposes of § 52-557n (b) (8) is more egregious than mere negligence and requires that health and safety inspectors disregard a substantial risk of harm." Id. We disagree.

In *Williams*, the only question at issue was what standard applies for a claim under the second exception in § 52-557n (b) (8), which expressly requires that a plaintiff show reckless disregard. See id., 354. Therefore, the conclusion that the second exception requires something "more egregious than mere negligence"; id., 366; has no applicability to a claim under the other, distinct exception in § 52-557n (b) (8), which requires notice.

more than mere negligence, it would have conveyed that intent expressly, as it did in the second exception. The fact that the legislature did not use such terms as "intentional," "wanton," or "reckless" in the first exception but did choose to use "reckless" in the second exception indicates that the legislature knew how to express its intent that the claim be one involving more than "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . ." Black's Law Dictionary, supra, p. 1196.

Thus, we conclude that the absence of such language in the first exception indicates that the legislature intended for a claim under that exception to be based on the negligence concepts that are at issue in the rest of § 52-557n. See, e.g., *Stratford Police Dept.* v. *Board of Firearms Permit Examiners*, 343 Conn. 62, 64–65, 272 A.3d 639 (2022) (concluding that absence of language that is used in other statutes indicates that legislature intended not to include such requirement). Had the legislature intended for a claim under the first exception to require proof of more than negligence, it could have said so expressly, as it did in the second exception. Accordingly, the plain language of the statute supports the conclusion that a cause of action under the first exception in § 52-557n (b) (8) is a cause of action created by statute based on negligence.

Furthermore, an examination of each of the terms used in the statute regarding an inspection of property by a municipal actor—namely, "failure" to inspect and "inadequate" or "negligent" inspection—also supports the conclusion that the conduct giving rise to a claim under subsection (b) (8) of § 52-557n is based on negligence. First, the term "failure" is defined as "[a]n omission of an expected action, occurrence, or performance." Black's Law Dictionary, supra, p. 713. Second, the term "inadequate" is defined as "insufficient, deficient . . . ."

Webster's Third New International Dictionary (2002) p. 1139. Finally, as we explained previously, "negligence" is defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . ." Black's Law Dictionary, supra, p. 1196. Therefore, whether it is a failure to inspect or an inadequate or negligent inspection, the very behavior that gives rise to a claim under § 52-557n (b) (8) is not only explicitly described as negligent behavior, but falls within the definition of negligence. Accordingly, we conclude that the action giving rise to a claim under the first exception in § 52-557n (b) (8) is "based on negligence . . . ." General Statutes § 52-572h (o).

We also disagree with the plaintiff's contention that the requirement of notice in the first exception renders a claim under that exception akin to an intentional tort rather than a negligence based claim. A comparison of the cause of action created in the first exception in § 52-557n (b) (8) to common-law negligence claims that expressly include a notice or knowledge requirement supports the conclusion that a cause of action under the first exception in § 52-557n (b) (8) is a cause of action created by statute based on negligence. It is well established that notice is a common element in a claim for negligence. Cf. 65 C.J.S. Negligence § 45 (2022) ("[i]n order for an act or omission to be negligent, the person charged therewith must generally have, or be reasonably chargeable with, knowledge that it involved danger to another").

For instance, at common law, a negligence action for an injury that an invitee sustains on another's property requires proof of notice but is still a claim deriving from negligence. In such a case, actual notice is necessary to prove that the owner of the premises owed a duty to the plaintiff. To be sure, this court has explained that "[i]t is well established that, in the context of a

negligence action based on a defective condition on the [defendants'] premises, [t]here could be no breach of the duty resting [on] the defendants unless they knew of the defective condition or were chargeable with notice of it . . . ." (Internal quotation marks omitted.) *Riccio* v. *Harbour Village Condominium Assn., Inc.*, 281 Conn. 160, 163, 914 A.2d 529 (2007).

Similarly, in a premises liability action, "[f]or [a] plaintiff to recover for the breach of a duty owed to [him] as [a business] invitee, it [is] incumbent [on him] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition [that] caused [his injury] or constructive notice of it." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116–17, 49 A.3d 951 (2012); accord *Baptiste* v. *Better Val-U Supermarket, Inc.*, 262 Conn. 135, 140, 811 A.2d 687 (2002). Thus, we conclude that the legislature's decision to incorporate a notice requirement, which is also used in connection with common-law claims of negligence, in the first exception contained in § 52-557n (b) (8) supports the conclusion that the legislature intended to create a cause of action based on negligence. See, e.g., *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 270, 146 A.3d 975 (2016) ("the legislature is presumed to be aware of the common law when it enacts statutes").

Furthermore, this court has explained that, "in the tort lexicon . . . intentional conduct and negligent conduct, although differing only by a matter of degree . . . are separate and mutually exclusive." (Citation omitted.) *American National Fire Ins. Co.* v. *Schuss*, 221 Conn. 768, 775, 607 A.2d 418 (1992). "In its most common usage, intent involves (1) . . . a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given

consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act." (Emphasis omitted; internal quotation marks omitted.) Id., 776. "Negligent conduct, however, is a matter of risk." (Internal quotation marks omitted.) Id.

The mere inclusion of the requirement that the plaintiff prove that the municipal actor had notice of the hazard or defect does not raise the municipal actor's conduct to the level of intentional conduct. The statute does not require that the municipal actor who failed to inspect or who conducted a negligent inspection desired that a negative result would occur or believed that the result was substantially certain to occur from the failure to inspect or negligent inspection. Indeed, the plaintiff's revised complaint does not allege such facts. Instead, the first exception in § 52-557n (b) (8) creates a cause of action for a failure or omission by a municipal employee related to the inspection of property that created a sufficiently great risk of danger that would lead a reasonable person in the municipal actor's position to anticipate that risk and to act to guard against it, which is the foundation for a negligence claim. "In negligence, the actor does not desire to bring about the consequences [that] follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely the risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them . . . ." (Internal quotation marks omitted.) Id., 776–77. Accordingly, we conclude that the first exception in § 52-557n (b) (8) is directed at negligent conduct, not intentional conduct.

In her revised complaint, the plaintiff alleges that the defendants are liable under § 52-557n (b) (8), in part because Kerr and Collins had notice of the aboveground pool, notice that it had no self-closing and self-latching

gate and notice that it did not have a pool alarm. Accordingly, we conclude that the plaintiff alleged, at least in part, a cause of action created by statute based on negligence.[13] Therefore, we agree with the Appellate Court that the trial court improperly sustained the plaintiff's objections to the defendants' apportionment complaint and notice of intent to seek apportionment

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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[13] Given that we conclude that § 52-572h (o) is applicable to the plaintiff's revised complaint because the plaintiff alleged a cause of action based, in part, on negligence, the defendants could institute an apportionment action pursuant to § 52-102b. See footnotes 7 and 8 of this opinion.

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CONNECTICUT APPELLATE REPORTS

Vol. 213

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BUDLONG & BUDLONG, LLC v. ANGHAM ZAKKO (AC 44374)

Cradle, Clark and Bishop, Js.

Syllabus

The plaintiff law firm sought to recover damages from the defendant for, inter alia, breach of contract in connection with its representation of the defendant. The matter was referred to an attorney fact finder, who filed a report recommending judgment for the plaintiff on the complaint. The trial court overruled the defendant's objection to the report of the attorney fact finder and rendered judgment in accordance with it. Two exhibits, a retainer agreement and a bill for services, were considered by the attorney fact finder, but were not reviewed by the court, as they were reported missing from the clerk's office. The defendant appealed to this court, claiming that the court improperly overruled her objection to the attorney fact finder's report and improperly rendered judgment in accordance with the attorney fact finder's report because the report contained insufficient factual findings. *Held*:

1. The trial court improperly overruled the defendant's objection to the attorney fact finder's report because the court failed to review all of the evidence considered by the attorney fact finder: a court, on reviewing a report of an attorney fact finder, must assess all of the evidence that was presented to the attorney fact finder in order to properly consider objections challenging the report, and, here, the court could not adequately assess the defendant's claims that the billing was excessive and that the quantum of work claimed by the plaintiff did not correlate to the claimed time expended without reviewing the retainer agreement and billing record entered as exhibits before the attorney fact finder; moreover, faced with the fact that these exhibits were missing from the record, it would have been appropriate for the court to remand the case to the attorney fact finder or to have taken any other action it deemed appropriate pursuant to the relevant rule of practice (§ 23-58 (a)).
2. The trial court improperly rendered judgment in accordance with the report of the attorney fact finder because it was not supported by sufficient factual findings: the minimal report's conclusion that the defendant owed the plaintiff a certain amount of money was not supported by the sole factual finding that the plaintiff's representation of the defendant was partially successful, its statement that exhibits were entered into evidence by the plaintiff did not constitute a finding as to the content of those documents, and it did not provide an adequate factual underlayment for the court's ultimate determination to accept it, falling below the bare minimum necessary for the court appropriately to render judgment; moreover, contrary to the plaintiff's assertion, this claim was properly preserved for appellate review, as in her objection

to the report, the defendant, a self-represented party, specifically claimed that the report's conclusions were not properly reached on the basis of various separate grounds and, at the hearing on her objection, the defendant repeatedly advanced the same arguments that the report's conclusions were unsupported.

Argued March 7—officially released July 19, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the matter was referred to *Harold M. Levy*, attorney fact finder, who recommended judgment for the plaintiff on the complaint; thereafter, the court, *M. Taylor*, *J.*, overruled the defendant's objection to the report and rendered judgment in accordance with the report, from which the defendant appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

Catherine M. Spain, for the appellant (defendant).

Joseph R. Brennan-Reilly, with whom, on the brief, was *C. Michael Budlong*, for the appellee (plaintiff).

Opinion

BISHOP, J. The defendant, Angham Zakko,[1] appeals from the judgment of the trial court, rendered following a hearing and report by an attorney fact finder, in favor of the plaintiff, Budlong & Budlong, LLC, on the plaintiff's complaint in the amount of $17,602.50. On appeal, the defendant claims that the court improperly (1) overruled her objection to the attorney fact finder's report because the court failed to review the evidence considered by the attorney fact finder, and (2) rendered judgment in accordance with the attorney fact finder's report because the report contained insufficient factual

[1] The defendant was not represented by counsel for the entirety of the underlying action, including the proceedings before the attorney fact finder. The defendant is represented by counsel in this appeal.

findings. We agree with both of the defendant's claims and, accordingly, reverse the judgment of the court.

The following facts and procedural history are relevant to our disposition of this appeal. On April 24, 2018, the plaintiff, a law firm, commenced this action seeking to collect unpaid fees for legal services it provided to its former client, the defendant. The plaintiff's three count complaint generally alleges that the defendant retained the plaintiff to represent her in a postjudgment dissolution proceeding. The complaint alleges that the parties executed a retainer agreement on December 2, 2016, and that the plaintiff provided the defendant with legal representation through approximately May 20, 2017. The complaint alleges that the defendant owes the plaintiff an unpaid balance of $17,201.04 for services rendered by the plaintiff. The counts in the complaint against the defendant assert breach of contract, unjust enrichment, and account stated. On May 18, 2018, the (then) self-represented defendant filed a form answer accompanied by a narrative "[e]xplanation and answers," in which she explains the history of the parties' relationship and alleges that the plaintiff overcharged her for the work it performed.

On August 22, 2019, the court, pursuant to Practice Book § 23-53,[2] issued an order referring the matter to an attorney fact finder.[3] On December 9, 2020, the parties

[2] Practice Book § 23-53 provides in relevant part that "[t]he court, on its own motion, may refer to a fact finder any contract action pending in the Superior Court . . . . Such cases may be referred to a fact finder only after the pleadings have been closed, a certificate of closed pleadings has been filed, and the time prescribed for filing a jury trial claim has expired."

[3] The court's referral to the attorney fact finder was prompted by the plaintiff's August 22, 2019 caseflow request, which stated that "[a]t the last appearance, the parties agreed to utilize the [Connecticut Bar Association's] dispute resolution program however, the [Connecticut Bar Association] does not allow participation in said program if a lawsuit is already pending. [The] defendant has not responded to [the] plaintiff's request for consent."

participated in a hearing before an attorney fact finder.[4] At the hearing, the attorney for the plaintiff stated that "there were two exhibits that were stipulated to, one is the retainer agreement, and the other is just a bill for services . . . ." The attorney fact finder marked the retainer agreement as exhibit 1, and the bill for services as exhibit 2. The plaintiff then elicited testimony from the defendant regarding the parties' relationship and the purposes for her retention of the plaintiff. The defendant testified that she hired a private investigator who discovered that the defendant's ex-husband, Laith Kasir, had hidden $74,000 in assets during their marital dissolution proceedings. She testified that she retained the plaintiff to obtain her portion of those hidden assets, and that she signed the retainer agreement marked as exhibit 1. The defendant also testified that she later entered into a postjudgment stipulation with respect to the hidden assets, which provided that she would receive the entire $74,000 of the hidden assets. The defendant finally testified that she received the bill for services provided by the plaintiff marked as exhibit 2; although she paid the plaintiff $13,000, it had been her "understanding . . . that ten thousand should take" her through the collection of her ex-husband's assets; and she has refused to pay the full amount claimed by the plaintiff "[b]ecause the bills are unrealistic."

The hearing before the attorney fact finder continued by way of the defendant's testimony in a narrative manner. The defendant testified that, following her divorce and before she retained the plaintiff, she had hired

[4] At the inception of the hearing, the attorney fact finder outlined a concern that the pleadings were not closed because the plaintiff had filed a motion to strike the defendant's answer, which was not decided at the time of the hearing. See Practice Book § 23-53 (prescribing that referral to attorney fact finder can occur "only after the pleadings have been closed"). This issue was not affirmatively resolved on the record before the attorney fact finder and was not presented as an issue before the trial court.

an investigator to discover assets she believed her ex-husband had hidden from her during the dissolution proceedings and, through that investigator, she had learned that her ex-husband had a retirement account with an approximate balance of $74,000. She stated that she confronted her "ex-husband's attorney, and they wanted to divide that asset." The defendant explained that she paid the plaintiff $10,000 "really to get [her] case resolved and get [her] rightful share" of her ex-husband's hidden assets as she believed there were more assets than the $74,000 her investigator had discovered. She testified that she had retained the plaintiff to discover other assets she believed her ex-husband had hidden but, instead, she was convinced by the plaintiff to settle for receiving the entire proceeds from the discovered account in lieu of conducting discovery to uncover further assets. She testified that Attorney Michael Budlong, an attorney employed by the plaintiff, overbilled her for meetings with her and was residing in Florida during the relevant time period. She further testified that the plaintiff improperly asked for $3000 in addition to the $10,000 she initially provided to resolve the case, that the stipulation she entered into to resolve the $74,000 in hidden assets failed to account for additional stocks her ex-husband possessed, and, thus, she later had to retain new counsel to obtain those additional hidden assets. The defendant also testified that the total amount charged by the plaintiff was approximately $33,000, of which she paid $13,000. She claimed that the $33,000 total charged by the plaintiff was disproportionate to the $35,000[5] of her ex-husband's assets that she actually received, taking into

[5] There is no explanation in the record for the mathematical discrepancy between the slightly differing sums the defendant claimed she received from her ex-husband, and the slightly differing amounts representing the hidden assets she claimed her investigator had found for which she settled while represented by the plaintiff.

account the $4000 she independently paid to her investigator.[6]

On January 14, 2020, the attorney fact finder filed with the court a brief written report (report) finding in favor of the plaintiff. The entire report provides: "On December 9, 2019, the above captioned parties appeared for a hearing. The hearing was held and completed on that date. The following are the findings and conclusion of this fact finder.

"(1.) This is an action to recover attorney's fees. [The] plaintiff introduced two exhibits. Exhibit 1 is the retainer letter for this representation and Exhibit 2 is [the] plaintiff's bill for the services provided showing a balance due of $16,102.50 plus interest of $4675.54 for a total of $20,778.04.

"(2.) The defendant questioned whether the time charges were accurate and claimed that she was overcharged. Although the representation was successful in getting her some recovery of a portion of the funds in dispute. I would give the defendant a credit of $2500 on her claims of overcharging.

"Accordingly, I would grant the [plaintiff] . . . the amount of $13,602.50 in fees plus interest of $4000 for a total judgment of $17,602.50 in favor of the plaintiff."

[6] At the conclusion of the hearing before the attorney fact finder, the defendant attempted to introduce into evidence a series of e-mails between the parties, a report of the private investigator, and other documents to support her defenses. The plaintiff objected to all of these exhibits as inadmissible on the grounds of hearsay, relevancy, and as communications regarding a settlement negotiation. The attorney fact finder sustained all of the plaintiff's objections to these exhibits. In her objection to the report, the defendant claimed that it was error for the attorney fact finder not to have admitted those exhibits into evidence. Notwithstanding, the trial court stated in its decision that it had reviewed certain of the defendant's documents as part of its assessment of the report, and the court concluded that "whether admitted or excluded . . . [these exhibits do] not constitute a legal defense to the plaintiff's claim." On appeal to this court, the defendant makes no specific claim in regard to this set of exhibits.

On January 24, 2020, the defendant, pursuant to Practice Book § 23-57,[7] filed an objection to the attorney fact finder's report, raising eight claims of error, and she attached eight documents to her filing.[8] In her objection, the defendant argued: (1) the report was "not properly reached due to lack of evidence" because the attorney fact finder improperly excluded her proffered exhibits; (2) the report lacked evidence because the bill submitted by the plaintiff was fabricated as it included charges for motions that were filed prior to the plaintiff's retention; (3) the parties agreed that $10,000 was "sufficient to do the work"; (4) the plaintiff exhausted the $10,000 payment within the first eight days after its retention without completing any discovery, asset location, depositions, or a trial within those eight days; (5) Attorney Budlong was in Florida and the plaintiff neglected her case; (6) the attorney fact finder's finding that the " 'representation was successful' " was erroneous because she had to pay another attorney to obtain the full amount of her ex-husband's assets; (7) she retained the plaintiff to obtain her ex-husband's "$72,000" in hidden assets, but that she received a payment of only "$32,500"; and (8) the plaintiff improperly charged the defendant for the work she performed herself, including the investigation and location of the hidden assets. The defendant concluded her objection by stating that these eight grounds show that the report's statements, conclusions, and factual findings were not properly reached. The plaintiff did not file a written response to the defendant's objection.

[7] Practice Book § 23-57 (a) provides: "A party may file objections to the acceptance of a finding of facts on the ground that conclusions of fact stated in it were not properly reached on the basis of the subordinate facts found, or that the fact finder erred in rulings on evidence or in other rulings, or that there are other reasons why the finding of facts should not be accepted."

[8] Although the court discussed certain of these documents in its decision, the defendant has not specifically raised any issue regarding the court's treatment of these documents on appeal. Accordingly, they warrant no further discussion.

On October 1, 2020, the court, pursuant to Practice Book § 23-58,[9] held a hearing on the defendant's objection. At the hearing, both parties initially presented argument as to the scope of the court's review of the report, the basis for the $2500 reduction in fees, and the several grammatical ambiguities in the report as to the amount of the judgment. The court preliminarily stated that it did not "have any basis to make a ruling on whether or not the [attorney] fact finder properly excluded evidence or not," and that it did not "have a basis for understanding why [the decision to credit the defendant $2500] was made." The court, citing *Banks Building Co., LLC* v. *Malanga Family Real Estate Holding, LLC*, 92 Conn. App. 394, 399, 885 A.2d 204 (2005) (*Banks*), also stated that "most of what I have to decide is whether or not I'm going to accept the [attorney] fact finder's report. I don't believe I can do that with—just with the technical aspects of what's been written here. The next opportunity is to reject the findings of fact and remand the case to the finder who originally heard the matter." The court further stated that it is "obligated to look at the entire record" and that it did not "have a record of what was said at the event itself, and I think I really need to look at that to

[9] Practice Book § 23-58 provides: "(a) After review of the finding of facts and hearing on any objections thereto, the judicial authority may take the following action: (1) render judgment in accordance with the finding of facts; (2) reject the finding of facts and remand the case to the fact finder who originally heard the matter for a rehearing on all or part of the finding of facts; (3) reject the finding of facts and remand the matter to another fact finder for rehearing; (4) reject the finding of facts and revoke the reference; (5) remand the case to the fact finder who originally heard the matter for a finding on an issue raised in an objection which was not addressed in the original finding of facts; or (6) take any other action the judicial authority may deem appropriate.

"(b) The judicial authority may correct a finding of facts at any time before accepting it, upon the written stipulation of the parties.

"(c) The fact finder shall not be called as a witness, nor shall the decision of the fact finder be admitted into evidence at another proceeding ordered by a judicial authority."

figure out whether or not there was an evidentiary basis for the $2500 or if there was a basis for excluding evidence that was being offered by the [defendant]." The court concluded the hearing by indicating its intention to order and review the transcript of the hearing before the attorney fact finder to determine whether a remand to the attorney fact finder was necessary.

On October 19, 2020, the court issued a memorandum of decision in which it overruled the defendant's objection to the report. At the outset, the court noted that the retainer agreement and bill for services that were entered into evidence as exhibits 1 and 2 at the hearing before the attorney fact finder "are no longer in the clerk's possession; however, the court accepts the findings of the [attorney] fact finder, that there was a retainer agreement and a disputed balance owed, as agreed upon by the parties. The defendant's essential claim is that the plaintiff overbilled her for the services rendered." The court noted also that "[a] transcript of the [attorney] fact finder proceeding was made a court exhibit in this case," thereby implying that the court reviewed the transcript corresponding to the hearing before the attorney fact finder. The court concluded that, "although errors were made in preserving an accurate record of the evidence submitted by both parties, the decision of the [attorney] fact finder in favor of the plaintiff was well grounded in the law of contract and the evidence presented. Further, although the defendant had no defenses to the plaintiff's claim, the [attorney] fact finder nonetheless credited the defendant with $2500 in overcharges. During her testimony, for example, she identified instances where she had been billed excessively for actual time that was spent on her file. Absent a formally filed defense and based upon her general testimony of being overbilled, the court finds that the credit of $2500 is not clearly erroneous."[10] The

[10] In contrast to the court's statements, the defendant did file a formal defense to the plaintiff's complaint by way of her answer, and the plaintiff

court, in accordance with the report, rendered judgment in favor of the plaintiff in the amount of $17,602.50. This appeal followed.

On December 10, 2020, during the pendency of this appeal, the defendant filed a motion for articulation representing that counsel for the plaintiff provided her with both exhibits 1 and 2, which were "missing" from the clerk's office. On the basis of this recent discovery, the defendant asked the trial court to articulate, inter alia, whether the court viewed exhibits 1 and 2 introduced at the hearing before the fact finder before it affirmed the report. On April 12, 2021, the court issued an articulation acknowledging that it had not viewed exhibits 1 and 2, which had been entered into evidence before the attorney fact finder, but were absent from the record on the court's review of the report.[11]

On appeal, the defendant claims that the court improperly (1) overruled her objection to the attorney

never objected to the attorney fact finder's report seeking to challenge the $2500 credit provided to the defendant.

[11] On December 11, 2020, the defendant filed a motion for rectification, pursuant to Practice Book § 66-5, seeking that the court include in the record for appeal "the missing plaintiff's exhibits 1 and 2 so that they are made part of the court file." On April 12, 2021, the court issued a rectification stating that, "[a]lthough exhibits 1 and 2 were accepted into evidence at [the attorney] fact finder hearing, they were not found in the court's file at the time of the appeal. In reviewing the evidence folder for this matter on April 8, 2021, the court concludes that they are either no longer in the court's possession or have been improvidently misfiled. In light of this circumstance, the court has no objection to the rectification of the court's file to include exhibits 1 and 2." The court then conditioned its rectification on the agreement of the parties, stating that "[t]he parties appear to agree that the submitted documents are accurate copies of the exhibits, as filed with the fact finder. If this is incorrect, either party may seek a hearing to establish the fact that these documents are accurate copies of exhibits 1 and 2." Neither party has sought such a hearing with the trial court. We offer no opinion on this process except to note generally that a motion for rectification "*cannot be used to add new matters to the record that were not presented at trial*." (Emphasis added; internal quotation marks omitted.) *State* v. *Walker*, 319 Conn. 668, 680, 126 A.3d 1087 (2015).

fact finder's report because the court failed to review the evidence considered by the attorney fact finder, and (2) rendered judgment in accordance with the attorney fact finder's report because the report contained insufficient factual findings.

Because both of the defendant's claims challenge the actions taken by both the attorney fact finder and the court, we first outline the parameters of the attorney fact finder process and the applicable standards of review. Subject to certain conditions, a court may refer a matter to an attorney fact finder to hear and decide issues of fact in contract actions pending in the Superior Court when the amount in controversy is less than $50,000. See Practice Book § 23-53; see also General Statutes § 52-549n. An attorney fact finder shall proceed to determine the matter submitted to them, a record shall be made of the proceedings before the attorney fact finder, and the rules of evidence shall apply. See Practice Book § 23-55;[12] see also General Statutes § 52-549r. An attorney fact finder's report shall be in writing, state in separate and consecutively numbered paragraphs the facts found and the conclusions drawn therefrom, include the days the hearing took place, be signed by the attorney fact finder, and be filed with the clerk's office within 120 days of the completion of the hearing. See Practice Book §§ 19-8 and 23-56; see also General Statutes § 52-549r. Within fourteen days after the filing of the report, a party may file objections to the report on the grounds that conclusions of fact stated in it were not properly reached on the basis of the subordinate facts found, that the fact finder erred in rulings on evidence or in other rulings, or that there are other reasons why the finding of facts should not be accepted.

[12] Practice Book § 23-55 was amended, effective January 1, 2021, to replace the phrase "civil rules of evidence" with the phrase "Connecticut Code of Evidence." This technical change has no bearing on our analysis.

See Practice Book § 23-57; see also General Statutes § 52-549s.

When presented with an objection to an attorney fact finder report, a trial court must hold a hearing on the objection. See Practice Book § 23-58; see also General Statutes § 52-549s. The trial court then has six discretionary options; it can "(1) render judgment in accordance with the finding of facts; (2) reject the finding of facts and remand the case to the fact finder who originally heard the matter for a rehearing on all or part of the finding of facts; (3) reject the finding of facts and remand the matter to another fact finder for rehearing; (4) reject the finding of facts and revoke the reference; (5) remand the case to the fact finder who originally heard the matter for a finding on an issue raised in an objection which was not addressed in the original finding of facts; or (6) take any other action the judicial authority may deem appropriate." Practice Book § 23-58; see also General Statutes § 52-549s.

When assessing the factual findings and legal conclusions of the attorney fact finder, the trial court is required to use different standards of review. The trial court is required to use the clearly erroneous standard of review to assess the attorney fact finder's factual findings. "The factual findings of [an attorney fact finder] on any issue are reversible only if they are clearly erroneous. . . . [A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Shapero* v. *Mercede*, 262 Conn. 1, 6, 808 A.2d 666 (2002). As to any legal conclusions made by the attorney fact finder, the trial

court, on review, is required to apply the plenary standard of review to assess the attorney fact finder's legal conclusions. "[B]ecause the attorney [fact finder] does not have the powers of a court and is simply a fact finder, [a]ny legal conclusions reached by an attorney [fact finder] have no conclusive effect. . . . The reviewing court is the effective arbiter of the law and the legal opinions of [an attorney fact finder], like those of the parties, though they may be helpful, carry no weight not justified by their soundness as viewed by the court that renders judgment." (Internal quotation marks omitted.) *Silver Hill Hospital, Inc.* v. *Kessler*, 200 Conn. App. 742, 747, 240 A.3d 740 (2020). With these principles in mind, we turn to the claims presented in this appeal.

I

The defendant first claims that the court improperly overruled her objection to the attorney fact finder's report because the court failed to review all of the evidence considered by the attorney fact finder. We agree.

We begin with the standard of review and legal principles relevant to the defendant's first claim. This claim requires us to determine whether the court employed the proper standard of review in assessing the fact finder's report and, thus, we exercise plenary review. See *Lewis* v. *Frazao Building Corp.*, 115 Conn. App. 324, 333, 972 A.2d 284 (2009) (applying plenary review to claim as to "whether the court employed the proper standard of review in assessing the fact finder's report"); see also *State* v. *Manuel T.*, 337 Conn. 429, 453, 254 A.3d 278 (2020) (whether trial court applied proper legal standard is subject to plenary review on appeal). To the extent we are required to interpret the defendant's objection to the report, our review also is plenary. See *BNY Western Trust* v. *Roman*, 295 Conn.

194, 210, 990 A.2d 853 (2010) (interpretation of pleadings is question of law subject to plenary review).

In *Banks Building Co., LLC* v. *Malanga Family Real Estate Holding, LLC*, supra, 92 Conn. App. 394, this court articulated the proper process for a trial court's review of an attorney fact finder's report. In *Banks*, the defendant claimed on appeal that the trial court improperly rendered judgment in accordance with the attorney fact finder's report without first holding a hearing on the defendant's objections. Id., 397. This court agreed with the defendant, holding that the "plain language" of Practice Book § 23-58 "indicates that if any objections to the report have been raised, the court, before deciding on one of the available courses of action, must take the mandatory prerequisite step of holding a hearing on the objections." Id., 398–99. Additionally, "[t]here is no per se requirement that a court review the transcripts of the hearing before the [attorney] fact finder prior to rendering judgment on the [attorney] fact finder's report. . . . When an objection raises the claim, however, that the facts found lack evidentiary support, *the court must review all of the evidence that was before the fact finder to make an informed disposition of the objection*." (Citation omitted; emphasis added.) Id., 399; see also *Dartmoor Condominium Assn., Inc.* v. *Guarco*, 111 Conn. App. 566, 572–73, 960 A.2d 1076 (2008) (holding that trial court's in camera review of party's objection to attorney fact finder's report did not satisfy *Banks* standard).

Accordingly, a trial court must hold a hearing and assess all of the evidence necessary to consider properly the particular objections raised by a party to a report of an attorney fact finder. Particularly, where a trial court is presented with an objection challenging the factual findings of a report, it must review all the evidence before the attorney fact finder to determine whether those findings are clearly erroneous. See *Silver*

Hill Hospital, *Inc.* v. *Kessler*, supra, 200 Conn. App. 746–47; see also *Sclafani Properties*, *LLC* v. *Sport-N-Life Distributing*, *LLC*, 198 Conn. App. 292, 301–302, 233 A.3d 1285 (2020). Where a trial court is presented with an objection challenging the attorney fact finder's exclusion of evidence at the hearing, it must necessarily review the exhibits that were excluded. See *Silver Hill Hospital*, *Inc.* v. *Kessler*, supra, 747; see also *Data-Flow Technologies*, *LLC* v. *Harte Nissan*, *Inc.*, 111 Conn. App. 118, 130–31, 958 A.2d 195 (2008). Where a trial court is presented with an objection challenging the legal conclusions of a report, it must determine whether those conclusions are legally and logically correct and supported by the findings of fact in the report. See *Silver Hill Hospital*, *Inc.* v. *Kessler*, supra, 747.

As noted, the defendant's objection to the report made eight claims of error, specifically challenging the attorney fact finder's factual findings and resultant legal conclusions. The defendant challenged, inter alia, the amount that the parties' agreed to in the retainer agreement submitted as exhibit 1 at the attorney fact finder hearing, the propriety of the charges on the bill submitted as exhibit 2 at the attorney fact finder hearing, the evidentiary support for the finding that the plaintiff's "representation was successful," and the lack of correlation between the plaintiff's charges and the work actually performed. In reaching its conclusion to accept the attorney fact finder's report, however, the court did not examine the retainer agreement and the billing statement because they were not part of the record and, consequently, the court was in no position to determine the merits of the defendant's objection. Therefore, the court could not properly consider whether the parties had agreed to a capped fee in the retainer agreement or whether the plaintiff's billing statement accurately reflected the quantum of work performed on behalf of the defendant. In light of these circumstances, the court

should have exercised its discretion to remand the case back to the attorney fact finder or to "take any other action the judicial authority may deem appropriate." Practice Book § 23-58 (a); see also General Statutes § 52-549s.

In response, the plaintiff argues that the court's failure to review the evidence before the fact finder was immaterial for two reasons. First, the plaintiff argues that "the defendant never raised a claim that the parties had agreed to a bargained for, capped fee of $10,000" before the attorney fact finder, and, second, the defendant's objection to the report was confined only to the attorney fact finder's improper exclusion of the exhibits that she had attempted to present to the attorney fact finder at the hearing. We reject the plaintiff's narrow construction of the defendant's arguments, which she made as a self-represented party before the attorney fact finder and the court.[13]

First, the nature of the defendant's objection to the attorney fact finder's report required the court to review both the retainer agreement and the billing record to properly and fairly assess the defendant's claims that the billing was excessive and the quantum of work claimed by the plaintiff did not correlate to the claimed time expended. Both of these claims implicate the accuracy and completeness of exhibits 1 and 2 that were presented to the attorney fact finder but were unavailable to the trial court. In the documents that the defendant submitted in response to the plaintiff's complaint, the defendant raised both of these claims: that the billing was excessive and that counsel's performance had

[13] Consistent with our policy of leniency to self-represented litigants, we construe the defendant's arguments and objection, which she made as a self-represented party, broadly and realistically, rather than narrowly and technically. See *Santana* v. *Commissioner of Correction*, 208 Conn. App. 460, 465, 264 A.3d 1056 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

not been as promised. At the hearing before the attorney fact finder, the defendant repeatedly testified that the parties had agreed that her $10,000 payment was sufficient to take care of her case. All of this was adequate for the defendant to place the plaintiff and the attorney fact finder on notice of her capped fee claim.

Second, the defendant's objection was not limited to her claim regarding the attorney fact finder's improper exclusion of documents that she had sought to introduce as evidence before the attorney fact finder. As previously outlined, the defendant's objection to the report expressly made eight challenges to, inter alia, the amounts charged for the work performed by the plaintiff and the amount to which the parties agreed for the representation.

In sum, we reiterate that a court, on reviewing a report of an attorney fact finder, must assess all of the evidence that was presented to the attorney fact finder in order to properly consider objections challenging the report of an attorney fact finder. In our view and on the basis of this record, we conclude that the court could not adequately assess the defendant's objections without reviewing both exhibit 1, the retainer agreement, and exhibit 2, the billing record. Faced with the fact that these exhibits were missing from the record, it would have been appropriate for the court to remand the case to the attorney fact finder or to "take any other action the judicial authority may deem appropriate." Practice Book § 23-58 (a); see also General Statutes § 52-549s. In this case, as soon as the court determined that these documents, necessary to its review function, were missing from the record, it should have remanded the matter to the attorney fact finder for the purpose of completing the record and, then, with a complete record, the court could have conducted its review. Because that procedure did not take place, the matter must be remanded to the trial court.

II

The defendant next claims that the court improperly affirmed the attorney fact finder's report because it contained insufficient factual findings to support its ultimate conclusion.[14] In support, the defendant argues that "[t]he sole 'fact found' in the entire report"—that the plaintiff's representation was successful—"is insufficient to sustain a legal conclusion that the [retainer agreement] was valid and enforceable for the amount billed . . . ." The plaintiff does not advance a substantive counterargument to support the report; rather, the plaintiff argues only that this court should decline to review this argument because the defendant failed to preserve it properly before the trial court. We conclude that the defendant's claim was properly preserved and that the court improperly affirmed the report.

We begin by setting forth the legal principles relevant to whether a claim properly was preserved for appellate review. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial

[14] Although our resolution of the defendant's first claim is dispositive of this appeal, we also address the defendant's second claim because it is likely to arise on remand. See, e.g., *State* v. *Raynor*, 337 Conn. 527, 552, 254 A.3d 874 (2020) (addressing "the defendant's second claim because it is likely to arise on remand"); *State* v. *Lebrick*, 334 Conn. 492, 521, 223 A.3d 333 (2020) (addressing "the merits of the defendant's second claim . . . because it is likely to arise on remand"); *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164 n.8, 971 A.2d 676 (2009) ("[w]e think it prudent to address the second issue because it is likely to arise on remand").

court and the opposing party." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). "[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 455, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). Furthermore, our interpretation of the defendant's pleadings is a question of law subject to plenary review. See *BNY Western Trust* v. *Roman*, supra, 295 Conn. 210. As stated herein, consistent with our policy of leniency to self-represented litigants, we construe the plaintiff's pleadings broadly and realistically, rather than narrowly and technically. See *Santana* v. *Commissioner of Correction*, 208 Conn. App. 460, 465, 264 A.3d 1056 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

In her objection to the report, the defendant specifically claimed that the report's "conclusions" were not properly reached on the basis of eight separate grounds. At the hearing on her objection, the defendant, still a self-represented party, repeatedly advanced the same arguments that the report's conclusions were unsupported. At the hearing, the court itself acknowledged that the report was devoid of a basis for its conclusions and stated that it did not think that it could affirm the report "just with the technical aspects of what's been

written here." We conclude from our broad review of the defendant's claims that she properly preserved her claim before the court that the conclusion by the report was unsupported by sufficient factual findings. We now turn to consider the claim on the merits.

We next outline our standard of review and the applicable legal principles to determine whether the court properly rendered judgment in accordance with the attorney fact finder's report. The trial court's determination to render judgment in accordance with the fact finder's report is a question of law subject to plenary review. See *Silver Hill Hospital, Inc.* v. *Kessler*, supra, 200 Conn. App. 747. "[O]ur review is limited to whether the trial court's legal conclusions are legally and logically correct and whether they find support in the facts set out in the memorandum of decision." Id., 751.

"When a matter is referred to [an attorney] fact finder, Practice Book § 23-56 (a) mandates that findings of fact be set forth in writing . . . . The fact finder's report shall state, in separate and consecutively numbered paragraphs, the facts found and the conclusions drawn therefrom." (Internal quotation marks omitted.) *Data-Flow Technologies, LLC* v. *Harte Nissan, Inc.*, supra, 111 Conn. App. 127. "This court has repeatedly stated that it is the function of a finding to state facts and not evidence. . . . A finding that certain testimony was given does not establish the truth of the facts testified to. . . . A finding should state ultimate, not evidential, facts . . . ." (Citations omitted; internal quotation marks omitted.) *Post Road Iron Works, Inc.* v. *Lexington Development Group, Inc.*, 54 Conn. App. 534, 541, 736 A.2d 923 (1999). "In cases involving [attorney] fact finders . . . the report submitted to the trial court must include sufficient facts to support a recommendation. The court cannot appropriately render judgment in accordance with facts found but not communicated. . . . Although the referral of cases to fact finders is

intended to create more streamlined access to justice, fact finders must take care with their responsibility of *finding facts* to which the courts may apply the law." (Citation omitted; emphasis in original.) *Data-Flow Technologies, LLC* v. *Harte Nissan, Inc.*, supra, 128–29. "We caution fact finders to avoid the confusion that comes from drawing conclusions without expressly finding each subordinate fact." Id., 129 n.8.

In *Post Road Iron Works, Inc.* v. *Lexington Development Group, Inc.*, supra, 54 Conn. App. 542, this court concluded that the trial court improperly affirmed the report of an attorney trial referee[15] because it contained insufficient factual findings. The relevant report was five pages, contained seven findings of fact, and had separate sections for discussion and recommendations. Id., 537. The defendants objected to the report on several grounds, but the trial court overruled the defendants' objection and accepted the attorney trial referee's report. Id., 538–40. On appeal, this court reversed the judgment of the trial court, reasoning that "the attorney trial referee made just seven findings of fact, one of which merely describes photographic evidence. In the discussion portion of his report, the attorney trial referee summarizes the testimony of the witnesses without making findings of fact." Id., 541. This court further held that "the trial court drew inferences from the attorney trial referee's report and entered them as factual findings in its memorandum of decision. This, the trial court may not do. The trial court may accept an attorney trial referee's report only when the recommendation is supported by the attorney referee's subordinate findings of fact. We conclude, therefore, that the trial court

[15] For purposes of our review, there is no material distinction between an attorney fact finder and an attorney trial referee as both "share the same function . . . whose determination of the facts is reviewable in accordance with well established procedures prior to the rendition of judgment by the court." (Internal quotation marks omitted.) *Killion* v. *Davis*, 257 Conn. 98, 102, 776 A.2d 456 (2001).

improperly accepted the attorney trial referee's report." (Footnote omitted.) Id., 542; contra *Data-Flow Technologies, LLC* v. *Harte Nissan, Inc.*, supra, 111 Conn. App. 129 (holding that attorney fact finder's two reports cumulatively containing ten factual findings supplied "the bare minimum necessary for the court to render judgment appropriately").

The report in the present case falls below the bare minimum necessary for the court appropriately to render judgment. The report is only one-half page long and contains only one factual finding. In the first paragraph, the report identifies the date of the hearing. In the second paragraph, the report describes the two exhibits introduced by the plaintiff and states that the plaintiff's "bill for the services provided [showed] a balance due of $16,102.50 plus interest of $4,675.54 for a total of $20,778.04." In the third paragraph, the report states that "[t]he defendant questioned whether the time charges were accurate and claimed that she was overcharged," finds that "the representation was successful in getting her some recovery of a portion of the funds in dispute," and then concludes that the attorney fact finder "would give the defendant a credit of $2500 on her claims of overcharging." The report concludes by stating that the attorney fact finder grants "the [plaintiff] . . . the amount of $13,602.50 in fees plus interest of $4000 for a total judgment of $17,602.50 in favor of the plaintiff."

The report's conclusion that the defendant owes the plaintiff $17,602.50 is not supported by the sole factual finding that the plaintiff's representation was partially successful. The report's statement that exhibits were entered into evidence by the plaintiff does not constitute a finding as to the content of those documents. See *Post Road Iron Works, Inc.* v. *Lexington Development Group, Inc.*, supra, 54 Conn. App. 541. This minimal report by the attorney fact finder did not provide an adequate factual underlayment for the court's ultimate

determination to accept it. Therefore, we conclude that the court improperly rendered judgment in accordance with the report because it was not supported by sufficient factual findings.

The judgment is reversed and the case is remanded with direction to render judgment rejecting the report and for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

JOHN P. COSTAS ET AL. *v.* COMMISSIONER OF REVENUE SERVICES (AC 44075)

Alvord, Cradle and Palmer, Js.

Syllabus

The plaintiff taxpayers, J and B, appealed to the trial court from the decision of the defendant Commissioner of Revenue Services disallowing in part their claims for certain income tax refunds. The plaintiffs resided in Connecticut, but J performed services for his employer, U Co., in both Connecticut and New York. As part of his compensation for those services, J received stock options and restricted stock from U Co. For the 2005, 2007 and 2008 taxable years, the plaintiffs filed Connecticut resident income tax returns on which they reported compensation that J had received from his exercise of stock options and the vesting of restricted stock that U Co. previously had granted to him. They also sought a credit for taxes paid to New York during those years for services J performed for U Co. that occurred both in Connecticut and New York. The commissioner allowed the credit pursuant to the applicable statute (§ 12-704 (a)). Following an audit conducted in New York, the plaintiffs paid additional taxes to New York for compensation that J had received from U Co. for the 2005, 2007 and 2008 taxable years. The plaintiffs filed amended Connecticut resident income tax returns for those years and sought a credit for the additional taxes they paid to New York. The commissioner disallowed in part the requested credit and the plaintiffs' claims for refunds of the taxes paid to New York for the subject taxable years on the ground that the plaintiffs were required to allocate income from the exercise of stock options and the vesting of restricted stock between Connecticut and New York in accordance with the relevant

state regulations (§§ 12-711(b)-17 (c) and 12-711(b)-18 (c)). In determining the apportionment and the credit to which the plaintiffs were entitled, the commissioner applied the methodology set forth in those regulations, which he construed as requiring a computation of the total compensation received by J during the relevant periods, including deferred compensation that J received in those periods for services rendered prior thereto. The plaintiffs had proposed an alternate methodology pursuant to the relevant state regulation (§ 12-711(b)-15 (a)) that did not include deferred compensation. The plaintiffs appealed to the trial court from the commissioner's decision, claiming that the commissioner had misinterpreted §§ 12-711(b)-17 (c) and 12-711(b)-18 (c), and abused his discretion in failing to utilize their alternate apportionment methodology because the methodology that he applied resulted in an unfair and inequitable allocation. The trial court rendered summary judgment in favor of the commissioner, and the plaintiffs appealed to this court. *Held*:

1. The trial court and the commissioner correctly interpreted §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) of the regulations, as their construction was mandated by the plain language of those regulations and did not yield absurd or unworkable results: it was undisputed that the deferred compensation at issue was received during the relevant periods, and, therefore, it fell squarely within the straightforward regulatory language directing that the computation of credit shall include all of the compensation received during the relevant periods for the particular services identified therein; moreover, although the plaintiffs claimed that the regulations must be understood in the context of the broader regulatory scheme and its overriding purpose and that their construction of the regulations best achieved that goal, they failed to identify any language in the regulations to substantiate their construction of those provisions, and their belief as to how the regulatory purpose is best served did not trump the plain and unambiguous language of the regulations, which was determinative of their meaning.
2. The plaintiffs' alternative claim that the trial court incorrectly refused to require the commissioner to exercise his discretionary authority under § 12-711(b)-15 (a) of the regulations to approve their proposed alternate apportionment methodology was without merit; because the commissioner correctly construed and applied §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) of the regulations, the resulting apportionment was presumptively fair and equitable under § 12-711(b)-15 (b), and the plaintiffs failed to overcome that presumption by establishing that the methodology set forth in §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) was so unfair and inequitable as applied to J that the commissioner was required to use their alternate apportionment methodology in determining the amount of their tax credit.

Argued October 5, 2021—officially released July 19, 2022

Procedural History

Appeal from the decision of the defendant disallowing in part the plaintiffs' claims for certain income tax refunds, brought to the Superior Court in the judicial district of New Britain, Tax Session, where the parties filed a joint stipulation of facts; thereafter, the court, *Hon. Arnold W. Aronson*, judge trial referee, granted the defendant's motion for summary judgment, denied the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Timothy P. Noonan, for the appellants (plaintiffs).

Patrick T. Ring, assistant attorney general, with whom were *Joseph J. Chambers*, deputy assistant attorney general, and, on the brief, *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (defendant).

Opinion

PALMER, J. The plaintiffs, John P. Costas and Barbara S. Costas, appeal from the summary judgment rendered by the trial court in favor of the defendant, the Commissioner of Revenue Services (commissioner), sustaining the commissioner's assessment of taxes against the plaintiffs with respect to certain stock options and restricted stock units granted to John P. Costas by his employer as compensation for services he performed both in this state and in New York.[1] On appeal, the plaintiffs claim that the court incorrectly concluded that the commissioner was entitled to summary judgment because the court (1) misinterpreted and misapplied

[1] Although both John P. Costas and Barbara S. Costas are the plaintiffs in this appeal, only compensation received by John P. Costas is relevant to the issues presented by the appeal. For the sake of simplicity and when necessary, hereinafter we refer to John P. Costas, individually, by his surname.

the regulations at issue, namely, §§ 12-711(b)-17[2] and 12-711(b)-18[3] of the Regulations of Connecticut State

[2] Section 12-711(b)-17 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) Connecticut adjusted gross income derived from or connected with sources within this state includes, to the extent provided in this section, income recognized under section 83 of the Internal Revenue Code on the transfer of property in connection with the performance of services, if, during the period beginning with the first day of the taxable year of the transferee during which such property was transferred thereto and ending with the last day of the taxable year of the transferee during which the rights of the person having the beneficial interest in such property first were transferable or first were not subject to a substantial risk of forfeiture, whichever occurs earlier (or, if an election is made under section 83(b)(1) of the Internal Revenue Code, the taxable year that such election is made), the transferee was performing such services within Connecticut. In determining whether the person was performing such services within Connecticut, the regulations of this Part shall apply. . . .

"(c) If, during the period described in subsection (a) of this section, the transferee's services were performed partly within and partly without Connecticut, the portion of the amount by which the fair market value of the property, as determined under section 83(a) of the Internal Revenue Code, at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, exceeds the amount, if any, paid for such property, that is derived from or connected with sources within this state is in the same ratio that the total compensation received from the transferor during such period for services performed in this state bears to the total compensation received from the transferor during such period for services performed both within and without this state. . . ."

[3] Section 12-711(b)-18 of the Connecticut State Regulations provides in relevant part: "(a) Connecticut adjusted gross income derived from or connected with sources within this state includes, to the extent provided in this section, income recognized under section 83 of the Internal Revenue Code in connection with a nonqualified stock option if, during the period beginning with the first day of the taxable year of the optionee during which such option was granted and ending with the last day of the taxable year of the optionee during which such option was exercised (or, if the option has a readily ascertainable fair market value, as defined in 26 C.F.R. § 1.83-7(b), at the time of grant, the taxable year during which such option was granted), the optionee was performing services within Connecticut. In determining whether the optionee was performing services within Connecticut, the regulations of this Part shall apply. . . .

"(c) If, during the period described in subsection (a) of this section, the optionee's services were performed partly within and partly without Connecticut, the portion of the amount by which the fair market value of the stock, at the time such option was exercised, exceeds the option price, that is derived from or connected with sources within this state is in the same ratio that the total compensation received from the grantor during such

Agencies, which govern the credit to which a Connecticut taxpayer is entitled for taxes paid to another state on compensation derived from the vesting of restricted stock and the exercise of nonqualified stock options (stock options), respectively, for services performed in both Connecticut and that other state, and (2) refused to require that the commissioner approve an alternate apportionment methodology with regard to the income attributable to Connecticut and New York for purposes of determining the amount of those tax credits pursuant to § 12-711(b)-15[4] of the Regulations of Connecticut State Agencies.[5] We reject the plaintiffs' claims and, accordingly, affirm the judgment of the court.

The following uncontested facts, as set forth by the court, and procedural history are relevant to our resolution of this appeal. "Costas joined UBS [Investment Bank (UBS), formerly known as UBS Warburg] in 1996

period for services performed in this state bears to the total compensation received from the grantor during such period for services performed both within and without this state. . . ."

[4] Section 12-711(b)-15 of the Regulations of Connecticut States Agencies provides in relevant part: "(a) Where the methods provided in this Part do not apportion items of income, gain, loss and deduction in a fair and equitable manner, the Commissioner may require a nonresident individual to apportion those items under such method as the Commissioner prescribes, as long as the prescribed method results in a fair and equitable apportionment. In addition, a nonresident individual may submit an alternate method of apportionment with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without Connecticut. The proposed method shall be fully explained in the Connecticut nonresident income tax return. If the method proposed by such individual is approved by the Commissioner, it may be used in lieu of the applicable method described in this Part.

"(b) The methods provided in this Part are presumed to result in fair and equitable apportionment, and any person, whether it be the Commissioner or a nonresident individual, proposing an alternate method of apportionment shall bear the burden of establishing that the methods provided in this Part unfairly and inequitably attribute items of income, gain, loss or deduction to Connecticut. . . ."

[5] We note that, although §§ 12-711(b)-15, 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies refer to nonresident taxpayers, they are equally applicable to resident taxpayers. See Regs., Conn. State Agencies § 12-704(a)-4 (a) (3).

as the Head of Fixed Income. In 2001, [he] assumed the role of [chief executive officer (CEO)] of . . . UBS . . . before being promoted to Deputy CEO of UBS in 2004. In 2005, [Costas] became CEO of UBS's Dillon Reed Capital Management, and he remained in that role until he left UBS in 2007. When [Costas] joined UBS in 1996, he was a resident of New Jersey and he performed services for UBS in New York. However, in 1998, [he] moved to Connecticut and, in doing so, moved his office from New York City to . . . Stamford . . . . [Following this move, Costas initially] did not spend any significant amount of time performing services in New York. Gradually, however, his time spent [performing services] in New York increased as follows: [between 1 and 2 percent in 2003, 10.22 percent in 2004, 29.11 percent in 2005, 66.29 percent in 2006, 60.22 percent in 2007, and 0 percent in 2008].

"As an executive of UBS, from 1998 through 2007, [Costas'] compensation package was comprised [primarily] of [deferred stock based compensation] . . . which had no readily ascertainable value at the time of grant.[6] Specifically, UBS granted [Costas] stock options (the ability to purchase UBS stock at a fixed price after a period of vestment) and restricted stock (a grant of stock subject to a vesting schedule deemed received on the date of vestment)." (Footnote added; internal quotation marks omitted.) "[In] recognition that stock options and restricted stock [generally] have no reasonably ascertainable fair market value at the time awarded and, consequently, are not subject to taxation at the time they are granted [stock options are treated as taxable income when they are exercised and restricted stock is treated as taxable income upon vesting]."

"The plaintiffs . . . filed Connecticut resident income tax returns for each of the taxable years of

[6] Although Costas also received some compensation in the form of wages and bonuses, those wages and bonuses are not the subject of this appeal.

2005, 2007 and 2008, and, on each of these returns, the plaintiffs included compensation that [Costas] had received from his exercise of stock options and [the vesting of] restricted stock previously given to him [by UBS]. In filing their tax returns, the plaintiffs claim a credit for taxes paid to New York for services [Costas] performed for UBS . . . that occurred both in Connecticut and in New York." This credit was awarded pursuant to General Statutes § 12-704,[7] which permits a Connecticut resident to offset a credit for income taxes paid to other states "[i]n order for [the] taxpayer to avoid having to pay a double tax on the same services provided to his or her employer."

"Subsequently, the New York State Department of Taxation and Finance conducted an audit of the plaintiffs' tax returns and entered into an agreement with the plaintiffs whereby the plaintiffs agreed that they owed the state of New York additional tax on the compensation that [Costas] had received from UBS for the taxable years of 2005, 2007 and 2008. Following the payment of the additional taxes to New York, the plaintiffs filed amended Connecticut income tax returns for the taxable years of 2005, 2007 and 2008 in which they sought additional credits for these additional taxes paid to New York. . . . The [commissioner] disallowed part of the plaintiffs' claims for a refund of taxes paid to New York for the taxable years of 2005, 2007 and 2008 [on the ground] that the plaintiffs were required to allocate income from the exercise of stock options and vesting of restricted stock between Connecticut and New York in accordance with [§§ 12-711(b)-17 (c) and

[7] General Statutes § 12-704 (a) (1) provides: "Any resident or part-year resident of this state shall be allowed a credit against the tax otherwise due under this chapter in the amount of any income tax imposed on such resident or part-year resident for the taxable year by another state of the United States or political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this chapter."

12-711(b)-18 (c) of the Regulations of Connecticut State Agencies].”[8] (Footnote omitted.)

The parties acknowledge that, in calculating the amount of the credit to which the plaintiffs were entitled for each of the taxable years at issue, the commissioner was required to apply the methodology set forth in §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) of the Regulations of Connecticut State Agencies for determining how much income from stock options and grants of restricted stock is allocated to this state when, as here, the employee performs services both within and outside this state during the “grant-to-exercise period” (in the case of stock options) and “grant-to-vest period” (in the case of restricted stock).[9] As the parties also agree, the proper apportionment of income for tax credit purposes is a function of the ratio between the total compensation received during the grant-to-exercise period or grant-to-vest period for services performed in New York (the ratio’s numerator) and the total compensation received during those periods for services performed in this state, New York and anywhere else (the ratio’s denominator). In determining that apportionment, however, the commissioner construed §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) as requiring a computation of the total compensation received by Costas during the grant-to-exercise and grant-to-vest periods, *including* deferred compensation that was received in those periods for

[8] In their amended returns for taxable years 2005, 2007 and 2008, the plaintiffs increased the amount of their claim for credit for income tax paid to New York to $259,446, $2,878,718, and $280,668, respectively. The commissioner ultimately determined that the plaintiffs were entitled to credit for income tax paid to New York in the amount of $182,536, $1,568,022 and $70,899, for the taxable years 2005, 2007 and 2008, respectively.

[9] The parties use the term “grant-to-exercise period” to refer to the period from the date a stock option is awarded to the date the option is exercised, and the term “grant-to-vest period” to refer to the period from the date restricted stock is awarded to the date of its vesting. For ease of reference, we hereinafter use the same terminology.

services rendered prior thereto. This construction of the applicable regulations differed from the interpretation advocated by the plaintiffs, who contended that the apportionment computation should include only compensation received *for services actually performed* during such periods and *not* deferred compensation earned earlier but received in those periods.[10]

In accordance with General Statutes § 12-730,[11] the plaintiffs appealed to the trial court from the determination of the commissioner partially disallowing their claims for refunds. On appeal to the trial court, the plaintiffs claimed that the commissioner (1) misinterpreted §§ 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies, thereby miscalculating to their detriment the amount of the credit available to them, and (2) abused his discretion in failing

[10] By way of illustration of these differing interpretations, the parties provided the following example, as set forth in the plaintiffs' brief to this court: "On June 30, 2007, [Costas] received $13,997,956 in compensation from the vesting of restricted stock that he was granted on March 1, 2006, from [UBS]. . . . During this period of time, [Costas] worked about 65 percent of his time in New York. [The commissioner], taking into account *all* compensation received by [Costas] from January 1, 2006, through June 30, 2007—including compensation received by him in 2006 and 2007 for services rendered *prior* to 2006, when he worked much less in New York—calculated the 'New York [c]ompensation ratio' to be only 23.76 percent, and thus significantly reducing the credit [Costas] claimed for tax paid to New York.

"[The] [p]laintiffs, taking into account all compensation received by [Costas] from January 1, 2006, [through] June 30, [2007], *for services performed during such period*, calculated the 'New York [c]ompensation ratio' to be 65.56 percent. Thus, under [the commissioner's] method, a much lower percentage of this income was deemed to be derived from New York sources, and, therefore, [Costas] was entitled to a much lower credit for the New York tax paid." (Emphasis in original.)

[11] General Statutes § 12-730 provides in relevant part: "[A]ny taxpayer aggrieved because of any determination or disallowance by the commissioner under section 12-729, 12-729a or 12-732 may, not later than thirty days after notice of the commissioner's determination or disallowance is mailed to the taxpayer, take an appeal therefrom to the superior court for the judicial district of New Britain . . . ."

to utilize the alternate method of apportionment authorized under § 12-711(b)-15 of the regulations in determining the amount of credit to which they were entitled. After jointly stipulating to uncontested facts, the plaintiffs and the commissioner both filed motions for summary judgment.[12]

The court subsequently issued a memorandum of decision granting the commissioner's motion for summary judgment and denying the plaintiffs' motion. In its decision, the court agreed with the commissioner's construction of §§ 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies as providing that the compensation to be considered for purposes of income allocation was all of the compensation Costas received during the grant-to-exercise and grant-to-vest periods, including deferred compensation that Costas received in those periods but had earned prior to those periods. The court held that this calculation was dictated by the language of the regulations, noting, further, that the required methodology was consistent with federal and state income tax principles, which, as the court explained, "focus on taxable events, not when the services occurred," such that "compensation is includable in gross income in the year received, and not in the year earned." (Internal quotation marks omitted.) The court also rejected the plaintiffs' contention that the commissioner should have exercised his discretion to award them the credit they sought under the alternate apportionment methodology authorized by § 12-711(b)-15 of the regulations because the methodology applied by the commissioner resulted in an unfair and inequitable allocation. The plaintiffs thereafter appealed to this court, renewing the same claims that they had raised in the trial court.

[12] Neither the plaintiffs nor the commissioner claimed that there were any material facts in dispute.

Before addressing those claims, we set forth the legal principles that guide our analysis. Our review of the trial court's decision granting the commissioner's motion for summary judgment is well settled. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Elder* v. *21st Century Media Newspaper, LLC*, 204 Conn. App. 414, 420, 254 A.3d 344 (2021).

"Administrative regulations have the full force and effect of statutory law and are interpreted using the same process as statutory construction . . . . Accordingly, in conducting this analysis, we are guided by the well established principle that [i]ssues of statutory construction raise questions of law, over which we [also] exercise plenary review. . . .

"When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court] seek[s] 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 [the court] 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." (Citations

omitted; internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 307–308, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

"Ordinarily, the construction and interpretation of a [regulation] is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where . . . the [regulation] has not previously been subjected to judicial scrutiny or time-tested agency interpretations." (Internal quotation marks omitted.) *State Medical Society* v. *Board of Examiners in Podiatry*, 208 Conn. 709, 718, 546 A.2d 830 (1988). Because the regulations at issue in the present case have not previously been subjected to judicial scrutiny, and because neither party claims that the commissioner's interpretation is time-tested, the commissioner's interpretation of the applicable regulations is not entitled to deference.

Furthermore, "[t]he United States Supreme Court has recognized that the taxing authority of a state government is a key component of a state's sovereignty." *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 281, 21 A.3d 759 (2011). As the United States Supreme Court also has explained, "[t]he [s]tates have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the [n]ational [g]overnment or violating the guaranties of the [f]ederal [c]onstitution, the [s]tates have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959). "The [state's] taxing power is an inherent attribute of sovereignty and as such unlimited in character and scope, [except insofar] as limitations may be self-imposed. Under our form of government its exercise is vested in the legislative

department which may exercise it for lawful purposes in its discretion both as regards the choice of subject-matter of taxation and the extent and manner of the tax, save as constitutional limitations may intervene . . . .'' (Internal quotation marks omitted.) *Lublin* v. *Brown*, 168 Conn. 212, 221, 362 A.2d 769 (1975). Thus, the authority of the legislature to levy taxes and to grant exemptions is extremely broad. See *Allied Stores of Ohio, Inc.* v. *Bowers*, supra, 526; *Lublin* v. *Brown*, supra, 220–23. Consequently, ''[i]t is well established that a state may tax all of the income of one of its domiciliaries, irrespective of the source of that income, geographical or otherwise.'' (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, supra, 324 Conn. 316.

Nevertheless, Connecticut allows a credit to residents of this state for taxes paid by such residents to another jurisdiction with respect to any income that is derived from sources within that other jurisdiction, including compensation for services performed therein. See General Statutes § 12-704. Under our statutory scheme, a taxpayer is entitled to such credit only if two conditions are met: (1) the tax paid to the other jurisdiction is for income derived from sources within that jurisdiction and (2) the income for which the credit is being sought is taxable as income in this state. See General Statutes § 12-704 (a). As previously indicated, §§ 12-711(b)-17 (pertaining to restricted stock) and 12-711(b)-18 (pertaining to stock options) of the Regulations of Connecticut State Agencies govern the credit against this state's income tax to which a Connecticut taxpayer is entitled for taxes paid to another state on compensation derived from those sources for services performed in both Connecticut and that other state.[13]

[13] It also bears emphasis that, as the trial court explained, compensation from restricted stock is treated as income at the time the stock vests, and compensation derived from stock options generally is treated as income at the time the options are exercised. The parties do not dispute that restricted stock and stock options are treated in this manner for tax purposes under

Mindful of these principles, we turn to the merits of the plaintiffs' claims.

I

We first address the plaintiffs' claim that the court's interpretation of §§ 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies, like that of the commissioner, was flawed, thereby resulting in the wrongful disallowance of certain credits for taxes the plaintiffs had paid to New York. Specifically, the plaintiffs claim that the court misconstrued the regulations by calculating the tax credit on the basis of a computation of the total compensation for the relevant period as including deferred compensation, that is, compensation that Costas received during the grant-to-exercise and grant-to-vest periods but earned *prior* to those periods. In other words, according to the plaintiffs, the court should have calculated the credit to which they were entitled solely on the basis of the compensation that Costas received during the grant-to-exercise and grant-to-vest periods for services performed during those periods and those periods only. The commissioner takes a contrary view, arguing that the court correctly determined the credit to which the plaintiffs were entitled because "[t]he regulations are not concerned with when . . . compensation is 'earned,' but rather when it is received," and the total compensation received by the plaintiffs during the periods in question included

both federal law and Connecticut law. See, e.g., *Allen* v. *Commissioner of Revenue Services*, supra, 324 Conn. 321–22 (explaining that, because stock option generally has no reasonably ascertainable fair market value at time of award and does have value at time it is exercised, taxable income attributable to stock option is calculated at time of exercise). In the case of stock options, the taxable income is measured by the difference between the option price and the fair market value of the stock when the option is exercised, and, in the case of restricted stock, the taxable income is measured by the difference between the price of the stock when it was granted and its fair market value upon vesting.

compensation for services performed both during *and* prior to those periods.

We agree with the commissioner and the court because we conclude that their construction of §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) of the Regulations of Connecticut State Agencies is mandated by the plain language of those two provisions. Under both provisions, the amount of credit to be awarded for taxes paid to another state is determined on the basis of the "same ratio that the *total compensation received* . . . during [the relevant] period for services performed in this state bears to the *total compensation received* . . . during [the relevant] period for services performed within and without this state." (Emphasis added.) Regs., Conn. State Agencies § 12-117(b)-17 (c); accord Regs., Conn. State Agencies § 12-117(b)-18 (c). In the present case, there is no dispute that the deferred compensation at issue, that is, compensation that was paid to Costas during the grant-to-exercise and grant-to-vest periods—and which therefore was taxable at that time—was *received* during those periods. Consequently, that deferred compensation falls squarely within the straightforward regulatory language directing that the computation of credit shall include *all* of the compensation received during the relevant periods for the particular services identified therein.

The plaintiffs nevertheless contend that the regulations contemplate a limitation on the compensation to be included in the apportionment calculation, such that, to be part of the computation, the compensation must also be for services performed during the grant-to-exercise and grant-to-vest periods. That is, the plaintiffs maintain that the provisions should be construed so that the computation excludes compensation, even if it was received during the relevant periods, unless it also was *earned* during those periods. In support of this reading of the regulatory language, the plaintiffs

argue that it is more consistent with the statutory and regulatory purpose of offsetting taxes that they were required to pay to New York under that state's allocation methodology because it more faithfully accounts for the amount of time Costas worked in Connecticut during the grant-to-exercise and grant-to-vest periods relative to the amount of time he worked in New York during those same periods.

The plaintiffs' belief as to how the statutory and regulatory purpose is best served, however, cannot trump the plain and unambiguous language of §§ 12-711(b)-17 (c) and 12-711(b)-18 (c) of the Regulations of Connecticut State Agencies, which is necessarily determinative of the provisions' meaning. Our Supreme Court's observations in this regard with respect to the construction of statutes is equally applicable to the construction of regulations. "It is well established that a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as [our Supreme Court] has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 516, 196 A.3d 315 (2018). Simply put, if the regulatory provisions had been promulgated with the intent that only compensation received *for services performed* during the grant-to-exercise and grant-to-vest periods were to be included in the allocation computation, those provisions undoubtedly would contain language to that effect, and they do not. See, e.g., *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 729, 6 A.3d 763 (2010) (if legislature intended to limit scope of

statutory definition at issue, it "easily could have expressed such an intent"); *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 299, 933 A.2d 256 (2007) (legislature knows how to convey its intent expressly).

Indeed, the plaintiffs have identified no language in §§ 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies to substantiate their reading of those provisions.[14] They argue, however, that those provisions must be understood in the context of the broader regulatory scheme and its overriding purpose, and that their construction of the provisions best achieves that goal. We disagree.

As the commissioner explained in his appellate brief, "Connecticut [need not] provide a one to one tax credit based on the number of days a taxpayer has worked in another jurisdiction. . . . Connecticut's allocation ratio does not measure days worked in New York (or any other jurisdiction), but rather compensation received during the grant-to-exercise [or grant-to-vest] period attributable to New York (or any other jurisdiction). That is, if during the period the benefits the plaintiffs received for services performed in Connecticut

[14] The plaintiffs do assert that, because subsection (c) of both provisions begins with the qualifier "[i]f, *during the period described in subsection (a) of this section*," that is, the grant-to-exercise period and the grant-to-vest period, and thereafter describes the relevant "compensation" as compensation received "*during such period* for services performed in this state," the apparent intent of the provisions is to limit the compensation to be included in the calculation of the credit only to the compensation that was received during that period. (Emphasis in original; internal quotation marks omitted.) The plaintiffs' argument is unavailing because the first reference in subsection (c) to the "period described in subsection (a) of this section" merely delineates the time frame within which services must have been performed partly within and partly without this state so as to implicate the provisions of subsection (c), and the second reference in subsection (c) to that period relates to the "total compensation received" during that period for services performed in this state and contains no limitation as to when the compensation to be included in the computation of credit was earned. Regs., Conn. State Agencies § 12-117(b)-17 (c); accord Regs., Conn. State Agencies § 12-117(b)-18 (c).

were more valuable than the benefits the plaintiffs received for services performed in New York, then the allocation ratio would favor Connecticut over New York, *regardless of the number of days that Costas might have worked in New York during that period.* And because the number of days worked in a place does not necessarily reflect the value of the benefits received from that place, there is a good reason for Connecticut to use this kind of allocation ratio. . . .

"[In sum] Connecticut has decided to allow a tax credit based on the value of the benefits received from another jurisdiction, not the number of days worked in that jurisdiction. Absent some constitutional infirmity, Connecticut is free to calculate its tax credit in this way." (Citation omitted; emphasis in original.)

The commissioner is correct. The plaintiffs have made no claim challenging the constitutionality of the commissioner's construction of §§ 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies. Furthermore, those provisions, construed in accordance with their plain language, do not yield absurd or unworkable results.[15] We therefore reject the plaintiffs'

[15] We note that the plaintiffs also contend that *Allen* v. *Commissioner of Revenue Services*, supra, 324 Conn. 292, supports their interpretation of §§ 12-711(b)-17 and 12-711(b)-18 of the Regulations of Connecticut State Agencies. We are not persuaded. In *Allen*, our Supreme Court was required to determine whether, under subsection (a) of § 12-711(b)-18, the exercise of stock options is taxable if the taxpayer, although performing services in Connecticut at the time the options were awarded, was not performing services in Connecticut at the time the options were exercised. Id., 303. In agreeing with the commissioner that "§ 12-711(b)-18 (a) requires only that the taxpayer [was] performing services in Connecticut at the time the options were granted"; id., 307; our Supreme Court concluded that § 12-711(b)-18 (a) was plain and unambiguous as applied to the taxpayers' claim because that provision was susceptible of only one reasonable interpretation when considered in the context of the regulation as a whole. Id., 308–13. More specifically, the court explained that the interpretation advocated by the taxpayers in that case "would create disharmony within the regulation itself"; id., 309; and "lead to bizarre results." Id., 311. *Allen* does not aid the plaintiffs because it involved an issue entirely different from the one in the present case. Moreover, applying the plain and unambiguous language of §§ 12-

claim that the court erred in concluding that the commissioner incorrectly applied the provisions in determining the tax credit to which the plaintiffs are entitled.

II

The plaintiffs also claim, in the alternative, that the court incorrectly refused to require the commissioner to exercise his discretionary authority under § 12-711(b)-15 of the Regulations of Connecticut State Agencies to approve the apportionment methodology they have advanced. In the plaintiffs' view, applying that methodology—irrespective of the requirements of §§ 12-711(b)-17 and 12-711(b)-18 of the regulations—is, at least in this case, the only approach that fairly and appropriately allocates income for tax credit purposes. The plaintiffs' claim is without merit.

Subsection (a) of § 12-711(b)-15 of the Regulations of Connecticut State Agencies provides in relevant part: "[A] nonresident individual may submit an alternate method of apportionment with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without Connecticut. The proposed method shall be fully explained in the Connecticut nonresident income tax return. If the method proposed by such individual is approved by the [c]ommissioner, it may be used in lieu of the applicable method described in this Part."[16] Relatedly, subsection (b) of § 12-711(b)-15 provides in relevant part: "The methods provided in

711(b)-17 (c) and 12-711(b)-18 (c) to the plaintiffs' claim neither creates disharmony within the regulatory scheme nor leads to a bizarre or untenable result.

[16] It is undisputed that the plaintiffs did not submit or propose an alternate method of apportionment under § 12-711(b)-15 of the Regulations of Connecticut State Agencies in connection with their resident tax returns for taxable years 2005, 2007 and 2008 but did so in connection with the amended tax returns they filed in 2010 for those years. For present purposes, we treat the plaintiffs' proposal for an alternate method of apportionment pursuant to § 12-711(b)-15 on their amended tax returns as sufficient to preserve their claim on appeal under that provision.

this Part are *presumed to result in fair and equitable apportionment, and any person . . . proposing an alternate method of apportionment shall bear the burden of establishing that the methods provided in this Part unfairly and inequitably attributed items of income, gain, loss or deduction to Connecticut.*" (Emphasis added.) Accordingly, under § 12-711(b)-15 (b), the plaintiffs in the present case bear the burden of establishing that the methods provided in §§ 12-711 (b)-17 and 12-711(b)-18 of the regulations, as construed by the commissioner, are so unfair and inequitable as applied to Costas that the commissioner was required to use the alternate method of apportionment proposed by the plaintiffs in determining their tax credit.

In support of their claim under § 12-711(b)-15 (a) of the Regulations of Connecticut State Agencies, the plaintiffs merely repeat their argument that the commissioner's interpretation of §§ 12-711(b)-17 and 12-711(b)-18 of the regulations results in "an unfair and unreasonable allocation of income." We already have explained, however, that the commissioner correctly construed and applied §§ 12-711(b)-17 and 12-711(b)-18 and, consequently, under § 12-711(b)-15 (b), the resulting apportionment thereunder is presumptively fair and equitable. Moreover, the commissioner necessarily must be afforded wide latitude to accept or reject a proposed alternate methodology pursuant to § 12-711(b)-15 (a). Although the plaintiffs are dissatisfied with the apportionment mandated by the regulatory scheme—preferring the apportionment that would result from application of their methodology—that is hardly reason for us to declare that the income allocation derived from the regulations themselves is unfair or unreasonable. Because the plaintiffs have failed to overcome the presumption created by § 12-711(b)-15 (b), we reject their claim under § 12-711(b)-15 (a).

The judgment is affirmed.

In this opinion the other judges concurred.

MERCEDES-BENZ FINANCIAL *v.* 1188 STRATFORD AVENUE, LLC, ET AL.
(AC 43463)

Bright, C. J., and Prescott and Moll, Js.

Syllabus

The plaintiff financing company sought to recover damages from the defendants, a limited liability company and its principal, for the defendants' alleged failure to make payments due under a motor vehicle lease agreement. After the defendants were defaulted for failure to appear, the trial court granted the plaintiff's motion for judgment and rendered judgment for the plaintiff. Thereafter, the court denied the defendants' motion to open and to set aside the default judgment, and the defendants appealed to this court, claiming that the trial court abused its discretion by denying their motion to open and denying their oral request to continue the hearing on the motion to allow them to present testimony and evidence in support of the motion. *Held*:

1. The trial court did not abuse its discretion in denying the defendants' motion to open and to set aside the default judgment: although the court improperly determined that the motion to open was untimely, the court reasonably considered the merits of the motion and determined that the motion had no basis, as the defendants, who were aware of the pending action but failed to take any action in response, were not prevented from appearing as a result of mistake, accident or other reasonable cause; moreover, neither the motion nor the attached affidavit made any reference to an alleged representation that the plaintiff would not be pursuing the action, which the defendants' counsel raised for the first time during the hearing on the motion.

2. The trial court did not abuse its discretion in denying the defendants' oral request to continue the hearing on their motion to open the judgment, the defendants having failed in the affidavit attached to their motion to set forth adequately the reason why they failed to appear; moreover, the defendants had requested only oral argument and not an evidentiary hearing, and the court was not required to continue the matter to allow the defendants to present testimony in support of a claim that was not raised in their motion to open.

(*One judge dissenting*)

Argued May 9—officially released July 19, 2022

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in

the judicial district of Ansonia-Milford, where the defendants were defaulted for failure to appear; thereafter, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the plaintiff's motion for judgment and rendered judgment for the plaintiff; subsequently, the court denied the defendants' motion to open and set aside the default judgment, and the defendants appealed to this court. *Affirmed.*

Daniel D. Skuret III, with whom was *Patrick D. Skuret*, for the appellants (defendants).

Gary Greene, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendants, Aniello Dizenzo and his company, 1188 Stratford Avenue, LLC (company), appeal from the judgment of the trial court denying their motion to open the default judgment rendered in favor of the plaintiff, Mercedes-Benz Financial. The defendants claim that the court abused its discretion by denying their (1) motion to open and (2) oral request to continue the hearing on the motion to allow the defendants to present testimony and evidence in support of it. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. In 2012, Dizenzo, on behalf of his company, entered into a motor vehicle lease agreement (agreement) with a dealership in Fairfield for a 2013 Mercedes-Benz (vehicle). Dizenzo signed the agreement on behalf of his company and also in his individual capacity as guarantor. The dealership assigned its rights under the agreement to the plaintiff. In January, 2017, the plaintiff brought the underlying action against the defendants alleging that the defendants had failed to make the payments due under the agreement. The return date was February 28, 2017, but neither defendant filed an appearance.

On September 1, 2017, the trial court clerk granted the plaintiff's motion for default for failure to appear as to both defendants. On September 1, 2019, more than one year after the default had entered, the plaintiff filed a motion for judgment and order of weekly payments. On May 13, 2019, the court granted the motion, rendering judgment for the plaintiff in the amount of $11,734.61 and awarding the plaintiff postjudgment interest at the annual rate of 8 percent pursuant to General Statutes § 37-3a.[1] The court ordered the defendants to make weekly payments in the amount of $35. On May 28, 2019, the plaintiff sent a notice of judgment to the defendants.

On July 29, 2019, the defendants filed a motion to open the judgment pursuant to General Statutes (Rev. to 2019) § 52-212.[2] In that motion, the defendants asserted that the vehicle "had serious defects" and required repairs that would have taken several months to complete. As a result, the defendants told the dealership that, because the vehicle did not function properly,

[1] General Statutes § 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ."

"An award of interest under § 37-3a is discretionary . . . and 10 percent is the maximum rate of interest that a trial court, in its discretion, can award . . . meaning the court, as in the present case, has the discretion to set a lower rate of interest." (Citations omitted; internal quotation marks omitted.) *Lavy* v. *Lavy*, 190 Conn. App. 186, 208 n.15, 210 A.3d 98 (2019).

[2] General Statutes (Rev. to 2019) § 52-212 provides in relevant part: "(a) Any judgment rendered . . . upon a default . . . may be set aside, within four months following the date on which it was rendered . . . and the case reinstated on the docket . . . upon the . . . written motion of any party . . . prejudiced thereby, showing reasonable cause, or that a good . . . defense in whole or in part existed at the time of the rendition of the judgment . . . and that the . . . defendant was prevented by mistake, accident or other reasonable cause from . . . making the defense. . . .

"(c) The . . . written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the . . . defendant failed to appear. . . ."

All references herein to § 52-212 are to the 2019 revision of the statute.

"the lease was void and they left the [vehicle] with the dealer[ship]." The defendants claimed that, although they were aware of the lawsuit in 2017, they "mistakenly thought [it] was resolved and did not hear anything else until June of 2019, when [they] received notice of judgment." They further claimed that they "ha[d] good defenses to the plaintiff's claim based upon breach of warranties and misrepresentations and w[ould] file a counterclaim . . . when the judgment is set aside." Dizenzo repeated these claims in an affidavit, which was filed with the motion. The plaintiff filed an objection to the motion, claiming that the defendants failed to establish good cause for their failure to appear and that the "[d]efendants' purported defenses and [counter]claims arise from the alleged acts of the dealership, not the plaintiff financing company."

On August 9, 2019, the defendants filed a caseflow request in which they requested oral argument "[t]o explain [the] motion to open judgment . . . and the reasons why the court should grant it." On August 13, 2019, the defendants filed a notice of intention to appear and argue and request for oral argument, requesting "permission to appear and . . . explain the defenses and the reasons why the court should grant the motion . . . ." On September 16, 2019, the court held a hearing on the motion. At the hearing, the court initially thought that judgment had entered in 2017. After the courtroom clerk informed the court that judgment had entered on May 13, 2019, the following exchange occurred:

"The Court: May, June, July, August, September. We are more than four months?

"[The Defendants' Counsel]: No. We . . . filed within time, Your Honor. And you know I asked that this be heard back in August with—

"The Court: All right. So we are barely in time. Tell me; you were served properly, correct?

"[The Defendants' Counsel]: I believe the defendants were served properly.

"The Court: Okay. So 2017.

"[The Defendants' Counsel]: Yes.

"The Court: Versus 2019, with nothing happening—

"[The Defendants' Counsel]: That's right. They didn't—

"The Court: —after being served.

"[The Defendants' Counsel]: Well, it's not that nothing has happened, Your Honor. What, in effect, happened was he contacted [Mercedes-Benz] after that period of time and was told the fact that they weren't going to go forward.

"The Court: Is your client here to testify?

"[The Defendants' Counsel]: Well, what I will do is—I thought this was oral argument. But if you want testimony, we can bring him in.

"The Court: No. No. This is your motion to open. Why should I rely on a pleading [or] a story that there was an agreement, supposedly, and that's why you didn't bother doing anything, when I don't even have an affidavit?

"[The Defendants' Counsel]: You do have an affidavit.

"The Court: To that effect?

"[The Defendants' Counsel]: You have an affidavit.

"The Court: Okay. All right. All right. But was the affidavit cross-examined? Do I have witnesses on the other side? Do we have time for a hearing? Do we have—are we ready for evidence?

"[The Defendants' Counsel]: You know, Your Honor, I thought this was for oral argument, and I'm sorry. It's my fault. And what I will do is if Your Honor just

continues the argument to next week, I'm sure what can happen is that we can bring him forward.

"The Court: And even if you bring him in—Counsel, do you agree there was an agreement not to do anything?

"[The Plaintiff's Counsel]: Absolutely not. And it flies in the face of their own affidavit. Their affidavit articulates that they didn't get the satisfaction they wanted. And they turned around and just left the car with a dealer and said we'll go elsewhere. I mean that's the fair reading of their affidavit.

"[The Defendants' Counsel]: That's not the fair reading.

"[The Plaintiff's Counsel]: More importantly, these defenses, A, are probably time barred because the lease was entered into in November of 2012. And more importantly than that, how do you hold the financing entity culpable for defects in the product you used its money to buy? . . . You go after the dealer. These are Lemon Law type of allegations. We had a lousy car. It didn't work. It had this problem; it had that problem. But Mercedes-Benz Financial had nothing to do with that. They were not the dealer of the car. They were not the owner of the car. They didn't sell the car or lease the car to the defendant[s]. . . .

"[The Defendants' Counsel]: That's not true. . . . I have a copy of the lease. May I show it to Your Honor?

"The Court: Tell me what it says.

"[The Defendants' Counsel]: It says Mercedes-Benz Financial Services.

"The Court: Is the lessor?

"[The Defendants' Counsel]: It says Mercedes-Benz Financial Services, and it's a first class lease. And basically, it's all over here about Mercedes-Benz Financial

Services. And what had, in fact, happened was there's a breach of actual contract. There's a breach with regard to the warranties. It's a violation of the Lemon Law. And basically, he was told the fact that they weren't going to do anything with it. He left the car there because the car was not operable, and he didn't want to actually get anybody injured.

"You know it's a situation where all he wants to do is get his day in court. And he is sorry that this thing didn't actually—he didn't actually move faster with regard to this; that's all. It's very simple. And all we'd like to do is we would like to reopen the judgment; do some discovery with it; file a counterclaim. . . . This two year period of time is very important, actually, to the plaintiff as he is talking. But it is also very important to us because the fact that they did nothing, which is sort of—which shows the fact that when [Dizenzo] talked to them, they weren't going to go forward with regard to the file. Then all of a sudden, this happened.

"The Court: Has he got anything in writing, any communication at all, saying we're not going forward; we are not going to bother you? Anything at all aside from your word or his word? Everybody knows what an e-mail is. There isn't a human being in this country who doesn't know you put things in writing.

"[The Defendants' Counsel]: Well, you are not talking with a person that uses e-mail all of the time, Your Honor. You're talking with a—

"The Court: That's you. How about your client?

"[The Defendants' Counsel]: The client is the same way, and Attorney D.J. Skuret can attest to that. You know my client is around my age, so it's not like he's computer literate so that is not going to happen. All we are doing is we're looking for our day in court, Your Honor; that's all.

"[The Plaintiff's Counsel]: Your Honor, please.

"[The Defendants' Counsel]: And Your Honor has been very fair with regard to the other people that have appeared before Your Honor today. All we are looking for is fairness in getting this set aside so we can go forward with regard to discovery.

"The Court: Your client is savvy enough to have himself an LLC. I bet you he knows what an e-mail is.

"[The Defendants' Counsel]: I think he knows what an e-mail is, but I don't think he's savvy enough to have a—to do e-mail. So with regard to having an—

"The Court: He's got a corporation. Is he smart enough to set up a corporation?

"[The Defendants' Counsel]: I don't think he set up any corporation. I—

"The Court: What's the LLC?

"[The Defendants' Counsel]: The corporation is a limited liability company.

"The Court: I understand. That's a corporation.

"[The Defendants' Counsel]: But I don't think he set it up. He's not savvy enough to set it up. The man was a mechanic, mechanic.

"The Court: Who set it up for him? Who signed the papers?

"[The Defendants' Counsel]: I'll go and I'll check. I didn't know it would be necessary to have it here today.

"The Court: All right. Counsel?

"[The Plaintiff's Counsel]: Yes, Your Honor. May I? Counsel filed an affidavit. And I think it's very illuminating because the affidavit paragraph 5, the dealer represented to me; paragraph 6, the dealer told me. He is

talking about a separate entity. Mercedes-Benz Financial is not the dealer.

"The Court: Correct—

"[The Plaintiff's Counsel]: All of these alleged counterclaims—

"The Court: Correct, counsel? Your affidavit only says the dealer did all of these things. The plaintiff here is not the dealer.

"[The Defendants' Counsel]: Well, let me say this . . . Your Honor. The fact that, number one, with regard to the LLC, it is set up with regard to my client's house, and it's a—

"The Court: No. No, the dealer. Your affidavit says the dealer promised; the dealer made an agreement. It doesn't say anything about the plaintiff.

"[The Defendants' Counsel]: Well, as I indicated to Your Honor, and actually if Your Honor wants—what I can do is I don't have another copy of this, but I do have actually the first class lease. And it's a situation where [Dizenzo] was told the fact that [the plaintiff was not] going forward [with the case]. They waited over two years.

"The Court: But your affidavit tells me it was the dealer who did that.

"[The Defendants' Counsel]: Well, I'm sorry, Your Honor. It was more than the dealer. It was actually it was Mercedes-Benz Financial. Whenever he called, they told him the fact that it wasn't going to go forward. And they waited two years to do it, which is proof [of] the fact that they didn't.

"The Court: That's not proof of anything.

"[The Defendants' Counsel]: Well, it is. The fact that they sat on their—they sat with regard to doing it

because of the fact that—he was told the fact that they weren't going forward.

"The Court: Yes, counsel?

"[The Plaintiff's Counsel]: Well, Your Honor, I have to assume that this affidavit was vetted and probably drafted by [the] defendants' counsel. And it was based on communications based—articulated to him by his client; not the LLC, but the principal in the LLC. And he wouldn't file an affidavit in court that was misleading or inappropriate. And as I said—

"The Court: Anything else, counsel?

"[The Defendants' Counsel]: I'm sorry. I didn't hear that.

"The Court: Anything else?

"[The Defendants' Counsel]: Yes, there is. If this is a question with regard to who he spoke to, then I'm sorry that I didn't bring the client here today. But I will have him available if Your Honor would just continue it for a week.

"The Court: [I am] going to deny the motion to open. It's untimely and it has no basis." The court also issued a written order denying the motion, which stated: "Motion is untimely with no basis." This appeal followed.

I

The defendants first claim that the court abused its discretion in denying their motion to open the judgment because they filed the motion within four months after the judgment was rendered and because they satisfied both prongs of the standard governing the opening of default judgments. The plaintiff agrees that the defendants' motion was filed timely but argues that the defendants failed to establish that they were "prevented by

mistake, accident or other reasonable cause" from appearing and raising their defenses and counterclaims. We agree with the plaintiff.

We begin with the applicable standard of review and controlling legal principles. "A motion to open . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did. . . .

"To open a judgment pursuant to Practice Book § 17-43 (a)[3] and . . . § 52-212 (a), the movant must make a two part showing that (1) a good defense existed at the time an adverse judgment was rendered; and (2) the defense was not at that time raised by reason of mistake, accident or other reasonable cause. . . . The party moving to open a default judgment must not only allege, but also make a showing sufficient to satisfy the two-pronged test [governing the opening of default judgments]. . . . The negligence of a party or his counsel is insufficient for purposes of § 52-212 to set aside a default judgment. . . . Finally, because the movant must satisfy both prongs of this analysis, failure to meet

[3] Practice Book § 17-43 (a), which mirrors § 52-212 (a), provides in relevant part: "Any judgment rendered . . . upon a default . . . may be set aside within four months succeeding the date on which notice was sent . . . upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good . . . defense in whole or in part existed at the time of the rendition of such judgment . . . and that . . . the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. Such written motion shall be verified by the oath of the complainant or the complainant's attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or the defendant failed to appear. . . ."

either prong is fatal to [the] motion." (Footnote added; internal quotation marks omitted.) *Little* v. *Mackeyboy Auto, LLC*, 142 Conn. App. 14, 18–19, 62 A.3d 1164 (2013).

In the present case, the court denied the motion to open, stating: "It's untimely and it has no basis." We agree with the defendants that the court improperly determined that the motion to open was untimely. The defendants filed the motion on July 29, 2019, seventy-seven days after the judgment was rendered on May 13, 2019, which was well within the four month period under § 52-212 (a). Nevertheless, because the court also denied the motion on the ground that "it ha[d] no basis," we conclude that the court properly denied the motion to open.

The defendants contend that the court did not reach the merits of their motion to open because it determined that the motion was untimely.[4] In their principal brief, they repeatedly claim that, "[i]f the court had not erroneously determined that the motion to open judgment was untimely filed and simply stopped its inquiry, the defendants would have been able to show the court that it met the two-prong test for opening the judgment." In addition, at oral argument before this court, the defendants' counsel asserted that he understood the court's order as finding that the motion was untimely and that there was no basis for filing the motion late. This construction of the court's judgment is belied by the record.

Specifically, after the clerk told the court that judgment had been rendered on May 13, 2019, the court

[4] We note that "[t]he statutory limitation imposed on motions to open judgments does not implicate the court's jurisdiction. Rather, our Supreme Court has explained that General Statutes § 52-212a operates as a constraint, not on the trial court's jurisdictional authority, but on its substantive authority to adjudicate the merits of the case before it." (Footnote omitted; internal quotation marks omitted.) *710 Long Ridge Operating Co. II, LLC* v. *Stebbins*, 153 Conn. App. 288, 295, 101 A.3d 292 (2014).

proceeded to ask a series of questions regarding the merits of the motion to open. More specifically, the court questioned the defendants' counsel regarding the second prong of the standard governing motions to open—the reasonable cause for the defendants' failure to appear and to defend the action. The court first sought to determine whether the defendants had been served properly, which the defendants' counsel conceded, stating that he "believe[d] they were served properly." When counsel explained that the defendants did not appear because Dizenzo had been told by the dealership that they were not pursuing the action—an explanation not stated in either the motion to open or Dizenzo's affidavit—the court asked whether the defendants had any documentary evidence of such an agreement. Given the court's questions during the hearing, we are persuaded that the court considered the merits of the defendants' motion and concluded that the motion "ha[d] no basis." In other words, the court concluded that the defendants were not prevented from appearing as a result of "mistake, accident or other reasonable cause." General Statutes (Rev. to 2019) § 52-212 (a); Practice Book § 17-43 (a).

As to the merits of their motion to open, the defendants argue: "On multiple occasions the defendants contacted the lessor after that period of time and were told the fact that they were not going to go forward as the motor vehicle had been returned. Based upon these representations, the defendants did not hire an attorney or file an appearance in the case. The defendants relied on these representations and thus believed that this matter was resolved. The defendants did not hear anything else for over two . . . years until June of 2019, when they received the notice of judgment. Nor did the plaintiff pursue anything in the matter for over two . . . years, which further supports the defendants' understanding that this matter had been resolved."

We again note that the defendants' motion to open and Dizenzo's accompanying affidavit are devoid of any reference to the alleged representations made by either the dealership or the plaintiff as to the continuation of the lawsuit. In each of those documents, with regard to the defendants' failure to appear, the defendants stated: "The defendants . . . when they were sued in 2017, *mistakenly thought this matter was resolved* and did not hear anything else until . . . [they] received notice of judgment."[5] (Emphasis added.) Such an explanation is insufficient under § 52-212 (a) because "a defendant's negligence does not constitute reasonable cause for failing to appear . . . ." *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 533–34, 253 A.3d 1033 (2021). As this court has explained, § 52-212 (a) "is remedial, but it cannot be so construed as to authorize relief . . . where a defendant indeed has received proper notice of the underlying action and the plaintiff's motion for default yet failed to file an appearance." (Citation omitted; internal quotation marks omitted.) Id., 535.

This court's decision in *Berzins* v. *Berzins*, 105 Conn. App. 648, 938 A.2d 1281, cert. denied, 289 Conn. 932, 958 A.2d 156 (2008), is instructive. In *Berzins*, the defendant moved to open a judgment of dissolution rendered on his default for failure to appear; id., 649; claiming "that after being served, the plaintiff informed him that she had withdrawn the action and no longer wanted to proceed." Id., 651. The trial court denied the motion to open, finding that the defendant had been served properly but "simply chose not to appear." Id., 652. The court noted that, assuming that the defendant had relied on such a representation by the plaintiff, "his subsequent negligence supersede[d] his purported reliance

[5] Dizenzo's affidavit stated: "The defendant, [Dizenzo], when he was sued in 2017, mistakenly thought this matter was resolved and did not hear anything until . . . when he received notice of judgment."

on the plaintiff's actions." (Internal quotation marks omitted.) Id. On appeal, this court affirmed the judgment, explaining that "[t]he defendant was served with notice of this action and did nothing. Had he filed an appearance, he would have received notice of the [scheduled] hearing . . . . The court correctly concluded that the defendant's inaction in this case was nothing short of complete and utter negligence." (Internal quotation marks omitted.) Id., 653.

In the present case, as in *Berzins*, the defendants were served with notice of the action and claimed that they failed to appear because, according to their counsel, they relied on an alleged representation that the plaintiff would not pursue the action. Just as the defendant's inaction in *Berzins* constituted "complete and utter negligence"; (internal quotation marks omitted) id.; so too does the defendants' inaction in the present case. The defendants were aware of the pending action but failed to take any action in response. Furthermore, as we noted previously, neither the defendants' motion nor Dizenzo's affidavit made any reference to the alleged representation that their counsel raised for the first time during the hearing on the motion to open. Consequently, because the reason given for the defendants' failure to appear did not constitute reasonable cause for such failure, we conclude that the court did not abuse its discretion when it denied the motion to open as being without basis.

II

The defendants next claim that the court abused its discretion by "denying the defendants an evidentiary hearing and [by] denying the[ir] request for a continuance of one . . . week to allow the defendants to be present to provide the court with testimony and evidence in support of the motion to open judgment." We are not persuaded.

"Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances. . . . An abuse of discretion must be proven by the appellant by showing that the denial of the continuance was unreasonable or arbitrary." (Internal quotation marks omitted.) *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 268, 242 A.3d 542 (2020). Likewise, "unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court." (Internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 797, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

In the present case, the defendants do not claim that an evidentiary hearing was required by a statute, rule of practice, or rule of evidence. Instead, they argue that the court, by failing to allow the defendants to present testimony and submit evidence, "did not properly assess [their] claimed defenses and the reasons for not presenting them as required by the two step process." The defendants further argue that "[i]t was necessary for the court to hold an evidentiary hearing as the plaintiff never provided to the court a legible copy of the claimed lease agreement."

At the outset, we note that, in each of the caseflow requests filed by the defendants, they requested only oral argument—not an evidentiary hearing. It was only after the court asked whether Dizenzo was present to testify as to the plaintiff's alleged representation that it would not pursue the lawsuit that the defendants' counsel requested that the matter be continued in order to present testimony. Moreover, as previously noted, although the defendants' counsel explained that Dizenzo had been told that the plaintiff would not pursue the

lawsuit, this explanation was not presented in either their motion to open or the accompanying affidavit. Section 52-212 (c) requires that a written motion to open "shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and *shall particularly set forth the reason why the plaintiff or defendant failed to appear*." (Emphasis added.) Dizenzo's affidavit failed to provide the detail called for by the statute as to why the defendants failed to appear and certainly did not set forth the claim that the defendants' counsel made at oral argument before the trial court. The statute does not contemplate that a party can file a deficient verified statement and then insist on an evidentiary hearing to correct deficiencies noted by the court. The defendants failed to meet their statutory burden under § 52-212, and the court did not abuse its discretion by refusing to continue the matter to allow the defendants to present testimony in support of a claim that was never raised in their motion to open.

The judgment is affirmed.

In this opinion, MOLL, J., concurred.

PRESCOTT, J., dissenting. I respectfully dissent for three reasons. First, all parties and the majority agree that the trial court improperly determined that the motion to open filed by the defendants, 1188 Stratford Avenue, LLC, and Aniello Dizenzo, was untimely. It plainly was timely. In my view, this error is likely to have tainted the court's decision whether to exercise its discretion, at the very least, to grant the defendants a short continuance in order for them to present evidence in support of their motion to open.

Second, it is not clear to me whether the court's statement "and it has no basis," which immediately follows its incorrect statement that the motion to open

was untimely, refers to the merits of the motion to open or was intended to mean that the defendants have not alleged a sufficient basis, such as fraud, to open a judgment that is older than four months. See *Tyler E. Lyman, Inc.* v. *Lodrini*, 78 Conn. App. 684, 687, 828 A.2d 681 (courts have intrinsic powers, independent of any statutory authority, to grant motion to open default judgment obtained by fraud, duress or mutual mistake, even if motion to open was filed more than four months after judgment rendered), cert. denied, 266 Conn. 917, 833 A.2d 468 (2003). Although the defendants did not file a motion for articulation in order to resolve this ambiguity, I am unwilling to apply the normal presumption regarding the correctness of a trial court's decision in light of the clear error of the court's determination that the motion was not filed within four months of the date judgment was rendered.

Finally, as the majority recognizes, if a motion to open is filed later than four months after the judgment is rendered, the court lacks authority to adjudicate it in the absence of one of the recognized exceptions such as fraud. Because the court had already concluded that the motion was untimely, albeit incorrectly, it should have proceeded no further in adjudicating the motion. I am unwilling in these circumstances to presume that the court's subsequent exercise of its discretion with respect to either the merits of the motion or the decision whether to grant a short continuance, was not affected by its incorrect view that the motion to open was not filed timely.

In sum, regardless of the ultimate merits of the defendants' motion to open, I am of the view that they are entitled to have that motion adjudicated by a trial court that is not laboring under the misapprehension that the motion was late. I, therefore, respectfully dissent.

STATE OF CONNECTICUT *v.* DANIEL GREER (AC 43726)

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

Syllabus

Convicted of four counts of risk of injury to a child, the defendant appealed to this court. The defendant, a rabbi, was a teacher at and served as the dean of a private, Orthodox Jewish high school. The victim, E, attended the school for four years, commencing in 2001. E alleged that, during his sophomore year, when he was fourteen and fifteen years old, he and the defendant met at least once a week to engage in various sexual acts. The defendant continued to engage in sexual acts with E after he turned sixteen years old. In 2016, E reported the sexual abuse to the police. The defendant was arrested and charged with four counts each of sexual assault in the second degree and risk of injury to a child. At trial, the state introduced uncharged misconduct evidence pursuant to a provision (§ 4-5) of the Connecticut Code of Evidence regarding a sexual relationship between the defendant and R, a former student at the school, and the defendant's relationship with E after his sixteenth birthday. Following R's testimony, the court provided a limiting instruction to the jury. After the close of evidence at trial, defense counsel moved for a judgment of acquittal as to the charges of sexual assault in the second degree on the ground that the prosecution was barred by the applicable statute ((Rev. to 2001) § 54-193a, as amended by Public Acts 2002, No. 02-138, § 1) of limitations because E had not notified a police officer or state's attorney within five years of the commission of the offense. The state conceded that the charges were barred, and the trial court granted the motion for a judgment of acquittal. Thereafter, the state filed a new information limited to the four counts of risk of injury to a child. In its final instructions to the jury, the court instructed in relevant part regarding misconduct evidence: "It is for you to determine whether the defendant committed any uncharged sexual misconduct . . . ." The jury found the defendant guilty. The defendant filed postverdict motions for a judgment of acquittal and a new trial, claiming, inter alia, that the limitation period applicable to the charges of sexual assault in the second degree should also apply to the risk of injury charges because the charges were based on the same conduct. The trial court denied the motions, and the defendant appealed to this court. *Held*:

1. The trial court properly denied the defendant's motion for a judgment of acquittal as to the risk of injury charges: our courts previously have concluded that risk of injury to a child and sexual assault are separate and distinct offenses; moreover, contrary to the defendant's assertion, the requirement that a victim notify a police officer or state's attorney of an offense within five years of its commission was limited by the

plain and unambiguous language of § 54-193a to charges of sexual assault in the second degree pursuant to statute (§ 53a-71 (a) (1)); furthermore, if the legislature had intended the additional reporting requirement to also apply to charges of risk of injury under the applicable statute (§ 53-21 (a) (2)), it would have stated so expressly, and, accordingly, for the court to expand the requirement to violations of § 53-21 (a) (2) would be contrary to the presumed intent of the legislature; additionally, applying different statutes of limitations to the two sets of charges would not lead to an absurd or unworkable result, as two criminal statutes can be construed to proscribe the same conduct and a defendant may be prosecuted under either.

2. The trial court properly instructed the jury as to the evidence of uncharged misconduct: the defendant adequately preserved his challenge to the trial court's instructions regarding the uncharged misconduct evidence involving the defendant's continued sexual acts with E after E turned sixteen by stating in his request to charge that, "[a]s to any evidence of uncharged misconduct," the state had the burden to prove such conduct by clear and convincing evidence; moreover, the trial court instructed that it was for the jury "to determine" whether the defendant engaged in the acts of uncharged misconduct and, contrary to the defendant's assertions, there was no meaningful distinction between an instruction that a jury may consider prior misconduct evidence if it "believes" such evidence, which our Supreme Court endorsed in *State* v. *Cutler* (293 Conn. 303) and which is used in the Connecticut Criminal Jury Instructions, and the trial court's use of the word "determine"; accordingly, the trial court's instructions regarding the uncharged misconduct were not deficient.

Argued February 28—officially released July 19, 2022

Procedural History

Substitute information charging the defendant with four counts each of the crimes of sexual assault in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *Alander*, *J.*; thereafter, the court, *Alander*, *J.*, granted the defendant's motion for a judgment of acquittal as to the four counts of sexual assault in the second degree; verdict of guilty of four counts of risk of injury to a child; subsequently, the court, *Alander*, *J.*, denied the defendant's postverdict motions for a judgment of acquittal and a new trial and rendered

judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, with whom was *David T. Grudberg*, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, former state's attorney, and *Maxine Wilensky* and *Karen A. Roberg*, senior assistant state's attorneys, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Daniel Greer, appeals from the judgment of conviction, rendered after a jury trial, of four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the court improperly (1) concluded that the statute of limitations applicable to sexual assault in the second degree under General Statutes (Rev. to 2001) § 54-193a, as amended by Public Acts 2002, No. 02-138, § 1 (effective May 23, 2002) (P.A. 02-138),[1] did not apply to the risk of injury charges and (2) declined to instruct the jury to apply a standard of proof to determine whether certain prior misconduct occurred. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant, who is a rabbi, founded Yeshiva of New Haven, Inc. (yeshiva), a private, Orthodox Jewish school, and served as a dean, rabbi, and teacher at the yeshiva. The victim, E,[2] attended the yeshiva for high

[1] The legislature repealed § 54-193a effective October 1, 2019. Unless otherwise indicated, all references to § 54-193a in this opinion are to the 2001 revision of the statute, as amended by P.A. 02-138.

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

school, beginning his freshman year in August or September, 2001, when he was thirteen years old. E's birthday is in October, and he turned fourteen years old during his freshman year. Shortly after the school year began, E was expelled from the yeshiva, but he was allowed to return to complete his freshman year after spending a few weeks at home.

In 2002, when he was fourteen years old, E returned to the yeshiva for his sophomore year. At some point during the beginning of the school year, the defendant told E to meet him at an apartment adjacent to the school, and E complied. At the apartment, the defendant offered E a can of nuts and an alcoholic drink, either wine or hard liquor, in a red Solo cup. They proceeded to drink and talk about E's family and his future, and E began to get emotional and his head felt "fuzzy . . . ." At some point, the defendant touched E's thigh or crotch area and attempted to kiss him on the lips. When E pulled away and asked the defendant what he was doing, the defendant said that "[i]t wasn't a big deal and that this is what he does to his kids." Nothing further transpired, and E returned to his dormitory.

After the initial incident at the apartment, E and the defendant met at least once a week during his sophomore year at various locations—often in New Haven or at a motel in Branford—and engaged in oral or anal sex. During these encounters, the defendant and E often would consume alcohol. E acknowledged that "the encounters meld together" but was "very sure" that he and the defendant engaged in anal and oral sex during his sophomore year, during which time he was fourteen and fifteen years old. He testified that, during that period, he and the defendant frequently performed oral sex on each other, that he performed anal sex on the defendant "many" times, and that, when the defendant attempted to perform anal sex on E, E forced him to stop because it was too painful. After these encounters,

E would feel "shame, guilt, [and] confusion." At the yeshiva, the defendant gave E preferential treatment and would not yell at him as he regularly did with other students. When E attempted to end the sexual relationship, the defendant stopped giving him preferential treatment and became "nasty" instead of "nice and charming . . . ." The defendant continued to engage in sexual acts with E after he turned sixteen years old in October, 2003.

After graduating in 2005, E went to an Orthodox yeshiva in Israel to continue his Jewish studies and met S, his future wife, while staying there. In 2006, E told S that the defendant had molested him during high school, but he did not provide any details about the abuse. In the summer of 2006, E returned to Connecticut and met the defendant at the Branford motel, where they had their last sexual encounter.

In December, 2007, E and S were married, and the defendant was one of the witnesses at the ceremony, which is a position of honor. E explained that he gave the defendant this honor because he respected the defendant and "still felt part of the New Haven community . . . ." For several years following their marriage, E and S would travel to New Haven for Jewish holidays, where they would share meals with members of the yeshiva community, including the defendant. When E and S had a son in June, 2010, E asked the defendant to hold the baby during the circumcision, which is also a position of honor.

In 2013, E and S bought a house in New Jersey, and E found a rabbi in that community. Around that time, E stopped traveling to New Haven and communicating with the defendant. At some point before 2016, E disclosed the abuse to his therapist and two family friends, one of whom was working at the yeshiva. In May, 2016,

E filed a civil action in federal court against the defendant seeking money damages stemming from the sexual abuse. In August, 2016, while the civil action was pending, E reported the sexual abuse to the New Haven Police Department.

On July 26, 2017, the defendant was arrested and charged with four counts of sexual assault in the second degree under General Statutes § 53a-71 (a) (1)[3] and four counts of risk of injury to a child under § 53-21 (a) (2).[4]

[3] General Statutes § 53a-71 provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person . . . .

"(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court."

Although § 53a-71 has been the subject of several amendments since the defendant's commission of the crime that formed the basis of his conviction; see, e.g., Public Acts 2004, No. 04-130, § 1 (establishing additional form of sexual assault when actor is twenty years old or older and stands in position of power, authority or supervision); Public Acts 2007, No. 07-143, § 1 (increasing, from two to three years, age difference between teenagers required for older individual to be guilty of sexual assault in second degree); those amendments have no bearing on the merits of this appeal. Accordingly, in the interest of simplicity, we refer to the current revision of the statute.

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection . . . ."

Although § 53-21 has been the subject of several amendments since the defendant's commission of the crimes that formed the basis of his conviction; see, e.g., 2007 Public Acts, No. 07-143, § 4 (establishing five year mandatory minimum sentence for violation of § 53-21 (a) (2) when victim is under thirteen years old); 2013 Public Acts, No. 13-297, § 1 (adding additional form of risk of injury); those amendments have no bearing on the merits of this appeal. Accordingly, in the interest of simplicity, we refer to the current revision of the statute.

In the operative long form information, the state alleged that the charged conduct occurred when E was fourteen and fifteen years old, "at the city of New Haven on divers dates between 2002 up to October 27, 2003 . . . ." As the state acknowledged at oral argument before this court, the sexual assault and risk of injury charges were premised on the same conduct—anal intercourse and fellatio.[5]

The case proceeded to a jury trial, and, at the close of evidence, defense counsel moved for a judgment of acquittal as to the charges of sexual assault in the second degree on the ground that the prosecution was barred by the statute of limitations set forth in § 54-193a because E had not notified a police officer or state's attorney within five years after the commission of the offense. After a brief recess, the state conceded that the sexual assault charges are barred under § 54-193a, and the court granted the motion for a judgment of acquittal as to the four counts of sexual assault in the second degree (counts one, three, five, and seven). Thereafter, the state filed a new information limited to the four counts of risk of injury to a child, and the jury found the defendant guilty of those charges.

The defendant filed postverdict motions for a judgment of acquittal and a new trial. In the memorandum of law in support of the motions, the defendant claimed, inter alia, that the same limitation period applicable to

[5] Counts one, three, five, and seven alleged that the defendant violated § 53a-71 (a) (1) by engaging in the following conduct: "anal intercourse—Daniel Greer's penis with [E's] anus" (count one); "fellatio—Daniel Greer's penis in [E's] mouth" (count three); "anal intercourse—[E's] penis in Daniel Greer's anus" (count five); and "fellatio—[E's] penis in Daniel Greer's mouth" (count seven). Counts two, four, six, and eight alleged that the defendant violated § 53-21 (a) (2) based on the following contact between the defendant and E: "Daniel Greer's genital area with [E's] anus" (count two); "Daniel Greer's genital area with [E's] mouth" (count four); "[E's] genital area with Daniel Greer's anus" (count six); and "[E's] penis in Daniel Greer's mouth" (count eight).

sexual assault in the second degree should apply to the risk of injury charges because all of the charges were based on the same conduct.[6] After hearing argument, the court rejected the defendant's statute of limitations claim and denied the motions. Thereafter, the court sentenced the defendant to twenty years of incarceration, execution suspended after twelve years, followed by ten years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the same limitation period that applied to the charges of sexual assault in the second degree also applies to the risk of injury charges, which were based on the same conduct and proved by the same evidence. We are not persuaded.

As a preliminary matter, we set forth our standard of review and the legal principles that guide our analysis. The defendant's statute of limitations claim presents an issue of statutory construction. "Issues of statutory construction present questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *500 North Avenue, LLC* v. *Planning Commission*, 199 Conn. App. 115, 121, 235 A.3d 526, cert. denied, 335 Conn. 959, 239 A.3d 320 (2020); see also *State* v. *George J.*, 280 Conn. 551, 562–63, 910 A.2d 931 (2006) (statute of limitations claims raise questions of statutory construction subject to plenary review), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent

[6] Although the defendant's memorandum stated that it was filed in support of both his motion for a new trial and his motion for a judgment of acquittal, it addressed only the defendant's claim that the risk of injury charges should be dismissed for the same reason that the sexual assault charges were dismissed. Thus, on the basis of the statute of limitations issue raised, the defendant sought a judgment of acquittal and not a new trial.

of the legislature. . . . 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

"[I]t is reasonable to presume that, by rejecting the underlying premise [of a prior decision], the legislature also . . . express[es] its disapproval of [the court's prior] conclusion . . . . The legislature can reject the underlying premise of a decision by changing or deleting a provision on which the court relied. This is especially true when that provision exists elsewhere in the statutory scheme. For instance, [when] a statute, with reference to one subject, contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . This tenet of statutory construction ensures that statutes [are] construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant, and that every sentence, phrase and clause is presumed to have a purpose." (Citations omitted; internal quotation marks omitted.) *Gilmore* v. *Pawn King, Inc.*, 313 Conn. 535, 542–43, 98 A.3d 808 (2014).

"The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts

the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. . . . Indeed, it is because of the remedial nature of criminal statutes of limitation[s] that they are to be liberally interpreted in favor of repose." (Citation omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 677, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

In accordance with § 1-2z, we begin with the text of § 54-193a, which provides in relevant part: "Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense, except a class A felony, involving sexual abuse, sexual exploitation or sexual assault of a minor except within thirty years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense, whichever is earlier, provided if the prosecution is for a violation of subdivision (1) of subsection (a) of section 53a-71 . . . the victim notified such police officer or state's attorney not later than five years after the commission of the offense." General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138.

Thus, for an offense involving sexual abuse, sexual exploitation, or sexual assault of a minor, the statute of limitations is the earlier of (1) thirty years from the date the victim reaches eighteen years old or (2) five years from the date the victim notifies law enforcement

or a state's attorney of the offense. See General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. The legislature, however, provided a further requirement for a violation of § 53a-71 (a) (1), which involves sexual intercourse between a victim at least age thirteen but under age sixteen and an actor at least three years older, that the victim notify a police officer or prosecutor within five years after the offense is committed. See General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. That reporting requirement is at issue in the present case.

It is undisputed that E did not report the defendant's conduct to the police within five years of its occurrence. In fact, it was for this reason that the court granted the judgment of acquittal as to the sexual assault charges. The defendant argues that, because the sexual assault and risk of injury charges were based on the same conduct, "it would be illogical and unreasonable to apply a greater limitation period to that same conduct when it is *simultaneously* prosecuted under the risk of injury statute—a statute that *does not* require proof of sexual intercourse or penetration, and which can be violated simply by proof of over the clothes contact with the intimate parts of the perpetrator or the intimate parts of the child victim. Such a bizarre or irrational result was undoubtedly neither intended nor foreseen by the legislature . . . ." (Emphasis in original; footnote omitted; internal quotation marks omitted.) In response, the state asserts that the plain and unambiguous statutory language defeats the defendant's claim because, "where the legislature expressly has proscribed a shorter statute of limitations for one way of committing a crime . . . a reviewing court cannot presume that it also intended to extend that limitation to other crimes not specifically named."[7] We agree with the state.

[7] The state also contends that the defendant waived this claim by failing to raise it at trial. We disagree.

As a preliminary matter, we note that "[o]ur courts have addressed the relationship between risk of injury to a child and the various degrees of sexual assault in the context of double jeopardy claims on several occasions, each time concluding that the two crimes do not constitute the same offense. In *State* v. *Bletsch*, [281 Conn. 5, 28–29, 912 A.2d 992 (2007)], for example, [our Supreme Court] . . . concluded that, under the charging instruments in that case, the crimes of sexual

In *State* v. *Golodner*, 305 Conn. 330, 355–56, 46 A.3d 71 (2012), the defendant filed postverdict motions for a judgment of acquittal and a new trial, asserting that one count of the substituted information was barred by the applicable statute of limitations. The trial court denied the motion, "stating that the defendant had failed to raise the statute of limitations defense in a timely manner . . . ." Id., 356. On appeal, the state argued "that the defendant waived an affirmative defense based on the statute of limitations by raising it for the first time after the conclusion of trial." Id. In rejecting the state's waiver argument, our Supreme Court noted that a waiver of a statute of limitations defense must be voluntary and intelligent and held that "[t]here [was] nothing to suggest a voluntary waiver on the part of the defendant . . . . His motion for acquittal based on the statute of limitations would suggest the contrary." Id., 359.

In the present case, as in *Golodner*, the defendant raised the statute of limitations defense in postverdict motions and, therefore, he did not voluntarily waive it. Although the state argues that *Golodner* is distinguishable because it involved an amendment to the information and, therefore, the statute of limitations defense was unavailable before trial; see id., 355–56; we are not persuaded that this fact had any bearing on the court's holding in *Golodner*. In fact, the court agreed with the defendant's argument in *Golodner* that Practice Book § 41-8's "use of the phrase 'if made prior to trial' suggests that the motion *does not have to be made before trial*." (Emphasis added.) Id., 356; see also Practice Book § 41-8 (statute of limitations defense "shall, if made prior to trial, be raised by a motion to dismiss the information").

The state also contends that the present case should be controlled by *State* v. *Pugh*, 176 Conn. App. 518, 535, 170 A.3d 710, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017), in which this court held that, because the defendant failed to assert the statute of limitations defense at trial, "the defendant is deemed to have waived such defense and is, therefore, barred from raising it on appeal." Unlike the present case, however, the defendant in *Pugh* failed to raise the statute of limitations claim before the trial court and sought to raise it for the first time on appeal. See id. Therefore, the claim in *Pugh* was unpreserved. Accordingly, we conclude that *Pugh* is distinguishable and that *Golodner* is controlling.

assault in the second degree under . . . § 53a-71 (a), and risk of injury to a child under § 53-21 (a) (2), do not constitute the same offense for double jeopardy purposes because the language of the statutes makes it possible to have 'sexual intercourse' under § 53a-71 (a) without touching the victim's 'intimate parts' under § 53-21 (a) (2), and vice versa." *State* v. *Alvaro F.*, 291 Conn. 1, 7, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009). Accordingly, although the underlying conduct giving rise to the charges in the present case is the same, sexual assault in the second degree and risk of injury to a child are separate and distinct offenses.

Notwithstanding this fact, the defendant, relying on *State* v. *George J.*, supra, 280 Conn. 571–76, contends that the same statute of limitations should apply to both offenses. In *George J.*, the defendant claimed that his prosecutions for two counts of risk of injury to a child were time barred under General Statutes (Rev. to 1993) § 54-193, which provided the statute of limitations for nonclass A felony offenses generally. Id., 571. The defendant argued that General Statutes (Rev. to 1993) § 54-193a, as amended by Public Acts 1993, No. 93-340, § 11 (P.A. 93-340), which provided an extended statute of limitations " 'for any offense involving sexual abuse, sexual exploitation or sexual assault of a minor,' " applied "only to offenses for which sexual abuse, sexual exploitation or sexual assault of a minor is an element of the crime, and that risk of injury is not such an offense because conduct other than sexual acts against minors is encompassed within that offense." Id. At the time of the offense, General Statutes (Rev. to 1993) § 53-21 did not include subsection (2), which was added in 1995 to address sexual contact with a minor child. Id., 573–74 and n.15.

In rejecting the defendant's claim, the court noted that "the legislature has created an extended limitations

period to allow child sexual abuse victims, who may be unable to come forward at the time the offense has occurred, a reasonable opportunity to report the abuse. It would thwart that purpose and create disharmony to apply the extended statute of limitations to a sexual assault offense, but apply the general limitations period of five years from the date of the offense to a risk of injury charge involving the same conduct. The law prefers rational and prudent statutory construction, and we seek to avoid interpretations of statutes that produce odd or illogical outcomes." Id., 574–75.

The defendant contends that "the 'odd or illogical outcome' that the *George J.* court sought to avoid, would occur here if the court allowed the risk of injury convictions to stand—convictions based on the same essential conduct underlying the time barred sexual assault charges. . . . Where, as here, the alleged violations of § 53-21 (a) (2) are based on the same conduct forming the basis for the sexual assault charges under § 53a-71 (a) (1), the same five year statute should apply." (Footnote omitted.) We disagree.

In *George J.*, our Supreme Court sought to determine whether the extended statute of limitations for sex offenses against minors applied to the risk of injury statute despite the fact that General Statutes (Rev. to 1993) § 53-21 did not include a sexual element of the offense. *State* v. *George J.*, supra, 280 Conn. 573. In rejecting the state's contention that General Statutes (Rev. to 1993) § 54-193a "clearly" applied to risk of injury to a child, the court explained that "the meaning of the statute is not plain and unambiguous, because it does not refer expressly either to the crime of risk of injury or to the statute addressing that crime, and there is more than one reasonable construction based solely on the text of the statute. Indeed, because the crime of risk of injury does not *necessarily* involve

sexual abuse, we certainly cannot conclude that [General Statutes (Rev. to 1993)] § 54-193a becomes unambiguous by looking to the crime charged in the present case." (Emphasis in original; internal quotation marks omitted.) Id., 563 n.8. Nevertheless, after considering the specific language the legislature chose to use in General Statutes (Rev. to 1993) § 54-193a, the legislative policy underlying the statute, and the bill analysis prepared by the Office of Legislative Research (OLR), the Supreme Court concluded that the extended statute of limitations applied to risk of injury charges that were based on sexual abuse, sexual assault, or sexual exploitation of a minor. Id., 572–76.

Specifically, the court first noted that, at the time of the defendant's conduct, "[i]t [was] well established that [General Statutes (Rev. to 1993) § 53-21's] proscription on actions that create a risk of 'impair[ing]' the 'health or morals' of a child encompasses a broad range of acts, including sexual acts against minors." Id., 572. The court then defined the question before it as "whether, by creating an extended statute of limitations for '*any* offense . . . *involving* sexual abuse, sexual exploitation or sexual assault of a minor' . . . General Statutes (Rev. to 1993) § 54-193a, as amended by P.A. 93-340, § 11; the legislature intended that the statute apply to any such conduct or only to such conduct when it expressly is prescribed as an element of the offense." (Emphasis in original.) *State* v. *George J.*, supra, 280 Conn. 573. The court answered that question by comparing General Statutes (Rev. to 1993) § 54-193a with other criminal statutes of limitations: "[General Statutes (Rev. to 1993) §] 54-193a is one of three criminal statutes of limitations. Notably, in both of the other statutes of limitations, the legislature specifically has provided the statutory provisions to which the limitations period applies; see General Statutes § 54-193b;[8]

[8] "General Statutes [Rev. to 2005] § 54-193b provides: 'Notwithstanding the provisions of sections 54-193 and 54-193a, a person may be prosecuted

or has delineated the statutory provisions or classes of offenses that are excluded from the limitations period. See General Statutes (Rev. to 1993) § 54-193. By contrast, in § 54-193a, the legislature did not cite specific statutes to which the expanded limitations period applies; rather, it used a broad descriptive phrase, 'any offense[s] involving . . . .' General Statutes (Rev. to 1993) § 54-193a, as amended by P.A. 93-340, § 11. It is difficult to imagine how the legislature could have phrased the statute more expansively and yet still limited its reach to sexual acts against children." (Footnote in original; footnote omitted.) *State* v. *George J.*, supra, 573–74. The court concluded that its interpretation was consistent with OLR's analysis of the public act, which was codified at § 54-193a. Id., 575.

As noted previously in this opinion, the court also discussed the legislative policy underlying General Statutes (Rev. to 1993) § 54-193a and concluded that applying the extended statute of limitations to a sexual assault offense but not to a risk of injury offense based on the same conduct would thwart the policy behind the statute, create disharmony, and produce odd or illogical outcomes. Id., 574–75. It is this policy statement on which the defendant relies to argue that it would create similar disharmony to apply the reporting requirement in § 54-193a to violations of § 53a-71 (a)

for a violation of section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b not later than twenty years from the date of the commission of the offense, provided (1) the victim notified any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense not later than five years after the commission of the offense, and (2) the identity of the person who allegedly committed the offense has been established through a DNA (deoxyribonucleic acid) profile comparison using evidence collected at the time of the commission of the offense.' Although § 54-193b was enacted in 2000; see Public Acts 2000, No. 00-80, § 1; we nonetheless find it useful in discerning the type of language that the legislature could have used in 1995 had it intended that § 54-193a have a more limited, specific reach." *State* v. *George J.*, supra, 280 Conn. 573 n.16.

(1) but not to risk of injury violations based on the same conduct.

The problem with the defendant's argument is that it ignores the plain and unambiguous language of the statute. The legislature specifically identified § 53a-71 (a) (1) as the sole statute to which the additional reporting requirement applies. General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. Given the plain and unambiguous statutory language, we cannot expand § 54-193a's limited exception for a prosecution of sexual assault in the second degree under § 53a-71 (a) (1) and apply it to a risk of injury charge under § 53-21 (a) (2). Indeed, to do so "would contravene the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—[under which] we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded. . . . Put differently, it is well settled that [w]e are not permitted to supply statutory language that the legislature may have chosen to omit." (Citation omitted; internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 776, 160 A.3d 333 (2017).

Furthermore, our conclusion is consistent with the reasoning in *George J.*, in which our Supreme Court expressly relied on the fact that the legislature did not limit the expanded statute of limitations in General Statutes (Rev. to 1993) § 54-193a to specific criminal statutes. *State* v. *George J.*, supra, 280 Conn. 573–74. It further noted that this was in stark contrast to other statutes of limitations that either were limited to specific statutes or excluded specific statutes from their operation. Id., 573. Relevant to the present case, the legislature did not provide that the additional reporting requirement applied to *any offense* involving sexual intercourse with another person between the ages of thirteen and sixteen when the defendant is more than

three years older than such person. Instead, the legislature specifically limited the application of the reporting requirement to only "a violation of subdivision (1) of subsection (a) of section 53a-71 . . . ." General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. Consistent with our Supreme Court's conclusion in *George J.*, we conclude that, had the legislature intended a different application of the statute, it readily could have so provided. See *State* v. *George J.*, supra, 574.

Finally, we are not persuaded that applying a different statute of limitations to the two sets of charges in the present case leads to an absurd or unworkable result. As this court has recognized, "[t]wo criminal statutes can be construed to proscribe the same conduct and a defendant can be prosecuted under either." *Evans* v. *Commissioner of Correction*, 47 Conn. App. 773, 780–81, 709 A.2d 1136, cert. denied, 244 Conn. 921, 714 A.2d 5 (1998). Although the defendant suggests that the legislature intended for the reporting requirement to apply to the *conduct* giving rise to a prosecution of sexual assault in the second degree, as noted previously in this opinion, such an intent is not reflected in the statutory language.

As our Supreme Court has explained, "[o]ur statute of limitations distinguishes between offenses according to their severity, and there is nothing inconsistent in the fact that some prosecutions are barred where others are not. We further believe that confidence in our judicial system would be severely eroded if serious charges were dismissed by the courts for reasons of judicial policy, when the legislature, through the statute of limitations, has manifested an intent that they be prosecuted." *State* v. *Ellis*, 197 Conn. 436, 476, 497 A.2d 974 (1985). In the present case, we are persuaded that the legislature, by establishing an extended statute of limitations for "*any offense* . . . involving sexual abuse,

sexual exploitation or sexual assault of a minor," has manifested an intent that charges of risk of injury to a child should be prosecuted, so long as the prosecution occurs within the extended statute of limitations. (Emphasis added.) General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138; see also *State* v. *George J.*, supra, 280 Conn. 574 ("[i]t is difficult to imagine how the legislature could have phrased [General Statutes (Rev. to 1993) § 54-193a] more expansively and yet still limited its reach to sexual acts against children"). The fact that the legislature identified a single statutory exception to that extended statute of limitations for a prosecution of sexual assault in the second degree does not indicate a contrary intent.

In sum, the legislature carved out a single exception to the extended statute of limitations under § 54-193a for the prosecution of a violation of § 53a-71 (a) (1). Had the legislature intended for the same exception to apply to § 53-21 (a) (2), it would have stated so expressly. Consequently, we conclude that § 54-193a is unambiguous and does not yield absurd or unworkable results. Therefore, the court properly denied the defendant's motion for a judgment of acquittal as to the risk of injury charges.[9]

[9] The defendant also claims that, "[i]f this court has any reasonable doubt about the proper scope of § 54-193a, relief should be granted as a matter of lenity." "[T]he touchstone of this rule of lenity is statutory ambiguity. . . . [W]e . . . [reserve] lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." (Emphasis in original; internal quotation marks omitted.) *State* v. *Palmenta*, 168 Conn. App. 37, 47, 144 A.3d 503, cert. dismissed, 323 Conn. 930, 150 A.3d 230 (2016), and cert. denied, 323 Conn. 931, 150 A.3d 231 (2016). Here, because we conclude that the statute is not ambiguous and that it does not lead to absurd or unworkable results, we have no reason to resort to the rule of lenity. See id. ("[b]ecause we conclude that, after full resort to the process of statutory construction, there is no reasonable doubt as to the meaning of the statute, we need not resort to the rule of lenity"); see also General Statutes § 1-2z (when meaning of text of statute "is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered").

II

The defendant next claims that the court, in its mid-trial and final instructions to the jury, improperly failed to provide the jury with a standard of proof to apply in determining whether the defendant had committed acts of uncharged misconduct. In response, the state argues that the defendant's challenge to the court's instruction as to the evidence of uncharged misconduct with E is unpreserved and unreviewable and that the court properly instructed the jury regarding the evidence of uncharged sexual misconduct with another student, R. We conclude that the defendant's claim is preserved and that the court properly instructed the jury.

The following additional facts and procedural history are relevant to the defendant's claim. Before trial, the state filed a motion to introduce uncharged misconduct evidence pursuant to § 4-5 of the Connecticut Code of Evidence.[10] The state sought to introduce evidence

[10] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "(a) General Rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

"(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

"(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. . . ."

regarding a sexual relationship between the defendant and R, a former student who attended the yeshiva in 2008, and the defendant's sexual relationship with E after E's sixteenth birthday. Following oral argument, the court granted the state's motion, determining that the defendant's uncharged sexual misconduct with R was admissible to establish the defendant's propensity to commit the type of sexual misconduct with which he was charged under § 4-5 (b) of the Connecticut Code of Evidence and that the continuation of the defendant's sexual relationship with E was admissible to show the defendant's common plan or scheme to have continuous sexual relations with E under § 4-5 (c).[11]

At trial, the state presented testimony from E regarding incidents that occurred after his sixteenth birthday. Before the state elicited that testimony, the court provided a limiting instruction to the jury.[12] The state also presented testimony from R regarding incidents of uncharged sexual misconduct. R testified that, in 2008, when he was thirteen or fourteen years old, the defendant had tutored him at the yeshiva. R recounted that

[11] The court explained that, "[t]o the extent that the subsequent sexual activity between the defendant and [E] is not viewed as misconduct, the issue becomes one of relevancy. . . . Evidence that the defendant and [E] had a sexual relationship after the alleged sexual misconduct in this case is probative of the full nature of their relationship and the prior sexual misconduct as well as the reason why [E] did not immediately report the sexual misconduct to the police."

[12] The court stated: "You're now going to be hearing evidence where . . . the witness is going to claim that he had sexual relations with the defendant after he turned sixteen. . . . [The defendant is] not charged with any crimes related to that, but you will be hearing about that.

"It's not being offered to show the bad character of the defendant, it's not being offered to show his propensity to commit crimes. It's being offered to show—it's being offered for a limited purpose; one, to show the complete nature of relationship between this witness and the defendant, and the state's also offering it to show that the defendant had in his mind a common plan to continue to have sexual relations and to have sexual relationships with [E]. I'll give you further instructions on this when I give you my final instructions on the law that applies to this case."

the defendant frequently would touch R's crotch to get R's attention and that, when R attempted to position himself in such a way to avoid that contact, the defendant would touch R's "butt" instead. R also testified regarding one particular incident where, after he told the defendant that he received a good grade, the defendant drove him to a local park to celebrate. When they arrived at the park, they sat on a bench, and the defendant pulled out a bottle of wine, two plastic cups, and a can of nuts. After drinking some of the wine, R began to feel dizzy and decided to eat some of the nuts. R testified that, while he was eating the nuts, the defendant was "trying to, like, French kiss me and I was trying to keep my mouth shut." When R became upset, the defendant "got all embarrassed and said, like, 'oh, I'm out of line, it must be the alcohol.' " The defendant then brought R back to the school.

Following R's testimony, the court provided the following limiting instruction to the jury: "The state is claiming that the defendant engaged in other sexual . . . misconduct with someone other than [E], particularly with . . . [R]. The defendant has not been charged with any offense related to this alleged conduct. In a criminal case such as this in which the defendant is charged with a crime involving sexual misconduct, evidence of the defendant's commission of other sexual misconduct is admissible and may be considered to prove that the defendant had the propensity or tendency to engage in the type of criminal sexual behavior with which he is charged. However, evidence of prior misconduct on its own is not sufficient to prove that the defendant is guilty of the crimes charged in the information. It is for you to determine whether the defendant committed any uncharged sexual misconduct and, if so, the extent, if any, to which that evidence establishes that the defendant had the . . . propensity or tendency to engage in criminal sexual behavior. Please bear in

mind as you consider this evidence that at all times the state has the burden of proving that the defendant committed each of the elements of the offenses which he is charged in the information, and I remind you that the defendant is not on trial for any act, conduct or offense not charged in the information."

Before the charge conference, the defendant filed a written request to charge regarding uncharged sexual misconduct, which provided in relevant part: "It is for you to determine whether the state has proven by clear and convincing evidence whether the defendant committed the alleged uncharged sexual misconduct. If you find that the state has met that standard, then you may determine the extent, if any, to which that evidence establishes that the defendant had a propensity or tendency to engage in criminal sexual behavior. Bear in mind as you consider this evidence that, at all times, the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. As to any evidence of uncharged misconduct, the state's burden is to prove that conduct by clear and convincing evidence." (Footnote omitted.)

At the charge conference, the following exchange occurred between the court and defense counsel:

"The Court: . . . [Y]ou're asking me to tell the jury that any uncharged sexual misconduct has to be proven by clear and convincing evidence.

"[Defense Counsel]: Correct.

"The Court: Do you have any authority for that?

"[Defense Counsel]: It's cited, Your Honor. It's out-of-state authority. . . .

"The Court: And this says 'but see [*State* v. *Cutler*, 293 Conn. 303, 977 A.2d 209 (2009), overruled in part

on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014)],' is that contrary authority?

"[Defense Counsel]: Absolutely. Yes.

"The Court: Okay. So you're asking me to overrule the Connecticut Supreme Court. . . . Your request is duly filed. That's not the law in the state of Connecticut and it's not—

"[Defense Counsel]: A journey of a million miles, Your Honor, begins with but a single step.

"The Court: No, I—I understand you may be pre—preserving for appellate review; I have no quarrel with that."

Shortly thereafter, while discussing the portion of the court's draft charge regarding evidence of the continuing sexual relationship between E and the defendant, which was titled "Evidence of Other Misconduct," defense counsel requested that the court instruct the jury that "[i]t is for you to determine, one, whether the state has proven such acts occurred . . . [and] [t]wo, if proven, whether they established what the state seeks to establish . . . ." Defense counsel explained that "[t]he way this is drafted it assumes that it has been proven; it doesn't really leave to the jury to determine. It essentially says, look, I, the judge, have admitted those, here's how you're supposed to use this, okay." When the prosecutor asked defense counsel to repeat himself, the court explained that "[h]e wants to emphasize that the state has to prove that these acts occurred." An exchange between the court and defense counsel followed:

"The Court: How . . . is it not clear when it says it is for you to determine; one, whether such acts occurred? How . . . does that assume that they've been proven?

"[Defense Counsel]: Because it's—it's the burden of the state to—to prove it. . . . Okay, they have to prove it. . . . What I asked for earlier was a standard by which they can determine whether it was proven, that's a—a flaw in our scheme for these—for addressing these types of cases. The court, having rejected my request and anticipating—

"The Court: No, it's not a flaw, it's that you want a higher standard than the law requires. It's not that there isn't a standard, the standard is preponderance of the evidence, you gotta prove these facts by the preponderance of the evidence this—this uncharged misconduct or other misconduct; you have to prove the elements of the crime beyond a reasonable doubt.

"[Defense Counsel]: And you have to—my position is that the state has to prove these by some standard, okay, and—and the way this is phrased without putting it that way essentially there's an imprimatur from the court that these things are valid and have been proven.

"The Court: Yeah, I don't read it that way . . . ."

The court denied the defendant's requests and subsequently instructed the jury regarding the uncharged misconduct evidence as follows: "The state has submitted evidence that the defendant engaged in sexual misconduct with [R]. The defendant has not been charged in this case with any offenses related to this alleged conduct. In a criminal case such as this in which the defendant is charged with a crime involving sex—sexual misconduct, evidence of the defendant's commission of other sexual misconduct is admissible and may be considered to prove that the defendant had the propensity or a tendency to engage in the type of criminal sexual behavior with which he is charged. However, evidence of prior misconduct on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. *It is for you to determine whether the*

defendant committed any uncharged sexual misconduct and, if so, the extent, if any, to which that evidence establishes that the defendant had the propensity or a tendency to engage in criminal sexual behavior. Bear in mind as you consider this evidence that, at all times, the state has the burden of proving that the defendant committed each of the elements of the offenses charged in the information. I remind you that the defendant is not on trial for any act, conduct or offense not charged in the information.

"The state has also presented that the defendant continued to have sexual relations with [E] after [E] reached the age of sixteen . . . . This evidence has not been admitted to prove the bad character of the defendant or the defendant's tendency to commit criminal acts and it cannot be used by you for such purposes. Such evidence has been admitted for a limited purpose only. This evidence was admitted to show or explain the full extent of the sexual relationship be—between the defendant and [E] and to show a common plan or scheme by the defendant to have continuous sexual relations with [E]. The evidence may be used by you only for those purposes. *It is for you to determine*, *one*, *whether such acts occurred* and, two, if they occurred, whether they establish what the state seeks to establish." (Emphasis added.)

A

We first address whether the defendant preserved his claim of instructional error regarding the evidence of uncharged misconduct with E. The state claims that, in his written request to charge, "the defendant only asked the court to instruct that the state had to prove by clear and convincing evidence 'alleged uncharged sexual misconduct' admitted to prove 'that the defendant had a propensity or tendency to engage in criminal sexual behavior.' " Significantly, however, the second

to last sentence of the request to charge provided: "*As to any evidence of uncharged misconduct*, the state's burden is to prove that conduct by clear and convincing evidence." (Emphasis added.) Moreover, the court understood the scope of the defendant's request to charge because the court explained: "It's not that there isn't a standard, the standard is preponderance of the evidence, you gotta prove these facts by the preponderance of the evidence this—*this uncharged misconduct or other misconduct* . . . ." (Emphasis added.) Consequently, we conclude that the defendant adequately preserved his challenge to the court's instructions as to the uncharged misconduct evidence involving E. See *State* v. *Ramon A. G.*, 336 Conn. 386, 395, 246 A.3d 481 (2020) ("[b]ecause the sine qua non of preservation is fair notice . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity *to place the trial court on reasonable notice* of that very same claim" (emphasis added; internal quotation marks omitted)).

B

Having determined that the defendant preserved his claim that the court improperly failed to provide the jury with a standard by which to determine whether the acts of uncharged misconduct occurred, we now consider its merits.

We begin our analysis with the standard of review. "When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort

but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Arroyo*, 292 Conn. 558, 566, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

In *State* v. *Cutler*, supra, 293 Conn. 303, our Supreme Court addressed a claim similar to the defendant's claim in the present case. In *Cutler*, the defendant claimed that the trial court improperly failed to instruct the jury to apply a preponderance of the evidence standard in considering uncharged misconduct evidence. Id., 315. The challenged instructions provided: "You may consider such evidence if you believe it, and further find that it logically and rationally supports the issue for which it is being offered by the state, but only as it may bear on the issue of intent. On the other hand, if you don't believe such evidence, or even if you do, if you find that it does not logically and rationally support the issue for which [it] is being offered by the state, namely the defendant's intent, then you may not consider the testimony for any purpose." (Internal quotation marks omitted.) Id., 316.

Our Supreme Court disagreed with the defendant and concluded "that it is not necessary that a trial court instruct the jury that it must find, by a preponderance of the evidence, that prior acts of misconduct actually occurred at the hands of the defendant. Instead, a jury may consider prior misconduct evidence for the proper purpose for which it is admitted if there is evidence from which the jury reasonably could conclude that the defendant actually committed the misconduct." (Footnote omitted.) Id., 322. The court explained that the trial court's "use of the word 'believe' comports with the

requirement that a jury may consider prior misconduct evidence if there is evidence from which it reasonably could conclude that the defendant committed the acts. . . . [I]t is clear that the trial court's use of the word 'believe' is not only correct in law, but also sufficiently guides the jury as to its consideration of the prior misconduct evidence. If the jury believes the prior misconduct evidence, it follows logically that there is evidence from which the jury reasonably could conclude that the defendant committed the prior acts of misconduct." Id., 322–23.[13]

In the present case, the defendant notes that the "believe" instruction endorsed in *Cutler* is used in the Connecticut Criminal Jury Instructions[14] and by Connecticut judges when instructing on uncharged misconduct. He argues that, in the present case, he "*did not even* get the benefit of the (lower than a preponderance) 'believe' standard, which has its own deficiencies. Instead, the jury was allowed to make its decisions (on whether the defendant committed any misconduct) unfettered by any uniform standard. . . . The court's instructional omission was patently erroneous." (Emphasis in original; footnote omitted.) We disagree.

[13] In *State* v. *Ortiz*, 343 Conn. 566, 601–602, A.3d (2022), which was decided after the present appeal had been argued, our Supreme Court reaffirmed its holding in *Cutler*. The court explained that, in *Cutler*, it had expressly rejected a claim that the trial court was required to instruct the jury that it must find prior misconduct evidence to be proven by a heightened standard and emphasized that "it saw *no reason to impose on trial courts a jury instruction that requires jurors to consider the properly admissible prior misconduct evidence at a higher standard*." (Emphasis in original; internal quotation marks omitted.) Id., 602 n.13.

[14] With respect to evidence of uncharged misconduct, the model jury instructions provide in relevant part: "You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issue[s] for which it is being offered by the state, but only as it may bear on the issue[s] [for which it was admitted]. . . ." Connecticut Criminal Jury Instructions 2.6-5, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 11, 2022).

Here, the court instructed that it was for the jury "to determine" whether the defendant engaged in the uncharged misconduct. We discern no meaningful distinction between the "believe" standard endorsed in *Cutler* and the court's use of the word "determine" in the present case. For that reason, we are not persuaded that the court's instructions were deficient. If anything, "determine" is a stronger standard than "believe." When used as a transitive verb, "believe" means "to consider to be true or honest" or "to accept the word or evidence of" or "to hold as an opinion . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 112. In the same context, "determine" means "to settle or decide by choice of alternatives or possibilities" or "to find out or come to a decision about by investigation, reasoning, or calculation . . . ." Id., p. 340. Thus, "believe" connotes, at least to some extent, subjective and emotional reasoning, whereas "determine" connotes more objective and logical reasoning. Accordingly, we find no error in the court's instructions to the jury that it must determine that something occurred rather than believe that it occurred. Consequently, we conclude that our Supreme Court's decision in *Cutler* controls and, therefore, that the court properly instructed the jury regarding the uncharged misconduct evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALEXANDER A. GARRISON
(AC 43796)

Prescott, Suarez and Bishop, Js.

Syllabus

The defendant, who had been convicted, after a trial to the court, of the crime of assault in the first degree, appealed to this court, claiming that the trial court had improperly denied his motion to suppress certain

statements he made to police officers while he was in a hospital examining room where he was attached to an intravenous line. The defendant claimed that the statements were inadmissible because they were the product of custodial interrogation, and the police had not advised him of his rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436). The state disagreed and claimed that, even if the police were required to advise the defendant of his rights pursuant to *Miranda*, the admission of his statements at trial was harmless beyond a reasonable doubt. The defendant had visited P and another man at their apartment, where the men consumed beer and whiskey and socialized. The men became highly intoxicated. An argument ensued, and P punched the defendant in the face. The defendant thereafter attacked P from behind and stabbed him six times with a knife. The defendant then walked to a nearby hospital. He was brought to the examining room, where he remained that evening and into the early morning for about four and one-half hours. The attending physician did not permit him to be discharged until he regained sobriety. At various times, five different police officers conducted multiple rounds of questioning of the defendant in his hospital room, during which he made inculpatory statements. One of the officers also transcribed the defendant's version of the events at issue, placed him under oath, instructed him to sign the written statement and then left the hospital room. The officer returned later and informed the defendant that he was free to leave the hospital but only if the medical staff allowed him to do so. None of the officers ever advised the defendant of his rights pursuant to *Miranda* or told him that he was under arrest or that he could terminate the interviews at any time. The questioning by the officers lasted, collectively, about one hour. Some of the officers wore plain clothes; others were in uniform and visibly armed with their service weapons. Several officers were in the defendant's room at the same time during three of the interviews. Hospital security guards and medical staff also were in the room during some of the questioning. The trial court denied the defendant's motion to suppress, reasoning that he had failed to prove that he was in custody for purposes of *Miranda* and that a person in his position would have understood that his freedom of action was curtailed to a degree associated with a formal arrest. *Held*:

1. Contrary to the trial court's determination, the defendant was in police custody for purposes of *Miranda*: the police did not explain to the defendant that they were not holding or detaining him until more than two hours after their first encounter with him, at no point did they inform him that he was free to stop answering their questions, and the police dominated atmosphere in his hospital room, with multiple officers entering and exiting for numerous rounds of questioning at various points throughout the evening, created a large and intimidating police presence that could undermine an individual's decision to remain silent; moreover, this court was unpersuaded that the factors that militated against a finding that the defendant was in custody outweighed the

coercive features of his detention, as five different police officers repeatedly questioned him for one hour, collectively, during the late evening into the early morning hours, the surroundings in which the questioning took place were not familiar to the defendant, who had a tenth grade education and was intoxicated during the questioning, and, although the defendant was alert enough to be able to converse with the police and the medical staff, in light of the police dominated atmosphere, his ability to request assistance from the medical staff to terminate the police interrogation did not mean that a reasonable person in his position would believe he was at liberty to do so; furthermore, a person in the defendant's position reasonably would have believed he was in police custody to the degree associated with a formal arrest, as the defendant was presented with inherently coercive pressures that included the officers' conduct, which conveyed a clear message of complete, unfettered and temporally indefinite police control, the restraint the medical attendants imposed on him for purposes of his treatment, and of which the police took advantage, and the extensive duration of the questioning by multiple police officers and their failure to advise him that he was free to terminate the interviews.

2. The police officers' questioning of the defendant constituted the functional equivalent of interrogation for purposes of *Miranda*, and the police were required to advise him of his rights pursuant to *Miranda* before eliciting statements from him and should have known that their questions reasonably were likely to elicit incriminating statements; the officers repeatedly asked the defendant to provide his version of the altercation with P, their questions were not objectively neutral and unrelated to the altercation but implied that the defendant was involved in it and explicitly called for responses regarding the altercation, for which he was later prosecuted, and, despite the testimony of one of the officers that he did not advise the defendant of his *Miranda* rights prior to taking his statement because, in the officer's mind, the defendant was not a suspect, the officer's subjective understanding of whether the defendant was a suspect did not overcome the strong, highly relevant relationship between the questions asked by all of the officers and the crime committed.

3. Contrary to the state's contention, the admission of the defendant's inculpatory statements at trial was not harmless beyond a reasonable doubt, and, therefore, the defendant was entitled to a new trial: this court could not say that the defendant's statements were relatively benign or facially innocuous, as the trial court explicitly relied on at least one of them in determining that the state had proven beyond a reasonable doubt the element of intent, a requisite element of the charge of assault in the first degree; moreover, the state extensively cross-examined the defendant at trial as to several of the statements he made to the police and recited them to the jury at the conclusion of the trial; furthermore, the court's

analysis of the defendant's claim of self-defense may have been influenced by many of the defendant's statements, which incriminated him with regard to various elements of that claim and may have had a tendency to demonstrate that he ignored any duty to retreat he may have had.

Argued January 10—officially released July 19, 2022

Procedural History

Information charging the defendant with the crimes of assault in the first degree and tampering with physical evidence, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the court, *Seeley*, *J.*; subsequently, the court, *Seeley*, *J.*, granted the defendant's motion for a judgment of acquittal as to the charge of tampering with physical evidence; judgment of guilty of assault in the first degree, from which the defendant appealed to this court. *Reversed*; *new trial.*

Erica A. Barber, for the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Jaclyn Preville*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Alexander A. Garrison, appeals from the judgment of conviction, rendered following a bench trial, of one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). The defendant claims that the trial court improperly denied his motion to suppress statements that he made to police officers while he was at a hospital because the statements (1) were made as a result of custodial interrogation and he had not been advised of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), at the time he

made the statements, and (2) were involuntarily given.[1] We agree with the defendant that the police obtained his statements as a result of custodial interrogation without providing to the defendant the advisement required by *Miranda*, and, therefore, the court improperly denied his motion to suppress. We further agree that the defendant was prejudiced by the admission of his statements and, accordingly, reverse the judgment of conviction and remand the case for a new trial.

Before setting forth the relevant facts and procedural history, we first set forth the applicable standard of review of a trial court's determination as to whether a person was "in custody" for *Miranda* purposes. "The

[1] In his principal appellate brief, the defendant additionally claims that the court improperly denied his motion to suppress the statements because the police officers who interviewed him did not electronically record the entire interrogation, as he asserts is required by General Statutes § 54-1o. The defendant withdrew this claim in his reply brief. Accordingly, we do not address it.

The defendant also claims on appeal that the court improperly denied his motion seeking dismissal of the case against him or other forms of relief because the prosecution had failed to timely disclose certain material evidence to the defense. Specifically, the defendant contends that the state failed to timely disclose impeachment material concerning the victim's probationary conditions. See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Because we conclude that the judgment of conviction must be reversed on other grounds and the matter remanded for a new trial, it is unnecessary to reach this claim. We recognize that our Supreme Court has held that, "[u]nder *Oregon* v. *Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), and its progeny, the double jeopardy clause will bar the retrial . . . of a . . . defendant whose conviction [in the first trial] . . . was secured by prosecutorial misconduct . . . if the prosecutor in the first trial engaged in misconduct with the intent to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Colton*, 234 Conn. 683, 687–96, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996). Our careful reading of the defendant's appellate briefs, however, reveals that he does not argue to this court that, in the event that he prevailed on appeal on his *Brady* claim, he is entitled to a judgment of acquittal. See id.; see also *Oregon* v. *Kennedy*, supra, 667.

trial court's determination of the historical circumstances surrounding the defendant's interrogation [entails] findings of fact . . . which will not be overturned unless they are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 197, 85 A.3d 627 (2014); see also *State* v. *Edmonds*, 323 Conn. 34, 39, 145 A.3d 861 (2016) ("we must, of course, defer to [a] trial court's factual findings"). If, however, "a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights . . . and the credibility of witnesses is not the primary issue"; (internal quotation marks omitted) *State* v. *Castillo*, 329 Conn. 311, 321, 186 A.3d 672 (2018); "our usual deference . . . is qualified by the necessity for a scrupulous examination of the record to ascertain whether [each] finding is supported by substantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Edmonds*, supra, 39; see also *State* v. *Mullins*, 288 Conn. 345, 362, 952 A.2d 784 (2008) (employing same standard of review over trial court's conclusion that defendant was not subjected to custodial interrogation), overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013). Thus, "[i]n order to determine the [factual] issue of custody . . . we will conduct a scrupulous examination of the record . . . in order to ascertain whether, in light of the totality of the circumstances, the trial court's finding is supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 197.

Our Supreme Court in *Edmonds* described this standard as requiring "a more probing factual review . . . ." (Internal quotation marks omitted.) *State* v. *Edmonds*, supra, 323 Conn. 39. Specifically, our Supreme Court explained, in scrupulously examining the record to ascertain whether the court's finding is supported by substantial evidence, "we are bound to consider not

only the trial court's factual findings, but also . . . *we must take account of any undisputed evidence that does not support the trial court's ruling . . . but that the trial court did not expressly discredit*." (Emphasis added; internal quotation marks omitted.) Id. In *Edmonds*, our Supreme Court reviewed the trial court's factual findings, as well as the undisputed testimony and evidence in the record, to resolve factual ambiguities in the court's decision.[2] See id., 44–46.

"The ultimate inquiry as to whether, in light of [the] factual circumstances, a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal

[2] Our Supreme Court in *Edmonds* specifically noted that "some ambiguity" existed; *State* v. *Edmonds*, supra, 323 Conn. 44; with respect to the factual circumstances surrounding the police search of a defendant in a parking lot and their seizure of narcotics from the defendant's person. See id., 39–44. Our Supreme Court stated, "[t]he precise sequence of events from the time the [police] officers entered the [parking] lot until they frisked the defendant [was] less clear. . . . The officers' testimony at the . . . hearing [on the defendant's motion to suppress], together with the trial court's subsequent factual findings, injected some ambiguity into [multiple parts] of the" sequence of events that the police officers had written in a police report; id., 43–45; including (1) whether a police sergeant who responded to the scene did so "precisely at the same time as" the arresting officers; id., 44; and (2) when the defendant was stopped by the police. See id., 44–45.

The Supreme Court stated that, although the trial court had found that the officers and the sergeant had "entered the parking lot *at the same time*"; (emphasis in original; internal quotation marks omitted) id., 45; "the police report [and the officers' testimony] . . . indicated that [the officers] entered the lot . . . shortly *before* [the sergeant] . . . and the record contain[ed] no evidence to the contrary . . . ." (Emphasis in original.) Id. Thus, our Supreme Court concluded, "*we must understand the* [*trial*] *court's finding* that the two [police] cruisers entered at the same time to mean that the two cruisers arrived at the lot at *approximately* the same time . . . ." (Emphasis altered.) Id. Further, to ascertain when the defendant was stopped by the police, our Supreme Court likewise reviewed the undisputed testimony of the officers, which it determined was "consistent with the police report"; id.; because "the trial court [had] made no findings" as to the issue. Id., 46. Accordingly, our Supreme Court referenced the officers' testimony, consistent with the police report, with respect to when the defendant was stopped by the police. See id., 45–46, 59.

arrest . . . calls for application of the controlling legal standard to the historical facts [and] . . . therefore, presents a . . . question of law . . . over which our review is de novo. . . . In other words . . . we exercise plenary review over the ultimate issue of custody." (Citation omitted; internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 197.

We now turn to the present case. The following procedural history and facts, either found by the court, *Bhatt*, *J.*, and set forth in its memorandum of decision on the defendant's motion to suppress, or found by the court, *Seeley*, *J.*, and set forth in its memorandum of decision, and as "supplemented by the undisputed [evidence]" in the record; *State* v. *Edmonds*, supra, 323 Conn. 39; are relevant to our resolution of this appeal. During the early evening hours of June 22, 2018, the defendant arrived at the apartment of his friend, Timothy Murphy, located in Vernon. William Patten, Murphy's cousin, also resided in the apartment. Murphy had invited the defendant to sleep at the apartment because the defendant had been staying at a local shelter. Murphy, Patten, and the defendant initially watched television, talked, and played guitar in the living room of the apartment, during which time they consumed beer and whiskey.

At approximately 6 p.m., Murphy, Patten, and the defendant decided to move to the lawn outside of the apartment. They built a fire pit and continued to drink beer and whiskey for several hours. Eventually, the men became highly intoxicated.[3] Later in the evening, Patten and the defendant began to argue, exchanging insults and offensive language. Eventually, the disagreement became physical; Patten and the defendant began to " 'tussl[e],' " pushed one another and, at some point,

[3] Later in the evening, after Patten and the defendant arrived at Rockville General Hospital in Vernon for treatment of injuries, medical staff determined that Patten had a blood alcohol content level of 0.31 and that the defendant had a blood alcohol content level of 0.217.

fell onto the ground near the fire pit. Patten gained an advantage over the defendant and punched him in the face.

After Patten punched the defendant, the pair stopped fighting, stood up from the ground, and sat around the fire once more. After a few minutes, the defendant attacked Patten from behind and, specifically, stabbed Patten in his back, front shoulder area, and arm using a Smith and Wesson folding knife.[4] In response, Patten grabbed the defendant's shirt and arm, pulled the defendant over his shoulder, and kicked the defendant away. This second altercation lasted approximately thirty seconds.

After the defendant stabbed Patten, Patten reentered his apartment. While Patten was inside, Murphy confronted the defendant and asked him what had happened. The defendant did not answer Murphy's question; instead, he stated repeatedly that he had blood on his body.

Meanwhile, Patten attempted to tend to his wounds inside of the apartment. He observed exposed muscle and tissue on his left arm and was unable to stop his wounds from bleeding. Patten then walked to Rockville General Hospital in Vernon (hospital), which was located approximately 500 yards from the apartment. Once he reached the hospital, he sat down outside of the building. He remained outside of the hospital until a hospital employee found him at approximately 9:45 p.m. Patten's injuries were determined to be life threatening, as he had lost approximately 30 to 40 percent of his blood volume. He later was transferred via a Life Star helicopter to Saint Francis Hospital and Medical Center in Hartford to receive additional care.

[4] The defendant stabbed Patten three times in the back, twice in the arm, and once in the front shoulder.

Back at the apartment and at some point after Patten had reentered the apartment following the second altercation, Murphy went inside to look for Patten. Murphy became nervous, however, when he observed a large amount of blood in the bathroom and could not find Patten. Murphy returned to the fire pit area and once again asked the defendant what had happened. Murphy additionally told the defendant to leave and said that he was going to call the police.

Before the defendant left the property, he threw the knife into an adjacent yard.[5] The defendant then walked to the hospital and arrived at approximately 9:42 p.m. A registered nurse, Sarah Hoyle, transported the defendant in a wheelchair to a hospital examining room and began to evaluate him. The defendant reported to the hospital staff that he had been struck in the nose and had sustained a brief loss of consciousness. He also informed the hospital staff that he was experiencing nasal pain and nasal swelling. The defendant was admitted, and the hospital conducted computed tomography (CT) imaging on his nose. The CT imaging revealed that the defendant had sustained a broken nose.

Due to the defendant's level of intoxication, the attending physician on duty that evening, Sarah Rajchel, mandated that the defendant be discharged from the hospital only after he became clinically sober. Thus, medical staff prohibited the defendant from leaving the hospital until he regained sobriety. Although the defendant "clearly [was] intoxicated," he was able to communicate with medical staff and others.

The defendant changed into a hospital gown, which he wore throughout the evening, and the hospital staff collected his clothes and other belongings and placed them into bags. At approximately 11 p.m. that evening,

[5] The police later recovered the knife. Subsequent forensic testing established that Patten's blood was on the knife.

police officers, who had arrived at the hospital earlier in the evening, requested that the defendant sign a consent form, allowing the police to seize and search his clothing. After the defendant signed the consent form, the police seized his clothing.

Several police officers—including Officer Ethan Roberge, Officer Thomas Bugbee, Detective Charles Hicking, Detective Michael Patrizz, Sergeant Christopher Pryputniewicz, and Detective Sergeant David Hatheway of the Vernon Police Department—were dispatched to the hospital throughout the evening. Between approximately 9:42 p.m. on June 22, 2018, the time at which the defendant arrived at the hospital, and shortly before 2:30 a.m. on June 23, 2018, the time at which he was discharged from the hospital, five of the officers questioned the defendant at various points during the evening. The multiple rounds of police questioning of the defendant collectively lasted approximately one hour. During three of the interviews, several police officers stood in the defendant's hospital room at the same time.

Roberge, the first officer to arrive at the hospital, was dispatched to the hospital at approximately 9:42 p.m. and arrived shortly thereafter. He wore a police uniform, and his service firearm was visible. Before entering the defendant's hospital room, Roberge unsuccessfully attempted to interview Patten, who, at that time, was unconscious in a nearby hospital room. Roberge then entered the defendant's hospital room and questioned the defendant from approximately 9:49 p.m. until 9:54 p.m.[6] Although Roberge was the only police officer in the hospital room during this interview, two hospital security guards also were present in the room.

[6] Roberge wore a body camera on his person, which he activated when he interacted with the defendant. The full audio and video recordings of the interactions between the defendant and Roberge were admitted into evidence during the suppression hearing and during the subsequent criminal trial.

Medical staff were present in the room as well. At no point prior to or during his conversation with the defendant did Roberge advise the defendant of his *Miranda* rights or inform the defendant that he was free to leave.

At the conclusion of their conversation, Roberge exited the defendant's hospital room and, upon exiting the room, had a conversation with two other officers on the premises.[7] At some point after he exited the defendant's room, Roberge then entered *Patten*'s hospital room to attempt to speak with him. Before he asked *Patten* any questions, Roberge advised *Patten* of his rights pursuant to *Miranda*.

At approximately 9:47 p.m., Hicking arrived at the hospital, dressed in plain clothes. His service weapon was not visible. Hicking entered the defendant's room, asked the nurse in the room if he could speak with the defendant, and subsequently began to question the defendant.[8] The defendant recounted his altercation with Patten to Hicking, and Hicking asked the defendant clarifying questions as to his version of events. During the conversation, the defendant stated, inter alia, "I take shit from no one." At some point, nursing staff interrupted the conversation between Hicking and the defendant to perform medical duties. At no point prior to or during his conversation with the defendant did Hicking advise the defendant of his *Miranda* rights or inform the defendant that he was free to leave.

Bugbee also was dispatched to the hospital and arrived in uniform, with his service weapon visible.

[7] Roberge additionally reentered the defendant's hospital room at approximately 10 p.m. and exited one minute later. He neither advised the defendant of his *Miranda* rights nor informed the defendant that he was free to leave during this second interaction.

[8] A portion of Hicking's conversation with the defendant was recorded by Bugbee's body camera. The audio and video recording was admitted into evidence during the suppression hearing and at the subsequent criminal trial.

Upon his arrival, Bugbee conferred with the other officers present at the hospital and subsequently entered the defendant's hospital room. Bugbee entered the defendant's room as Hicking was questioning the defendant about the altercation. Hicking ordered Bugbee to take a statement from the defendant, then exited the room. Bugbee told the defendant that he would take a statement, that the defendant should tell him what had happened, and that he would write down the defendant's version of events.[9] During this initial interaction, the defendant stated to Bugbee, inter alia, "I don't flight, I fight," "I'm a peaceable person until you get in my face, then I fuck you up," and, "I take shit from no one." Additionally, during this interaction between Bugbee and the defendant, Hoyle entered the defendant's hospital room and inserted an intravenous (IV) line into the defendant.[10] After approximately thirty

[9] Bugbee was wearing a body camera, which he activated before he spoke with the defendant. The full audio and video recordings of each of Bugbee's and the defendant's conversations from Bugbee's body camera were admitted into evidence during the suppression hearing, and portions of the recordings were admitted into evidence at the subsequent criminal trial.

[10] In its memorandum of decision on the defendant's motion to suppress, the court found the following: At no point during the defendant's stay at the hospital was he ever physically *restrained* or tied to medical equipment restricting his freedom of movement, *except for an IV at the beginning of his treatment*"; (emphasis added); "[h]e was *not restrained in any way*"; (emphasis added); "[the defendant] was not physically *restrained in any way*, by medical staff or [the] police"; (emphasis added); and, "[u]nlike the defendant [in] *Mincey* [v. *Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)], [the defendant in the present case] was not tied to any *tubes*, *needles* or breathing apparatus." (Emphasis added.)

These findings raise two concerns. First, despite the court's finding that, "[u]nlike the defendant [in] *Mincey*, [the defendant in the present case] was not tied to any *tubes*, *needles* or breathing apparatus[es]"; (emphasis added); the court simultaneously found that the defendant was attached to an IV line "at the beginning of his treatment." Second,, the court did not clarify what it meant by its use of the ambiguous term "restrained" in this context. We address each concern in turn.

With respect to the court's contradictory findings, a brief review of the United States Supreme Court's decision in *Mincey* is necessary. In *Mincey*, the United States Supreme Court concluded that a defendant's statements, which he made to the police from his hospital bed, were involuntarily made.

minutes, during which the defendant recounted the

See *Mincey* v. *Arizona*, supra, 437 U.S. 398–401. The defendant in *Mincey* was encumbered by "tubes, needles, and [a] breathing apparatus"; id., 399; when he was questioned, including "[t]ubes [that had been] inserted into his throat to help him breathe, and through his nose into his stomach to keep him from vomiting; [as well as] a catheter [that had been] inserted into his bladder. [The defendant also] received various drugs, and a device was attached to his arm so that he could be fed intravenously." Id., 396.

In the present case, to reconcile the court's seemingly contradictory statements, we read the court's statement, "[u]nlike the defendant [in] *Mincey*, [the defendant in the present case] was not tied to any tubes, needles or breathing apparatus," to mean that the court found that the defendant was not encumbered by the type of tubes, needles, and breathing apparatus that encumbered the defendant in *Mincey* or to the extent that the defendant in *Mincey* was so encumbered. Nonetheless, as the court also found in the present case, and it is undisputed, the defendant *was* attached to an IV line "at the beginning of his treatment."

With respect to our second concern—the court's use of the term "restrained"—we are unsure, simply by reading the court's memorandum of decision, what meaning the court intended to accord to the term "restrained" in this context. The court could have meant "*police* restraint," such as restraint by handcuffs. The court, however, equally could have meant "*hospital* restraint." We likewise are unsure whether the court, by finding that the defendant was not "restrained," determined that the defendant was not tethered to an IV line at any point when he was questioned by the police. Significantly, the court did not make any explicit factual findings concerning the time or times at which the IV line was inserted, exactly how long the IV line remained inserted, or the time at which the IV line was removed from the defendant. Thus, we " 'scrupulous[ly] examin[e]' "; *State* v. *Edmonds*, supra, 323 Conn. 39; the undisputed evidence in the record and the factual findings of the court to resolve whether the defendant was tethered to an IV line when he was questioned by the police. See id., 39, 44–46 (reviewing court's factual findings, as well as undisputed testimony and evidence in record, to resolve factual ambiguities in court's decision).

We have reviewed the defendant's medical records, which were admitted into evidence during the hearing on the defendant's motion to suppress and at trial. The medical records include the following notes from the night in question: (1) as entered into the medical record at 9:50 p.m. by physician's assistant Brian Karwaski, "[s]tart IV/saline lock"; and (2) as entered into the medical record at 10:27 p.m. by Hoyle, "(IV start kit used) Site #1: (20 gauge) IV catheter left hand IV site labeled per protocol" at approximately 10:20 p.m., and "[b]lood obtained from the left hand via IV attempted times 1" at approximately 10:20 p.m. We note that, during the suppression hearing, Hoyle testified that she had "inserted" an IV line into the defendant "soon after" he arrived at the hospital for the purpose of conducting a blood test.

altercation and Bugbee transcribed the defendant's version of events, Bugbee placed the defendant under oath, instructed the defendant to sign the written statement that he had transcribed, and exited the hospital room. At no point prior to or during this conversation did Bugbee advise the defendant of his *Miranda* rights or inform the defendant that he was free to leave.

At approximately 11:07 p.m., Bugbee reentered the defendant's room alongside Hatheway, who also had

We also note, as the court found, that the defendant arrived at the hospital at approximately 9:42 p.m.

We additionally observe that Bugbee questioned the defendant in his hospital room from 10:13 p.m. until 10:42 p.m., as reflected by the time stamps on the video footage from his body camera. Bugbee had activated the body camera when he entered the defendant's hospital room, and its video footage later was admitted into evidence during the suppression hearing. Bugbee testified during the suppression hearing that he "[did not] recall" whether the defendant was "hooked up to any medical equipment" at any point when he questioned the defendant.

Our careful review of the video recordings from Bugbee's body camera reveals that, at 10:13 p.m. and 10:17 p.m.—at which times the defendant's hands and arms momentarily were visible on the video recording—there does not appear to be an IV line or IV port in the defendant's hands or arms. At approximately 10:18 p.m., however, a nurse entered the video frame and spoke with the defendant. Although, between 10:18 p.m. and 10:22 p.m., the video camera was positioned such that a viewer of the video recording is unable to see the defendant's left hand and arm as well as what the nurse was doing, the audio recording from the video reflects that the defendant stated to the nurse at 10:19 p.m., "needles don't affect me." At 10:22 p.m., the nurse visibly exited the frame. At 10:42 p.m.—at which point the defendant's hands once again became visible on the video recording—an IV port, inserted into the defendant's left hand, was visible for the first time.

Because (1) Hoyle testified that she inserted an IV line into the defendant for the purposes of completing a blood test "soon after" he arrived at the hospital, (2) the video footage depicts Bugbee questioning the defendant from 10:13 p.m. until 10:42 p.m., (3) the video footage depicts that, at some point during Bugbee's interview, an IV port was inserted into the defendant's hand, and (4) the medical records reflect that Hoyle inserted an IV line into the defendant at approximately 10:20 p.m., and the record contains no evidence to the contrary, a fair reading of the court's finding that the defendant was attached to an IV line "at the beginning of his treatment" refers to when Hoyle inserted an IV into the defendant at approximately 10:20 p.m., during Bugbee's interrogation of him.

responded to the hospital. Hatheway was wearing plain clothes, but his badge and service weapon were visible. Hatheway questioned the defendant about the defendant's version of events, and Bugbee remained in the room during the interview.[11] At no point prior to or during his conversation with the defendant did Hatheway advise the defendant of his *Miranda* rights or inform the defendant that he was free to leave.

At approximately 12:09 a.m., Bugbee informed the defendant for the first time that, "as far as the police were concerned," the defendant was free to leave the hospital, but only if hospital personnel allowed him to leave. At 12:26 a.m., Bugbee again reiterated that, as far as the police were concerned, the defendant was free to leave, subject to the hospital's directive that the defendant could not leave the hospital until after he became clinically sober.[12] The defendant stated to Bugbee that he understood the hospital directive that he could not leave until after he became sober. Bugbee remained at the hospital until he was informed by police Lieutenant Lucas Gallant that the defendant would not be arrested that evening. Bugbee did not advise the defendant of his *Miranda* rights at any point during the evening.

[11] Hatheway's conversation with the defendant was recorded using Bugbee's and Pryputniewicz' body cameras, which Bugbee and Pryputniewicz had activated. The audio and video recordings of the conversation were admitted into evidence as full exhibits during both the suppression hearing and the subsequent criminal trial.

[12] Our review of the record—specifically, the recordings from Bugbee's body camera that were admitted into evidence during the suppression hearing—reveals that, at approximately 12:09 a.m., Bugbee informed the defendant for the first time, and only after the defendant already had been subjected to extensive questioning, that he was "pretty much free to go at any time . . . *with the exception of what the hospital's got to do*"; (emphasis added); and, at approximately 12:25 a.m., Bugbee told the defendant, "I think it's a *hospital policy*, because you've been drinking, that *they can't release you right away. . . . I think you . . . have to wait* [*a*] *couple of hours until* [*hospital staff*] *say that you're good to go. . . .* [T]hey're going to keep you as long as they have to." (Emphasis added.)

Patrizz arrived at the hospital after first responding to the scene of the apartment. He wore plain clothes, but his badge and service weapon were visible. At approximately 1:30 a.m., he and Hicking entered the defendant's room, and Patrizz began to question the defendant.[13] Patrizz asked the defendant to provide his version of events. After approximately five to ten minutes, the defendant expressed frustration at the fact that he had to repeat his story multiple times and indicated that he did not want to speak to the officers anymore. Patrizz and Hicking left the hospital at approximately 2 a.m. At no point prior to or during their conversation did Patrizz advise the defendant of his *Miranda* rights or inform the defendant that he was free to leave.

The defendant provided several statements, including inculpatory admissions, to the police throughout the evening. The defendant recounted his version of events. He told the police that he "wasn't in the right" for stabbing Patten, then stated, "I mean, look at what he did," while pointing at his nose. He also told the police, "I take shit from no one, you swing at me, I'm going to end you." The defendant additionally stated, "I'm a peaceable person until you get in my face, then I'll fuck you up," "[w]hen it comes to fight or flight, I fight," and, "[h]onestly, I can't take shit from no one." The defendant was not advised of his *Miranda* rights at any point while he was at the hospital.

The defendant was arrested on June 24, 2018, and arraigned the following day on June 25, 2018. The defendant was charged with one count of assault in the first degree in violation of § 53a-59 (a) (1) and one count of tampering with physical evidence in violation of General Statutes § 53a-155.

On April 22, 2019, the defendant moved to suppress portions of the statements that he had given to the

[13] This conversation was not recorded.

police at the hospital. Specifically, he sought to suppress the verbal statements that he made to Hicking, Bugbee, Hatheway, and Patrizz.[14] He also sought to suppress the written statement transcribed by Bugbee. The defendant contended, inter alia, that the statements were inadmissible because they were the product of custodial interrogation, and he had not been advised of his rights pursuant to *Miranda* v. *Arizona*, supra, 384 U.S. 478–79.[15] In memoranda of law in support of his motion to suppress, the defendant argued that a reasonable person in his position would not have believed he was free to leave and that, under the circumstances, he was in custody for purposes of *Miranda*. Because the police had not advised him of his *Miranda* rights before eliciting his statements, the defendant contended that his statements were inadmissible. In its response to the defendant's motion to suppress, dated May 20, 2019, the state maintained that the defendant neither was in custody, nor subjected to police interrogation at the hospital.

The court, *Bhatt*, *J.*, held a hearing on the defendant's motion to suppress on May 8, 9 and 13, 2019. Following

[14] During closing argument at the conclusion of the suppression hearing and in his posthearing memorandum of law in support of his motion to suppress, dated May 20, 2019, the defendant clarified that he specifically sought to suppress the statements that he had made to Hicking, Bugbee, Hatheway, and Patrizz between approximately 10 p.m. on June 22, 2018, and 2 a.m. on June 23, 2018. The defendant did not seek to suppress the statements that he made to Roberge, which included the following: he "wasn't in the right" for stabbing Patten; "I mean, look at what he did," while pointing at his nose; and, "I take shit from no one, you swing at me, I'm going to end you."

[15] The defendant additionally contended that the statements were inadmissible because (1) he involuntarily had provided the statements to the police, (2) the statements failed to meet the statutory requirements of General Statutes § 54-1o, (3) the rule of completeness, codified in § 1-5 of the Connecticut Code of Evidence, precluded their admission, and (4) the probative value of the statements was outweighed by the danger of their unfair prejudice pursuant to § 4-3 of the Connecticut Code of Evidence.

the conclusion of the hearing, the court issued a memorandum of decision, dated June 5, 2019, denying the defendant's motion to suppress the statements. The court concluded that the defendant had failed to prove that a reasonable person in his position would have understood his freedom of action to be curtailed to a degree associated with a formal arrest.

In so concluding, the court noted that the police did not transport the defendant to, or themselves physically restrain the defendant at, the hospital. The court stated that the police did not request that medical staff cease administering treatment to the defendant or prolong his treatment; by contrast, the police "appeared to defer" to the medical staff's treatment plan. The court also noted that the defendant conversed freely with the medical staff and police officers who entered his hospital room and found that the defendant was "coherent, alert, oriented, and able to communicate fully and effectively" throughout his time at the hospital. The court further noted that, although the police did not inform the defendant that he was free to leave prior to 12:09 a.m. or that he could terminate the interviews, the police did not tell the defendant that he was *prohibited* from leaving when the hospital staff was ready to discharge him. The court stated that the defendant had expressed a willingness and an eagerness to talk to the police and did not indicate to medical personnel or anyone else that he wanted to terminate the interviews. Finally, the court noted that the defendant eventually terminated the interviews at the end of the night, at which point the police ceased asking him questions.

The court acknowledged that five different police officers "questioned [the defendant] repeatedly" during the approximately four and one-half hours between 9:40 p.m. and 2:20 a.m. and that multiple other police officers were present both in the defendant's hospital room and

at the hospital generally throughout the evening.[16] The court also noted that the police officers interviewed the defendant for a total of approximately one hour between 9:40 p.m. and 2:20 a.m.[17] The court acknowledged that, although some of the officers who interviewed the defendant were wearing plain clothes, multiple officers were in uniform, and multiple officers visibly were armed with service weapons. The court additionally acknowledged that the defendant was "physically confined to the hospital until medical staff deemed that it was medically appropriate for him to be discharged," and that, at the beginning of the evening, a nurse had connected the defendant to an IV. The court noted that the medical staff had obtained the defendant's clothing, which the police seized and took into custody with the defendant's consent.

Further, the court found that the police did not inform the defendant that he was free to leave until 12:09 a.m. The court acknowledged that the police never informed the defendant that he was a suspect or that he could terminate their questioning of him. The court also noted that the defendant was intoxicated, had a tenth grade education and, in the past, may have been taking medication for attention deficit hyperactivity disorder, depression, and anxiety. The court, however, concluded that these circumstances did not render the defendant "especially vulnerable to police intimidation"; *State* v. *Jackson*, 304 Conn. 383, 419, 40 A.3d 290 (2012); or create a situation in which a reasonable person in his position would have believed that the police restraint on his freedom of movement was akin to restraint associated with a formal arrest. Accordingly, the court determined that the defendant had failed to meet his burden

[16] The court determined that the defendant was aware of at least one officer outside of his room; at one point during the evening, the defendant summoned Bugbee into the room.

[17] The court nonetheless concluded that "[t]he duration of [the] questioning was not excessive . . . ."

of proving that he was in custody for purposes of *Miranda*.[18]

Subsequently, the court, *Seeley*, *J.*,[19] conducted a bench trial over the course of multiple nonconsecutive days in June and July, 2019. At trial, the defendant claimed, among other things, that he was acting in self-defense when he injured Patten. Following the conclusion of the trial, the court found the defendant guilty of assault in the first degree.[20] In its written decision, dated August 26, 2019, the court concluded that the state had proven each element of the crime of assault in the first degree beyond a reasonable doubt.[21] With respect to the intent element—that is, that the defendant possessed the specific intent to cause serious physical injury to Patten—the court determined that the defendant's statement to the police that he was "a peaceable person until [someone got] in [his] face, then [he would] fuck [that person] up," supported a conclusion that he had intended to cause serious physical injury to Patten. The court also pointed to the circumstances of the stabbing, including that the defendant approached Patten from behind and stabbed him six

[18] Because it concluded that the defendant had failed to establish that he was in custody, the court declined to consider whether the police had subjected him to interrogation for purposes of *Miranda*.

[19] The defendant affirmatively waived his right to a jury trial on May 7, 2019.

[20] After the state rested, the defendant moved for a judgment of acquittal as to both counts. On July 1, 2019, the court orally denied the defendant's motion as to the first count, assault in the first degree, and granted the motion as to the second count, tampering with physical evidence. In granting the motion as to the second count, the court concluded that no rational fact finder could find, based on the evidence the state had presented, that the defendant had altered, destroyed, concealed, or removed the knife or that he did so with the purpose of impairing its verity or availability as evidence. See General Statutes § 53a-155 (a) (1).

[21] General Statutes § 53a-59 provides in relevant part: "(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

times, and that the stab wounds, some of which were located near Patten's vital organs, were deep, as evidence from which the court could infer that the defendant intended to cause serious physical injury. With respect to the causation and deadly weapon elements of § 53a-59 (a) (1)—that is, that the defendant caused serious physical injury to Patten and did so by means of a dangerous instrument—the court determined that the defendant's admission to the police that he had stabbed Patten with a knife indicated that the defendant caused serious physical injury to Patten by means of a dangerous instrument. The court also rejected the defendant's claim of self-defense, finding that the state had disproven beyond a reasonable doubt that the defendant subjectively believed Patten was about to use deadly physical force against him such that the defendant's use of potentially deadly physical force against Patten was justified.

The defendant subsequently was sentenced to ten years of incarceration, execution suspended after seven years, and five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendant claims on appeal that he was entitled to suppression of the statements he made to the police at the hospital because they were the result of custodial interrogation and that he had not been advised of his *Miranda* rights before the police elicited the statements. The defendant specifically contends that the court improperly concluded that he had failed to establish that he was in custody for purposes of *Miranda* when he made the statements to Hicking, Bugbee, Hatheway, and Patrizz. He argues that a reasonable person in his position would have understood that his freedom to terminate the police interviews was restricted to a degree associated with a formal arrest.

We agree with the defendant that his statements should have been suppressed.

I

We first address the defendant's contention that he was in custody for purposes of *Miranda*. We begin by setting forth the relevant legal principles. "Although [a]ny [police] interview of [an individual] suspected of a crime . . . [has] coercive aspects to it . . . only an interrogation that occurs when a suspect is in custody heightens the risk that statements obtained therefrom are not the product of the suspect's free choice. . . . This is so because the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements . . . . [T]he court in *Miranda* was concerned with protecting defendants against interrogations that take place in a police-dominated atmosphere, containing inherently compelling pressures [that] work to undermine the individual's will to resist and to compel him to speak [when] he would not otherwise do so freely . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 191. Thus, "[i]t is well established that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination. *Miranda* v. *Arizona*, [supra, 384 U.S. 444]. Two threshold conditions must be satisfied in order to [require] the warnings constitutionally [mandated] by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 294, 25 A.3d 648 (2011). "[E]ven patently voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case . . . ." (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 191 n.8.

"By adequately and effectively appris[ing] [a suspect] of his rights and reassuring the suspect that the exercise of those rights must be fully honored, the *Miranda* warnings combat [the] pressures inherent in custodial interrogations. . . . In so doing, they enhance the trustworthiness of any statements that may be elicited during an interrogation. . . . Consequently, police officers are not required to administer *Miranda* warnings to everyone whom they question . . . [but] rather, they must provide such warnings only to persons who are subject to custodial interrogation." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 191–92.

"As used in . . . *Miranda* [and its progeny], custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. . . . In determining whether a person is in custody in this sense . . . the United States Supreme Court has adopted an objective, reasonable person test . . . the initial step [of which] is to ascertain whether, in light of the objective[22] circumstances of the interrogation . . . a reasonable person [would] have felt [that] he or she was not at liberty to terminate the interrogation and [to] leave. . . . Determining whether an individual's freedom of movement [has been] curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. [Accordingly, the United States Supreme Court has] decline[d] to accord talismanic power to the freedom-of-movement inquiry . . . and [has] instead asked the additional question [of] whether the relevant environment presents the same

[22] "We emphasize that the test for whether an interrogation was custodial is an objective one. [T]he subjective views harbored by either the interrogating officers or the person being questioned are irrelevant. . . . The test, in other words, involves no consideration of the actual mindset of the particular suspect subjected to police questioning." (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 198 n.13.

inherently coercive pressures as the type of station house questioning at issue in *Miranda*." (Citations omitted; footnote added; internal quotation marks omitted.) Id., 193.

"Of course, the clearest example of custody for purposes of *Miranda* occurs when a suspect has been formally arrested. As *Miranda* makes clear, however, custodial interrogation includes questioning initiated by law enforcement officers after a suspect has been arrested or otherwise deprived of his freedom of action *in any significant way*. . . . Thus, not all restrictions on a suspect's freedom of action rise to the level of custody for *Miranda* purposes; in other words, the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. . . . Rather, the ultimate inquiry is whether a reasonable person in the defendant's position would believe that there was a restraint on [his] freedom of movement of the degree associated with a formal arrest." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 194. "The defendant bears the burden of proving custodial interrogation." (Internal quotation marks omitted.) *State* v. *Marsan*, 192 Conn. App. 49, 67, 216 A.3d 818, cert. denied, 333 Conn. 939, 218 A.3d 1049 (2019).

Our Supreme Court in *Mangual* set forth a nonexhaustive list of factors that courts may consider in determining whether a suspect was in custody for purposes of *Miranda*; see *State* v. *Mangual*, supra, 311 Conn. 196–97; and noted that the ultimate determination "must be based on the circumstances of each case," as opposed to a "definitive list of factors . . . ." (Internal quotation marks omitted.) Id., 196. These factors include "(1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not

under arrest; (4) who initiated the encounter; (5) the location of the interview; (6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." Id., 197.

Our Supreme Court explained in *Jackson* that, "[w]hen a defendant has been questioned by the police in a hospital, factors that [our Supreme] [C]ourt has considered in determining whether [a] defendant was in custody for *Miranda* purposes include whether the police physically restrained the defendant in any way or ordered the medical attendants to restrain him physically . . . whether the police took advantage of an inherently coercive situation created by any physical restraint that the medical attendants may have [imposed on] him for purposes of his treatment . . . whether the defendant was able to converse with . . . other people, express annoyance or request assistance from them . . . and the duration of the questioning. . . . Other factors that courts have considered [when a defendant has been questioned by the police in a hospital] include whether the police took a criminal suspect to the hospital from the scene of a crime, monitored the patient's stay, stationed themselves outside the door, [or] arranged an extended treatment schedule with the doctors . . . and the time of day, the mood and mode of the questioning, whether there were indicia of formal arrest, and the defendant's age, intelligence and mental makeup." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, supra, 304 Conn. 417–18. We emphasize that "no one factor in a custody analysis is outcome determinative." *State* v. *Mangual*, supra, 311 Conn. 208.

Various courts have concluded that suspects, questioned by the police in a hospital or similar settings, such as psychiatric facilities or ambulances, were in custody for purposes of *Miranda* under the particular facts of the cases before them. See, e.g., *People* v. *Mangum*, 48 P.3d 568, 570–72 (Colo. 2002) (defendant was in custody when police handcuffed him—not because he was under arrest but instead "for his own protection"—transported him to hospital, and questioned him for two to three hours while he remained handcuffed); *State* v. *Lowe*, 81 A.3d 360, 366 (Me. 2013) (defendant questioned by state trooper while in hospital after car accident was in custody after pause in questioning during which trooper gained sufficient information to consider defendant suspect in criminal case before resuming questioning); *People* v. *Tanner*, 31 App. Div. 2d 148, 149, 295 N.Y.S.2d 709 (1968) (defendant was in custody when questioned for one hour by police in hospital, where he was connected to IV tube and was unable to move); *Commonwealth* v. *D'Nicuola*, 448 Pa. 54, 55, 57–58, 292 A.2d 333 (1972) (defendant who had been admitted to hospital after apparent suicide attempt was in custody when questioned by police in hospital room); *Commonwealth* v. *Whitehead*, 427 Pa. Super. 362, 366, 368–69, 629 A.2d 142 (1993) (defendant was in custody when police questioned him in hospital while he was on gurney receiving care); *Scales* v. *State*, 64 Wis. 2d 485, 492, 219 N.W.2d 286 (1974) (defendant was in custody when police questioned him in hospital room after arresting him there on charges related to questioning); see also *Reinert* v. *Larkins*, 379 F.3d 76, 80, 87 (3d Cir. 2004) (defendant was in custody when police officer questioned him in ambulance), cert. denied sub nom. *Reinert* v. *Wynder*, 546 U.S. 890, 126 S. Ct. 173, 163 L. Ed. 2d 201 (2005); *United States* v. *Hallford*, 280 F. Supp. 3d 170, 173–77, 179 (D. D.C. 2017) (defendant was in custody when questioned by United States Secret

Service agents in physician's lounge room of psychiatric hospital, where defendant involuntarily was committed), aff'd, 756 Fed. Appx. 1 (D.C. Cir. 2018); *People* v. *Turkenich*, 137 App. Div. 2d 363, 365, 367, 529 N.Y.S.2d 385 (1988) (defendant with diminished mental capacity was in custody when questioned by police in psychiatric ward of hospital, where defendant was confined pursuant to involuntary commitment order).

In concluding that these suspects were in custody when they were questioned by the police in a hospital or a similar environment, the courts considered whether the relevant factual circumstances supported a determination that a reasonable person in the defendant's position would have believed he was in custody for *Miranda* purposes. See, e.g., *United States* v. *Hallford*, supra, 280 F. Supp. 3d 180 ("when determining whether a reasonable person would have felt free to terminate the interrogation and leave, courts must examine all of the circumstances surrounding the interrogation" (internal quotation marks omitted)); *People* v. *Mangum*, supra, 48 P.3d 571 ("[a] court must examine all of the circumstances surrounding the interrogation to determine whether there was a restraint on freedom of movement of the degree associated with a formal arrest"); see also *State* v. *Mangual*, supra, 311 Conn. 196. For example, in *People* v. *Tanner*, supra, 31 App. Div. 2d 149–50, the court determined, based on the factual circumstances surrounding the interrogation, that a defendant was in custody when he was questioned by the police in his hospital room. The court identified the various factual circumstances that informed its conclusion—that the defendant was questioned for one hour by various officers, that multiple police officers were present for the questioning, and that the defendant physically was incapable of moving because he was connected to an IV tube and had suffered a gunshot wound to his leg. See

id., 149–50. Thus, despite the defendant's being "immobilized by factors entirely independent of any police activity . . . [the court concluded that] for all practical purposes," the defendant's freedom of movement was restricted; id.; and that the police had interrogated the defendant in a way that "indicate[d] that [the interrogation] was custodial." Id., 150.

With these legal principles in mind, we turn to the merits of the defendant's contention that he was in custody for purposes of *Miranda* when the police questioned him in the hospital. This contention first requires us to ascertain whether a reasonable person in the defendant's position would have believed he was at liberty to terminate the police questioning and that his freedom of movement was restricted by the police.[23] See, e.g., *State* v. *Mangual*, supra, 311 Conn. 193. If we conclude that a reasonable person in the defendant's position would have believed he was at liberty to terminate the police questioning and that his freedom of movement was not restricted by the police, the inquiry is over, and the defendant has failed to meet his burden of establishing that he was in custody for purposes of *Miranda*. See id., 198. If, however, we conclude that a reasonable person in the defendant's position would not have believed he was at liberty to terminate the police questioning and that his freedom of movement *was* restricted by the police, we proceed to the second step of the inquiry to determine whether a reasonable

[23] We agree with the state that, because a directive from the hospital staff prohibited the defendant from leaving the hospital premises until he was medically sober, whether a reasonable person in the defendant's position would have believed he was "at liberty to . . . *leave*" *the premises*; (emphasis added; internal quotation marks omitted) *State* v. *Mangual*, supra, 311 Conn. 193; is less applicable to our resolution of this claim than whether a reasonable person in the defendant's position would have believed he was "at liberty to terminate the interrogation"; (internal quotation marks omitted) id.; and that his freedom of movement was restricted by the police. See id., 194–95.

person in the defendant's position would have believed that the police restraint on his freedom of movement was "akin to the restraint associated with a formal arrest." Id.

Having scrupulously examined the record, we first conclude, in light of the objective circumstances surrounding the police interviews of the defendant, that a reasonable person in the defendant's position would not have believed he was at liberty to terminate the interrogation. Although the police did not physically restrain the defendant or instruct medical personnel to restrain him physically, the police took advantage of the restraint that the medical attendants imposed on the defendant for purposes of his treatment. The defendant initially was attached to an IV line. Rajchel, the attending physician who provided medical care to the defendant, had mandated that the defendant be discharged from the hospital only after he became sober. Accordingly, the medical staff forbade the defendant from leaving the hospital premises until he regained sobriety. This directive was communicated to the defendant by a police officer, Bugbee. See footnote 12 of this opinion.

Significantly, and despite the hospital staff's restraint of the defendant, at no point during the evening did the police inform him that he was free to terminate their interviews at any time. At no point during the evening did the police tell the defendant that he could stop answering their questions if he so chose. Contra *State* v. *Pinder*, 250 Conn. 385, 412, 736 A.2d 857 (1999) (finding of custody less likely in case in which "it was made very clear to [the defendant] that . . . he could stop answering questions anytime he chose on at least three occasions" (internal quotation marks omitted)). "[T]he most obvious and effective means of demonstrating that a suspect has not been taken into custody . . . is for the police to inform the suspect that an arrest is not

being made and that the suspect may terminate the interview at will. . . . When . . . a detained suspect is not so informed but, instead, is kept in the dark about the purpose and duration of the detention, he is far more likely to view his seizure by the police as the functional equivalent of an arrest." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 204–205. Prior to 12:09 a.m., the police did not inform the defendant that, in the absence of a hospital directive to the contrary, he was free to leave.[24] In other words, the police did not explain to the defendant that they were not holding or detaining him in any way until more than two hours after their first encounter with him—which the police, not the defendant, initiated.

Moreover, the officers in the present case created a "large and intimidating police presence"; id., 208; that "transformed [the hospital] into the type of police dominated atmosphere that could undermine an individual's decision to remain silent." *State* v. *Castillo*, 165 Conn. App. 703, 717, 140 A.3d 301 (2016), aff'd, 329 Conn. 311, 186 A.3d 672 (2018). In addition to the five police officers who questioned the defendant, various other officers remained in the defendant's hospital room during periods of questioning such that the defendant was surrounded by multiple police officers during numerous rounds of questioning. See *State* v. *Mangual*, supra,

[24] We recognize that the defendant made some of the statements he later sought to suppress *after* Bugbee had told him that he was free to leave, "as far as the police were concerned." By that point, however, several police officers already had questioned the defendant during a period of more than two hours, and the defendant already had made various inculpatory statements to the police. Further, the defendant was, in fact, *not* free to leave. Bugbee made this fact clear to the defendant when he iterated to him that he was prohibited from leaving the hospital until he regained sobriety, per hospital directive. See footnote 12 of this opinion. Bugbee never explicitly informed the defendant that he was free to terminate the interviews despite informing him that he could not leave the hospital premises until he regained sobriety, per hospital directive.

311 Conn. 201 (presence of seven officers on premises supported finding of custody). At least one other officer who did not interview the defendant, Pryputniewicz, was present in the defendant's hospital room during questioning. "[T]here is an increased likelihood that a reasonable person in the defendant's position would have been intimidated by the considerable police presence"; id.; in his hospital room because multiple officers were in his room, at the same time, while he was questioned. See id.

Additionally, although the record does not reflect that an officer formally was stationed outside of the defendant's hospital room, multiple officers entered and exited the defendant's room at various points throughout the evening, and Bugbee remained on the premises for a significant portion of the evening. At one point during the evening, the defendant summoned Bugbee, who was outside of his room, indicating that the defendant was aware of at least Bugbee's presence in the vicinity of his hospital room. As our Supreme Court has stated, "the presence of a large number of visibly armed law enforcement officers goes a long way [in rendering a particular location] a police-dominated atmosphere." (Internal quotation marks omitted.) Id. Thus, the police dominated atmosphere that the police created supports a conclusion that a reasonable person in the defendant's position would have believed he was not at liberty to terminate the police questioning.

Further, during the period of approximately four and one-half hours during which the defendant was subjected to the hospital's directive not to leave the premises, five different police officers repeatedly questioned the defendant about his version of events. The police collectively questioned the defendant for approximately one hour. The questioning was not "limited" or "brief" in duration; *State* v. *DesLaurier*, 230 Conn. 572, 581, 646 A.2d 108 (1994); like questioning that lasts a mere

few minutes; see id.; or takes place over the course of ten or fifteen consecutive minutes. See *State* v. *Kirby*, 280 Conn. 361, 396, 908 A.2d 506 (2006). Unlike in the Illinois Appellate Court's decision in *People* v. *Vasquez*, 393 Ill. App. 3d 185, 913 N.E.2d 60 (2009), which our Supreme Court cited in *State* v. *Jackson*, supra, 304 Conn. 418, and in which the Illinois Appellate Court determined that police interrogation of a defendant in a hospital for thirty-five minutes during the early afternoon did not support a finding of custody; see *People* v. *Vasquez*, supra, 187–90; the collective one hour of questioning in the present case took place over the course of a "prolonged" period; *State* v. *Jackson*, supra, 418; of more than four hours during the late evening into the early morning hours.

Additionally, the questioning took place in a hospital room, as opposed to surroundings that were "familiar" to or comfortable for the defendant, like those present in *State* v. *Spence*, 165 Conn. App. 110, 118, 138 A.3d 1048, cert. denied, 321 Conn. 927, 138 A.3d 287 (2016), in which this court determined that a finding of custody was not supported when a defendant's "surroundings were familiar . . . [because] the defendant . . . was in an open area of [his] home, and he was surrounded by his family including other adults." Id.; see also *State* v. *Mangual*, supra, 311 Conn. 206 ("an encounter with police is generally less likely to be custodial when it occurs in a suspect's home"). Although the hospital was "public" in that nonpolice personnel had access to the defendant's hospital room, the record shows that the defendant was not "familiar" with the hospital to the same degree that, for example, a person would be with his home, and that the defendant was surrounded by the police, hospital security, and the medical staff, as opposed to friends and family, in the hospital room. We note, however, that "the setting of [an] interrogation is not so important to the inquiry as the question of

police domination of that setting . . . .'' (Internal quotation marks omitted.) Id. As we have noted, the police presence—particularly in the defendant's hospital room—dominated the defendant's immediate atmosphere.

Although the police did not prevent the defendant from speaking with or requesting assistance from the medical staff, which had access to his hospital room and spoke with him at various points during the evening, as we previously have explained, ''no one factor . . . is outcome determinative.'' Id., 208. Simply because the defendant theoretically[25] had the ability to converse with, express annoyance to, or request assistance from the medical professionals who provided him medical care to terminate the interviews does not mean, by itself, that a reasonable person in the defendant's position would believe that he was at liberty to terminate the interrogation, particularly in light of the police dominated presence that permeated his immediate surroundings. We also note that the defendant was alert enough to be able to converse with the police and the medical staff but that he had a tenth grade education and was intoxicated during his interviews with the police,[26] which may have further undermined his will to resist the pressures inherent in the police dominated environment that surrounded him.

Accordingly, we are unpersuaded that the factors that militate against a finding that the defendant was in

[25] We acknowledge that, at approximately 12:35 a.m. or 12:40 a.m., the defendant indicated that he did not want to speak to the officers anymore. Nonetheless, in the preceding three hours, during which it is uncontested that the defendant was intoxicated, the police did not inform him that he had the ability to terminate their interviews or to not respond to their questions if he so chose.

[26] We also note that the court stated in its memorandum of decision on the defendant's motion to suppress that ''[i]t is true that the defendant . . . may have, in the past, been taking medication for attention deficit hyperactivity disorder, depression and anxiety.''

custody outweigh the coercive features of the defendant's detention. See id., 206. We conclude that a reasonable person in the defendant's position would not have believed he was at liberty to terminate the police questioning and would have concluded that his freedom of movement was restricted by the police. Thus, we proceed to the second step of the inquiry—that is, we must determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." (Internal quotation marks omitted.) Id., 193. Our review of the factual circumstances of the present case leads us to answer this question affirmatively.

Although the defendant was not handcuffed; see id., 208 ("[h]andcuffs are generally recognized as a hallmark of a formal arrest" (internal quotation marks omitted)); or formally booked, he was physically connected to an IV line while at least one police officer questioned him, and he constantly was surrounded by numerous police officers and, during at least one interview, hospital security was inside his hospital room. As we have explained, several of the police officers who questioned the defendant or remained in his room while he was being questioned were in uniform, had visible service weapons on their persons, or both.

When the defendant was questioned, although the record does not reflect that the police utilized an "aggressive"; *State* v. *Jackson*, supra, 304 Conn. 418; or "threaten[ing]" tone; *State* v. *Mangual*, supra, 311 Conn. 208; the presence of multiple armed, uniformed officers for multiple hours and throughout multiple rounds of police questioning produced a "large and intimidating police presence"; id.; "that could undermine an individual's decision to remain silent." *State* v. *Castillo*, supra, 165 Conn. App. 717. This police presence lasted throughout the duration of the defendant's time at the hospital because police officers repeatedly entered and

exited the defendant's hospital room and, at least one officer, the presence of whom the defendant was aware, remained on the premises and in the defendant's vicinity throughout the duration of the evening.

Further, as we have stated, although the police did not advise the defendant that he was under arrest, they did not advise the defendant that they were not holding or detaining him until after multiple rounds of questioning, and they never advised him that he was free to terminate their interviews at any time or to stop answering their questions if he so chose. See footnote 24 of this opinion. The police presence was itself threatening and intimidating, and the officers' conduct "conveyed a clear message of complete, unfettered and temporally indefinite police control." *State* v. *Mangual*, supra, 311 Conn. 208. Thus, we conclude that a person in the defendant's position "reasonably would have believed that [he] was in police custody to the degree associated with a formal arrest"; id., 195–96; because, as we have set forth herein, " 'the relevant environment' "; id., 193; including the "large and intimidating police presence"; id., 208; which transformed the hospital into a police dominated atmosphere, the restraint that the medical attendants imposed on the defendant for purposes of his treatment and of which the police took advantage, the extensive duration of questioning to which multiple police officers subjected the defendant, and the failure of the police to advise the defendant that he was free to terminate the interviews "present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." (Internal quotation marks omitted.) Id., 193.

We note that the present case is distinguishable from cases in which our Supreme Court has determined that a defendant, questioned by the police in a hospital, was not in custody for *Miranda* purposes. In *State* v. *DesLaurier*, supra, 230 Conn. 576, for example, our

Supreme Court determined that a defendant, questioned by the police in a hospital, was not in custody for *Miranda* purposes under the factual circumstances of the case. The defendant in *DesLaurier* was convicted of assault in the second degree with a motor vehicle and operating a motor vehicle while under the influence of intoxicating liquor, arising out of an incident during which he lost control of and crashed the vehicle after having left a pool hall where he steadily consumed alcohol during the several hours he was there. Id., 573. An emergency response team found the defendant intertwined with the body of his stepbrother, who was in the front passenger seat; however, initially, it was unclear which individual had operated the vehicle. Id., 574. The defendant acted aggressively and combatively, arguing with medical personnel as they attempted to provide care, rejecting medical care and attempting to remove the brace and restraining belt attached to a body board that had been used to extract him from the vehicle. Id., 574–75.

A state police trooper who responded to the scene initially avoided interfering with the medical attendants' treatment of the defendant, but medical personnel eventually requested the trooper's assistance to attempt to calm the defendant. Id., 575. The trooper instructed the defendant to lie down and to allow medical personnel to do their job, and he stayed close by as they placed the defendant into an ambulance. Id. The trooper followed the ambulance as it transported the defendant and his stepbrother to a hospital. Id.

After the trooper arrived at the hospital, he proceeded to an emergency room in which the defendant was located, which was connected to a separate room in which the stepbrother was receiving care. Id. The defendant continued to refuse medical care, despite being injured, and the hospital staff informed the trooper that

the defendant "probably [was] going to take off." (Internal quotation marks omitted.) Id. The trooper thus entered the defendant's room, introduced himself to the defendant, and asked whether the defendant had been driving the vehicle. Id. The defendant answered, " '[n]o.' " Id. The trooper asked the stepbrother the same question, and the stepbrother replied that the defendant had been driving. Id. The trooper then relayed to the defendant what his stepbrother had said, and the defendant stated, "[a]ll right, I was . . . driving." (Internal quotation marks omitted.) Id. Immediately thereafter, the trooper placed the defendant under arrest and read him his *Miranda* rights. Id. At trial, the defendant's statement that he had been driving was admitted into evidence, over the defendant's objection. Id., 576.

On appeal, our Supreme Court concluded that the trial court properly had admitted the defendant's statement to the trooper because the defendant was not in custody for purposes of *Miranda*. Id. In so concluding, our Supreme Court noted that the trooper was the sole law enforcement officer present in the defendant's hospital room. See id., 581. Accordingly, unlike in the present case, in which multiple officers entered and exited the defendant's hospital room throughout the evening and stayed in the room during periods of questioning, the presence of a single trooper in *DesLaurier* did not create a "police-dominated atmosphere . . . ." (Internal quotation marks omitted.) Id., 579. Our Supreme Court relied on the fact that the trooper briefly questioned the defendant for a period of only several minutes in a public hospital emergency room in the presence of witnesses who were not police officers—specifically, hospital medical staff. See id., 581. Our Supreme Court stated that there was "no evidence indicating that the defendant was unable to converse with these other people, express annoyance or request assistance from them." Id. The trooper also did not restrain the defendant when he questioned him. Id., 580–81.

Significantly, our Supreme Court concluded that the duration of the trooper's questioning of the defendant was "momentary" and "temporary . . . ." Id., 581. Our Supreme Court cited two federal circuit court cases; see *Allen* v. *United States*, 390 F.2d 476, 479 (D.C. Cir. 1968); *United States* v. *Kennedy*, 573 F.2d 657, 660 (9th Cir. 1978); to distinguish "limited and brief inquir[ies]," which supported a conclusion that a suspect was not in custody, from longer periods of questioning, including a period of questioning of forty-five minutes, which supported a conclusion that a suspect was in custody. See *State* v. *DesLaurier*, supra, 230 Conn. 581. The Supreme Court likened the short, brief questioning that took place in *DesLaurier* to those "limited and brief inquir[ies]" that supported a conclusion that a suspect was not in custody for *Miranda* purposes. Id. The brief duration of the trooper's questioning of the defendant in *DesLaurier* certainly is distinguishable from the duration of the questioning that took place in the present case, which, as we have explained, occurred over the course of more than four hours and collectively lasted approximately one hour.

Likewise, in *State* v. *Jackson*, supra, 304 Conn. 419, our Supreme Court determined that a defendant, questioned by the police in a hospital, was not in custody for *Miranda* purposes under the factual circumstances of the case. The defendant was convicted of murder after he had killed his former paramour in her apartment in New Haven. Id., 387–88. On the day after the defendant committed the murder, he attempted to end his life by jumping out of a New York City hotel window, and, although he survived, he sustained several injuries. Id., 388. Consequently, the defendant was transported to a hospital, accompanied by police officers, for medical treatment and eventually was admitted into a surgical care unit. Id., 388, 414.

When New Haven police officers arrived at the hospital to interview the defendant approximately one day after he had jumped out of the window, an out-of-state police officer was present in the defendant's hospital room because the defendant had attempted to commit suicide. Id., 414. Before entering the defendant's hospital room, a New Haven police detective spoke to a nurse, who told the detective that the defendant was awake and able to talk. Id. The detective then instructed the out-of-state police officer to exit the hospital room and asked the defendant if he knew why he was in the hospital and for his name. Id. The defendant stated that he wanted to die and provided a fake name to the detective. Id. The detective initially did not inform the defendant that he was under arrest. Id. Eventually, after approximately thirty minutes, the defendant admitted his true identity, and the detective subsequently read the defendant his *Miranda* rights. Id., 414–15. The detective then informed the defendant that he was not under arrest and asked him questions, to which the defendant provided answers. Id., 415.

Prior to trial, the defendant moved to suppress the statements that he had provided to the detective in the hospital. Id. The trial court denied the defendant's motion, determining that the only statement the defendant had provided to the police before waiving his *Miranda* rights was his name and that the defendant was not subjected to custodial interrogation at that time. Id., 415–16, 419. Consequently, at trial, the detective testified as to the content of his interview of the defendant. Id., 415.

Our Supreme Court concluded that the trial court properly had admitted the defendant's statement to the trooper because the defendant was not in custody for purposes of *Miranda* when he provided the initial statement to the trooper. See id., 419. Our Supreme Court

relied on the fact that only one police detective questioned the defendant. See id., 414. Although an out-of-state police officer had accompanied the defendant to the hospital and remained in the hospital room until the detective began to question the defendant, the out-of-state officer had done so to monitor the defendant in light of his suicide attempt. Id., 418. The detective specifically instructed the out-of-state officer to exit the hospital room before he began to question the defendant. Id., 414. The Supreme Court stated: "[T]here was no reason for the defendant to feel intimidated by the presence of the police inside the hospital room before [the detective] arrived and outside the room thereafter." Id., 419. Accordingly, unlike the situation in the present case, the limited police presence in *Jackson* did not transform the defendant's hospital room into the sort of police dominated atmosphere "that could undermine an individual's decision to remain silent." *State* v. *Castillo*, supra, 165 Conn. App. 717.

Further, our Supreme Court noted that the questioning was "neither prolonged nor aggressive . . . ." *State* v. *Jackson*, supra, 304 Conn. 418. Unlike the situation in the present case, approximately thirty consecutive minutes passed between the time when the detective in *Jackson* asked the defendant what his name was and when the defendant provided his true identity to the detective, at which point the detective advised the defendant of his *Miranda* rights. Id., 414–15. The detective neither subjected the defendant to multiple rounds of questioning nor questioned the defendant over an extensive period of time, and the detective eventually advised the defendant of his *Miranda* rights. See id.

Additionally, our Supreme Court noted that the officer in *Jackson* eventually informed the defendant that he was not under arrest. See id., 415. The Supreme Court also noted that the defendant was immobilized for medical treatment and that the police did not physically

restrain him, ask hospital personnel to extend his medical treatment, or prohibit him from leaving the hospital room or asking hospital personnel to assist him in terminating the questioning. See id., 418. Finally, the Supreme Court determined that "there [wa]s no evidence that [the defendant's] age or intelligence rendered him especially vulnerable to police intimidation and, although he may have been despondent and was receiving pain medication for his injuries, the nurse indicated that he was capable of speaking with the police, and [the detective] testified that he was alert and coherent." Id., 419.

Thus, the case before us is distinguishable from *Des-Laurier* and *Jackson*. The facts of the present case lead us to conclude that a reasonable person in the defendant's position would have believed that he was not at liberty to terminate the police questioning, that his freedom of movement was restricted by the police; see *State* v. *Mangual*, supra, 311 Conn. 193; and "that [he] was in police custody to the degree associated with a formal arrest . . . ." Id., 195–96. "[T]he relevant environment present[ed] the same inherently coercive pressures" that would be present, had the police questioned the defendant at a police station. (Internal quotation marks omitted.) Id., 193. Accordingly, we conclude, contrary to the trial court's determination, that the defendant was in custody for purposes of *Miranda*.

II

Having determined that the defendant was in custody for purposes of *Miranda*, we next consider whether the police questioning of the defendant constituted interrogation. We conclude that the police officers' questioning of the defendant constituted interrogation for purposes of *Miranda* because the police officers should have known that their questions reasonably were likely to elicit incriminating statements from the

defendant. See *State* v. *Ramos*, 317 Conn. 19, 29, 114 A.3d 1202 (2015).

We begin by setting forth the applicable standard of review and governing legal principles. Whereas "[a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . [t]he ultimate determination . . . of whether a defendant already in custody has been subjected to interrogation . . . presents a mixed question of law and fact over which our review is plenary, tempered by our scrupulous examination of the record to ascertain whether the findings are supported by substantial evidence." (Citation omitted; internal quotation marks omitted.) Id., 30. We note that, during the hearing on the defendant's motion to suppress, the state presented evidence on the issue of whether the police interrogated the defendant for purposes of *Miranda* and, on appeal, the state does not raise this issue as an alternative ground for affirmance. Accordingly, although the court did not reach this issue because it concluded that the defendant was not in custody for *Miranda* purposes, we nonetheless determine this mixed question of law and fact because the court made sufficient findings of fact on which we may consider and resolve the issue. See, e.g., *Grady* v. *Somers*, 294 Conn. 324, 349 n.28, 984 A.2d 684 (2009) (reviewing alternative ground for affirmance that court below did not address because alternative ground raised question of law, over which Supreme Court's review is plenary, and essential facts pertaining to issue were undisputed); *Bouchard* v. *Deep River*, 155 Conn. App. 490, 496, 110 A.3d 484 (2015) (same).

"A defendant in custody is subject to interrogation not only in the face of express questioning by police but also when subjected to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know

are reasonably likely to elicit an incriminating response from the suspect. . . . Whether a defendant in custody is subject to interrogation necessarily involves determining first, the factual circumstances of the police conduct in question, and second, whether such conduct is normally attendant to arrest and custody or whether the police should know that such conduct is reasonably likely to elicit an incriminating response." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 317 Conn. 29. "[T]he definition of interrogation [for purposes of *Miranda*] can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. . . . The test as to whether a particular question is likely to elicit an incriminating response is objective; the subjective intent of the police officer is relevant but not conclusive and the relationship of the questions asked to the crime committed is highly relevant." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Smith*, 321 Conn. 278, 288, 138 A.3d 223 (2016).

We begin by examining the factual circumstances of the police conduct surrounding the defendant's statements. Each of the four police officers to whom the defendant provided the statements he later sought to suppress—Hicking, Bugbee, Hatheway, and Patrizz—asked the defendant to explain what had happened or to recount his version of events with respect to the altercation. Hicking specifically asked the defendant clarifying questions as the defendant recounted his version of the events leading up to the altercation and the altercation itself. Bugbee asked the defendant to tell him what happened and informed him that he would transcribe the defendant's version of events in the written statement he prepared. Hatheway, likewise, interviewed the defendant concerning the defendant's version of events. Finally, Patrizz, the lead detective

assigned to the case, asked the defendant to provide his version of events. As the court stated in its memorandum of decision, "[a]s the lead detective, [Patrizz] wanted to introduce himself to the defendant *and ask him about his version of events* . . . [and, in the defendant's hospital room] asked the defendant to once again provide his version of events." (Emphasis added.) The defendant eventually terminated the interview with Patrizz because he was "annoy[ed]" that he had to repeat his version of events multiple times.

As our Supreme Court explained in *State* v. *Gonzalez*, supra, 302 Conn. 298, when a police officer asks a defendant to provide his "side of the story" as to an altercation or a crime, the question is reasonably likely to elicit an incriminating response from the defendant. See id.; see also *State* v. *Hoeplinger*, 206 Conn. 278, 287 n.6, 537 A.2d 1010 (1988) (determining that, in case in which police officer asked defendant to "give [the officer] a statement concerning what happened," there was "no question that the defendant was subject to interrogation" for purposes of *Miranda*). Unlike asking a defendant routine booking questions unrelated to the crime; see, e.g., *State* v. *Evans*, 203 Conn. 212, 225–27, 523 A.2d 1306 (1987); or asking a defendant whether he understands his rights; see, e.g., *State* v. *Kirby*, supra, 280 Conn. 399–400; by asking a defendant to provide his version of the story, a police officer "implie[s] that the defendant was involved in the [subject crime] and explicitly [seeks] statements from the defendant regarding his involvement in" that crime. *State* v. *Gonzalez*, supra, 298. "[P]olice [officers] should know that such words are reasonably likely to elicit incriminating statements." Id.

In the present case, the police officers repeatedly asked the defendant to provide his version of events

with respect to his altercation with Patten. These questions were not "objectively neutral question[s] unrelated to the crime" for which the defendant was later prosecuted. Id. To the contrary, the questions "implied that the defendant was involved" in the altercation; id.; and explicitly called for responses from the defendant regarding his involvement in the altercation, for which he was later charged with assault in the first degree. The officers "should have known [that their questions] were reasonably likely to elicit an incriminating response" from the defendant. (Emphasis omitted; internal quotation marks omitted.) *State* v. *Smith*, supra, 321 Conn. 288.

At the suppression hearing, Bugbee testified that he did not advise the defendant of his *Miranda* rights prior to taking the defendant's statement because, in Bugbee's mind, the defendant "wasn't . . . a suspect." Although "the subjective intent of [a] police officer [may be] relevant" to our consideration of whether a defendant was interrogated for purposes of *Miranda*, it is "not conclusive." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 302 Conn. 299. Bugbee's subjective understanding of whether the defendant was a suspect does not overcome the strong, highly relevant "relationship [between] the questions asked" by all of the officers, including Bugbee, and "the crime committed . . . ." (Internal quotation marks omitted.) Id., 298. Therefore, we conclude that the officers' questions constituted "the functional equivalent of interrogation because the police should have known" that asking the defendant to provide his side of the story was "reasonably likely to invite the defendant to respond by making possibly incriminating statements." Id., 299. In light of our determination that the police subjected the defendant to custodial interrogation, we conclude that the police were required to advise the defendant of his

Miranda rights before eliciting statements from him. See id., 294.

III

Our inquiry, however, does not end simply because we have determined that the police were required to advise the defendant of his *Miranda* rights prior to subjecting him to custodial interrogation and eliciting statements from him. We additionally must address the state's contention that the admission of the defendant's statements into evidence at trial nonetheless was harmless beyond a reasonable doubt. The state specifically contends that the statements the defendant made to the police in response to police questioning did not constitute "confessions" and that many of the defendant's statements supported his self-defense theory at trial. The state also argues that the statements constituted only a "minimal part" of the state's proof, noting that it did not present the defendant's statements during its case-in-chief and that it merely offered the statements to show that parts of the statements were inconsistent with one another or with the defendant's in-court testimony. Finally, the state contends that the strength of its case against the defendant, outside of the statements, was overwhelming. Because we conclude that the defendant's statements may have had a tendency to influence the court's analyses of both the charged offense of assault in the first degree and the defendant's claim of self-defense, we reject the state's contention that the admission of the statements into evidence at trial was harmless beyond a reasonable doubt.

"If statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine. . . . The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely,

to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case." (Citations omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 459–60, 996 A.2d 251 (2010). "When an [evidentiary] impropriety is of constitutional [dimension], the state bears the burden of proving that the error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 214.

We emphasize that the state's burden is a "demanding" one. Id., 212. "Whether the error was harmless depends on a number of factors, such as the importance of the evidence to the state's case, whether the evidence was cumulative of properly admitted evidence, the presence or absence of corroborating evidence, and, of course, the overall strength of the state's case." *State* v. *Culbreath*, 340 Conn. 167, 192, 263 A.3d 350 (2021). "Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Moore*, 293 Conn. 781, 806, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010). "If the evidence may have had a tendency to influence the judgment of the [trier of fact], it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 214–15.

As our Supreme Court recently stated in *State* v. *Alexander*, 343 Conn. 495, 275 A.3d 199 (2022), in a case that "was tried to a court, not a jury . . . our harmless error analysis is facilitated substantially by the express findings contained in the memorandum of decision by which the [court] returned [its] ultimate finding of guilt." Id., 506. In *Alexander*, our Supreme

Court considered whether a defendant was harmed when his statements to the police, which should have been suppressed, improperly were admitted into evidence during his criminal trial. Id., 502. Our Supreme Court concluded that "the error was harmless beyond a reasonable doubt"; id., 506; because "the defendant's . . . statement[s] did not implicate [him] in the [charged offenses at issue], [were] not important to the state's case, and did not in any respect affect the convictions at issue." Id., 507.

Our Supreme Court noted that the trial court expressly had stated in its memorandum of decision that it "did not consider" the defendant's statements in determining his guilt as to the charged offenses at issue. (Internal quotation marks omitted.) Id., 503. Specifically, our Supreme Court stated, the trial court neither "credited [n]or relied on the defendant's . . . statement[s] to reach [its] respective findings of guilt." Id., 507. "[I]t did not consider any of the statements made by the defendant during his interview with the police . . . in determining the defendant's guilt" as to his conviction on the charge of felony murder. (Internal quotation marks omitted.) Id., 503. Our Supreme Court further stated that the trial court's "insistent remarks that the defendant's statements had no effect on [its] [decision] reinforce[d] our [Supreme Court's] confidence in [its] . . . conclusion that the improper admission of the defendant's . . . statement[s] had no impact on the guilty findings at issue." (Internal quotation marks omitted.) Id., 510.

Our Supreme Court in *Alexander* further noted that "[t]he accuracy of the [trial court's] assessment of the impact that the improperly admitted evidence had on [the] guilty verdict [was] underscored by the [court's] determination that" a separate offense for which the defendant was convicted—carrying a pistol without a permit—"necessitat[ed] a different result." (Internal

quotation marks omitted.) Id., 510 n.12. Our Supreme Court explained, "[i]n contrast to the defendant's conviction on the . . . charges [at issue on appeal], [the trial court] *did* explicitly rely on the defendant's statements"; (emphasis added) id., 510–11 n.12.; which the trial court had described as "inculpatory [as to the charge of carrying a pistol without a permit] and tantamount to a confession"; (internal quotation marks omitted) id., 504; in determining that the defendant was guilty of carrying a pistol without a permit. Id.

In the present case, and in the court's memorandum of decision, the court explicitly relied on at least one of the defendant's statements that we have concluded should have been suppressed—namely, the defendant's statement, "I'm a peaceable person until you get in my face, then I fuck you up"—in finding the defendant guilty of assault in the first degree. To meet its burden as to the offense of assault in the first degree, it was necessary for the state to prove beyond a reasonable doubt, inter alia, that the defendant possessed the specific intent to cause serious physical injury to Patten. See General Statutes § 53a-59 (a) (1). As the court recognized, "[i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 756–57, 250 A.3d 648 (2020).

In its evaluation of the intent element, the court noted that Patten had punched the defendant in the face during the first altercation, "*which angered the defendant*,"

and, after Patten and the defendant initially had separated from one another, the defendant "sat down by the fire, *but he was angry*." (Emphasis added.) The defendant's anger, the court concluded, motivated him to attack Patten from behind with the intent to cause serious physical injury to him. In support of its determination that the defendant possessed the requisite intent to commit assault in the first degree, the court specifically cited one of the statements that the defendant made to Bugbee: "I'm a peaceable person until you get in my face, then I fuck you up." As in *Alexander*, in which the trial court expressly relied on the statement of the defendant that he temporarily had possessed a handgun as evidence in support of its determination that he was guilty of carrying a pistol without a permit; see *State* v. *Alexander*, supra, 343 Conn. 510–11 n.12; the court in the present case expressly relied on the statement of the defendant that he was a "peaceable person until [someone] g[ot] in [his] face, then [he would] fuck [him] up" as evidence in support of its determination that the state had proven beyond a reasonable doubt the element of intent, a requisite element of the charge of assault in the first degree.

We also note, contrary to the state's position on appeal, that *many* of the defendant's statements were, indeed, inculpatory, and many of his statements specifically may have had a tendency to influence the court's analysis of the element of intent. As our Supreme Court noted in *State* v. *Mitchell*, supra, 296 Conn. 461, a "noteworthy fact" in a court's analysis of whether the improper admission at trial of statements that were taken in violation of *Miranda* nonetheless was harmless error is whether the statements themselves were inculpatory. In the present case, the defendant's statements—including, "I'm a peaceable person until you get in my face, then I fuck you up," "I take shit from no one," "I'm a peaceable man, but you drive me to the

edge, I'm not going to let up," and, "I don't flight, I fight"—incriminated him with regard to the offense of assault because the statements, both individually and collectively, specifically tended to demonstrate the defendant's intent to cause serious physical injury to Patten, who had punched him in the face shortly before he stabbed Patten.[27] Thus, we cannot say that these statements were "relatively benign [or] facially innocuous . . . ." (Internal quotation marks omitted.) *State* v. *Mitchell*, supra, 462.

Finally, we note that, at trial, the state extensively cross-examined the defendant as to several of the statements he made to the police and, during its rebuttal argument at the conclusion of the trial, recited his various inculpatory statements. Specifically, the prosecutor stated: "I think [the defendant] said it better than I ever could. 'I take shit from no one, you swing at me I'm going to end you.' 'He's lucky he's family because honestly I could have ended him but I didn't, instead of fight or flight you know how it goes, I don't fly, I fight.' 'I'm a peaceable person until you get in my face, then I'll fuck you up.' 'Honestly, I take shit from no one.' 'I'm

[27] Because the defendant did not challenge the admissibility of the statement he made to Roberge, "I take shit from no one, you swing at me, I'm going to end you," to the extent the court considered this statement, it did so properly. We cannot say, however, that the court, in assessing whether this statement bore on the issue of intent, was not already tainted by the multiple other inculpatory statements that improperly were admitted into evidence during trial. As this court, considering a claim of harmless error of a nonconstitutional dimension, has explained, "[o]ur [harmlessness] inquiry focuses on the impact of the improperly introduced evidence on the . . . perceptions [of the trier of fact] and [the trier of fact's] understanding of the other evidence presented in the case, rather than an analysis of the sufficiency of the remaining evidence to uphold the conviction in the absence of the admission of the [allegedly improperly admitted] evidence . . . ." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 41 Conn. App. 391, 399, 676 A.2d 409 (1996), aff'd, 240 Conn. 317, 692 A.2d 713 (1997); see also *State* v. *Merritt*, 36 Conn. App. 76, 92, 647 A.2d 1021 (1994) (same), appeal dismissed, 233 Conn. 302, 659 A.2d 706 (1995).

a peaceable man, but you drive me to the edge, I'm not going to let up.' "

Thus, we conclude that the defendant's multiple inculpatory statements "may have had a tendency to influence the judgment of the [trier of fact]"; (internal quotation marks omitted) *State* v. *Mangual*, supra, 311 Conn. 214; with respect to the element of intent. It is axiomatic, therefore, that the entry of the defendant's statements into evidence at trial was not harmless beyond a reasonable doubt. See id.

Moreover, many of the defendant's statements may have had a tendency to influence the court's analysis of his self-defense claim. As we have stated, the defendant pursued at trial a claim of self-defense—that is, that he had used reasonable physical force against Patten to defend himself from what he reasonably believed to be Patten's use or imminent use of physical force against him and that he was not the initial aggressor. See General Statutes § 53a-19.[28] The defendant specifically contended that Patten initially shoved the defendant, began

[28] General Statutes § 53a-19, titled "Use of physical force in defense of person," provides in relevant part: "(a) Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself . . . from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm.

"(b) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using deadly physical force upon another person if he . . . knows that he . . . can avoid the necessity of using such force with complete safety (1) by retreating . . . .

"(c) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . ."

to punch him, knocked him onto the ground, and choked him while repeatedly punching him. The defendant maintained that he was unable to breathe and momentarily had lost consciousness while Patten held him in a headlock, and that the defendant stabbed Patten as a necessary means to remove himself from Patten's chokehold.

"Under our Penal Code, self-defense . . . is a [claim of] *defense*, rather than an *affirmative defense*. . . . Whereas an *affirmative defense* requires the defendant to establish his claim by a preponderance of the evidence, a properly raised [claim of] *defense* places the burden on the state to disprove the defendant's claim beyond a reasonable doubt. . . . Consequently, a defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Grasso*, 189 Conn. App. 186, 198, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019). Because the court concluded that "the evidence presented at trial raised a genuine issue as to the possible availability of the [claim] of self-defense with respect to the charge of assault in the first degree," the state was required to disprove the defendant's claim of self-defense beyond a reasonable doubt. See *State* v. *Grasso*, supra, 198.

The court ultimately concluded that the state had disproven the defendant's claim of self-defense beyond a reasonable doubt. In assessing whether the state had met its burden, the court was required to consider, inter alia, whether the state had disproven beyond a reasonable doubt that the defendant was not the initial aggressor; see General Statutes § 53a-19 (c) (2); that the

defendant had the duty to retreat; see General Statutes § 53a-19 (b) (1); that the amount of force the defendant used, in response to the force he argued that Patten used against him, was proportional; see General Statutes § 53a-19 (a); or that the defendant used force to defend himself from what he believed was the use or imminent use of force against him. See General Statutes § 53a-19 (a).

The defendant's statements incriminated him with regard to various elements of his claim of self-defense. For example, the fact that the defendant stated, "I'm a peaceable person until you get in my face, then I fuck you up," "I take shit from no one," and, "I don't flight, I fight," tended to demonstrate that the defendant did not use force against Patten to defend himself but, instead, used force against Patten to cause serious physical injury to Patten. Likewise, these statements tended to show that the defendant was the initial aggressor—that is, that he used physical force against Patten before Patten used physical force against him—because he was angry at Patten.

Further, the fact that the defendant stated, "I don't flight, I fight," tended to demonstrate that he ignored any duty to retreat he may have had. The fact that the defendant stated, "I'm a peaceable person until you get in my face, then I fuck you up," made more likely that the amount of force that the defendant used against Patten was excessive. Accordingly, we conclude that the defendant's statements "may have had a tendency to influence the judgment of the [trier of fact]" with respect to various elements of the defendant's claim of self-defense. (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 214.

In light of the foregoing, we agree with the defendant that the state has not met the requisite "demanding standard"; id., 212; to prove that the improper admission

of the defendant's statements into evidence at trial was harmless beyond a reasonable doubt.

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

In this opinion the other judges concurred.

PAUL JOHN FERRI *v.* NANCY POWELL-FERRI ET AL.
(AC 44798)

Cradle, Suarez and Clark, Js.

Syllabus

The plaintiff sought damages for vexatious litigation from the defendant P, his former wife. P previously sought the dissolution of her marriage to the plaintiff and, in that action, a disputed asset was a trust. While the dissolution action was pending, the trustees of the trust brought a declaratory judgment action against P and the plaintiff, seeking approval of their actions in forming another trust, into which they had decanted all of the assets of the initial trust. As part of the declaratory judgment action, the defendants T and N Co., who represented P in both actions, filed a cross complaint on her behalf, alleging that the plaintiff violated his duty to preserve the marital assets by allowing the trustees to remove assets from the marital estate. The trial court rendered summary judgment in favor of the plaintiff on the cross complaint. In this vexatious litigation action, the plaintiff alleged that the defendants lacked probable cause to institute and pursue the cross complaint. The trial court granted the motion for summary judgment filed by T and N Co. Following a bench trial on the plaintiff's claims against P, the trial court rendered judgment in favor of P, from which the plaintiff appealed to this court. *Held* that the trial court correctly concluded that P had probable cause to pursue her cross complaint in the declaratory judgment action, the plaintiff having failed to satisfy his burden to prove that P did not have a reasonable, good faith basis for her cross complaint against him; as aptly noted by the trial court, not only did P have a good faith belief in the facts alleged in her cross complaint, but the relevant facts related to the existence of probable cause were undisputed, as P alleged that the plaintiff failed to seek the return of the assets of the initial trust, which were transferred to another trust, and, in light of the automatic orders that issue in dissolution cases, including an order that neither party transfer or dissipate marital assets, it could not reasonably be argued that P did not maintain a good faith belief that the plaintiff

violated the automatic orders when the trustees decanted funds that arguably were marital assets to a different trust.

Argued April 5—officially released July 19, 2022

Procedural History

Action seeking damages for, inter alia, vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was transferred to the Complex Litigation Docket; thereafter, the court, *Moll*, *J.*, denied the plaintiff's motion for summary judgment and granted the motion for summary judgment filed by the defendants Thomas Parrino et al. and rendered judgment thereon, from which the plaintiff appealed to this court, *Prescott*, *Devlin* and *D'Addabbo*, *Js.*, which affirmed the trial court's judgment; subsequently, the case was tried to the court, *Schuman*, *J.*; judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Jeffrey J. Mirman, with whom, on the brief, was *Alexa T. Millinger*, for the appellant (plaintiff).

Cristin E. Sheehan, with whom, on the brief, was *Robert W. Cassot*, for the appellee (named defendant).

Opinion

CRADLE, J. In this action alleging vexatious litigation, the plaintiff, Paul John Ferri, appeals from the judgment of the trial court, rendered following a court trial, in favor of the defendant Nancy Powell-Ferri.[1] On appeal, Ferri claims that the trial court incorrectly concluded that Powell-Ferri had probable cause to initiate and pursue her cross complaint filed against Ferri in a prior lawsuit. We affirm the judgment of the trial court.

[1] Thomas Parrino and the law firm of Nusbaum & Parrino, P.C. (Parrino defendants), also were named as defendants in this action. The trial court previously rendered summary judgment in their favor and that judgment was affirmed by this court. *Ferri* v. *Powell-Ferri*, 200 Conn. App. 63, 64–65, 239 A.3d 1216, cert. denied, 335 Conn. 970, 240 A.3d 285 (2020). They are, therefore, not parties to this appeal.

The following factual and procedural history, as previously set forth by this court, is relevant to our consideration of this appeal. "The present action is the third in a series of interrelated matters involving a dispute over the assets of a trust account. In the first action . . . Powell-Ferri sought the dissolution of her marriage to Ferri. In that action, a major marital asset in dispute was a trust created in 1983 and valued at between $60 million and $70 million. Powell-Ferri was represented in this action by the Parrino defendants.

"While the dissolution action was pending, the trustees of the 1983 trust brought a declaratory judgment action against Powell-Ferri and Ferri, seeking approval of the trustees' actions in forming another trust in 2011, into which they decanted all of the assets of the 1983 trust. The Parrino defendants also represented Powell-Ferri in the declaratory judgment action. As part of the trustees' action, the Parrino defendants filed a cross complaint against Ferri, on behalf of Powell-Ferri, alleging that Ferri had violated his duty to preserve the marital assets by allowing the trustees to remove assets from the marital estate. The trial court, *Munro*, *J.*, rendered summary judgment in favor of Ferri on the cross complaint, concluding that Powell-Ferri failed to state a cause of action. Our Supreme Court affirmed this decision on appeal and declined to recognize the new cause of action. See *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 235, 116 A.3d 297 (2015).

"The cross complaint against Ferri in the declaratory judgment action, brought by the Parrino defendants on behalf of Powell-Ferri, forms the basis for the present vexatious litigation action brought by Ferri against Powell-Ferri and the Parrino defendants. In this action, Ferri alleged that [Powell-Ferri and] the Parrino defendants lacked probable cause to institute and pursue the cross complaint. The trial court, *Moll*, *J.*, rendered summary judgment in favor of the Parrino defendants." *Ferri* v.

Powell-Ferri, 200 Conn. App. 63, 65–66, 239 A.3d 1216, cert. denied, 335 Conn. 970, 240 A.3d 285 (2020). This court affirmed the summary judgment rendered by the trial court as to the Parrino defendants, concluding that the trial court correctly determined that the Parrino defendants had probable cause to institute and pursue the cross complaint they had filed on behalf of Powell-Ferri. Id., 81.

Thereafter, Ferri's vexation litigation claims[2] against Powell-Ferri were tried to the court, *Schuman*, *J.* By way of a memorandum of decision filed on June 10, 2021, the court rendered judgment in favor of Powell-Ferri, concluding that she had probable cause to pursue her cross complaint against Ferri in the declaratory judgment action. The court reasoned, inter alia: "Upon review of the entire cross complaint, the court concludes that Powell-Ferri's cause of action against Ferri depended only on two critical facts. These facts are: (1) Ferri learned of the decantation after it happened but before the filing of the cross complaint, and (2) Ferri took no steps to return the assets to the original trust. These facts are alleged in paragraph 21 of the cross complaint, which was filed on or about October 31, 2012. Paragraph 21 alleges: [Ferri] was aware of the actions of the . . . trustees in establishing a new trust with the intent to deprive . . . [Powell-Ferri] of her equitable claims to trust assets but has taken no action to pursue his right and obligation to seek the return of the trust assets to the 1983 Trust. . . .

"There is virtually no dispute that the facts alleged in paragraph 21 are correct. First, Ferri himself testified that he learned about the new trust from his brother . . . in 2011 shortly after the trust's creation but well

[2] Ferri brought claims sounding in statutory vexatious litigation and common-law vexatious litigation against Powell-Ferri. For purposes of this appeal, we need not address in depth the distinction between those claims.

before the filing of the cross complaint. Ferri also admitted that he made no attempts to return the assets of the trust. . . .

"Given the conclusion that the facts in paragraph 21 are correct, it necessarily follows that the plaintiff has failed to prove by a preponderance of the evidence that Powell-Ferri conveyed inaccurate or misleading information to her attorney on the key points of the case. . . . Instead, the undisputed nature of the key facts underlying the cross complaint made the validity of the cross complaint almost wholly dependent on a question of law. That question was whether a party to a dissolution proceeding [must] take action to prevent the removal of assets that would benefit him. *Ferri* v. *Powell-Ferri*, supra, 200 Conn. App. 80–81. The Appellate Court has now ruled that Powell-Ferri's attorneys had probable cause to bring this claim even though it does not state a valid cause of action under Connecticut law. It almost necessarily follows that Powell-Ferri had probable cause to ask her attorneys to bring this action. After all, the court cannot expect lay litigants to know more about the law than lawyers. Further, the Appellate Court opinion recognizes that there is something intrinsically wrong, albeit not sufficiently wrong to become a recognized tort, when a spouse fails to [take] action to recapture sizable trust assets that had arguably fallen within the marital estate, and that filing a lawsuit over that matter is not a completely frivolous move. Stated differently, a reasonable layperson in this situation could have believed that litigation was justified. Thus, Powell-Ferri had both a reasonable, good faith belief in the facts alleged and the validity of the claim asserted . . . . For these reasons, Powell-Ferri had probable cause." (Citation omitted; footnote omitted; internal quotation marks omitted.) This appeal followed.

"In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to

statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under [General Statutes] § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context of a claim for vexatious litigation, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Emphasis omitted; internal quotation marks omitted.) *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, 207 Conn. App. 525, 533–34, 262 A.3d 885 (2021).

"[I]n an action for vexatious litigation, the burden rests with the plaintiff to prove that the defendant lacked probable cause to prosecute a prior action. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 330, 994 A.2d 153 (2010); see also *Zenik* v. *O'Brien*, 137 Conn. 592, 597, 79 A.2d 769 (1951) ('[a]lthough want of probable cause is negative in character, the burden is upon the plaintiff to prove affirmatively . . . that the defendant had no reasonable ground' for commencing action)." *Rockwell* v. *Rockwell*, 178 Conn. App. 373, 390, 175 A.3d 1249 (2017), cert. denied, 328 Conn. 902, 117 A.3d 563 (2018). "[T]he existence of probable cause is a question of law to be decided by the court." Id., 388. Accordingly, our review of the court's determination that probable cause existed is plenary. See, e.g., *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 97, 912 A.2d 1019 (2007).

On appeal, Ferri challenges the court's determination that Powell-Ferri had probable cause to pursue her cross complaint against him in the declaratory judgment

action. Although he sets forth several arguments in support of his claim that the court erred in so holding, the gravamen of his challenge to the court's conclusion is that there was "no evidence that . . . Powell-Ferri had a reasonable, good faith belief in the facts alleged and the validity of the claim asserted" in her cross complaint. (Internal quotation marks omitted.) He argues that his efforts to learn of the factual basis of Powell-Ferri's cross complaint were repeatedly thwarted by Powell-Ferri's evasive responses to discovery and during her testimony at her deposition and at trial. He asserts that Powell-Ferri "failed to identify any information [that] she shared with her attorneys" or "any factual basis for commencing the cross complaint . . . ." He contends that "there was no evidence that [Powell-Ferri] conducted an independent investigation as to the facts that might support a conclusion that she had a good faith belief sufficient to justify a reasonable person to institute the cross complaint against [Ferri]."

In so arguing, Ferri disregards the well settled principle, as stated herein, that it was his burden to prove that Powell-Ferri lacked probable cause to commence and pursue her cross complaint. Contrary to Ferri's position, Powell-Ferri was not required to present any evidence of her good faith belief in the facts alleged in her cross complaint or the validity of her action. Rather, to sustain an action for vexatious litigation against Powell-Ferri, Ferri had the burden of proving that Powell-Ferri did *not* have such a reasonable, good faith basis for her cross complaint against him.[3]

[3] In his brief to this court, Ferri specifically claims that the trial court erred "(1) in concluding that, because her attorneys had probable cause to bring the cross complaint, [Powell-Ferri] had probable cause, based only on the fact that [Ferri] learned of the decanting of trust assets only after it occurred; (2) in failing to analyze the issue of probable cause on [Powell-Ferri's] independent obligation to investigate facts; (3) in holding that [Ferri] was required to seek judicial review of [Powell-Ferri's] refusal to answer an interrogatory regarding her basis for bringing the cross complaint; (4) in speculating that there was no evidence that any information that she provided to her attorneys was false; and (5) in failing to hold that, even if

Moreover, as aptly noted by the trial court, not only did Powell-Ferri have a good faith belief in the facts alleged in her cross complaint, but the relevant facts related to the existence of probable cause were undisputed. Powell-Ferri alleged that Ferri failed to seek the return of the assets of the 1983 trust, which were transferred to another trust after she commenced the dissolution action. In light of the automatic orders that issue in all dissolution cases, which include an order that neither party transfer or dissipate marital assets, it cannot reasonably be argued that Powell-Ferri did not maintain a good faith belief that Ferri violated the automatic orders when the trustees decanted funds in excess of $60 million, which arguably were marital assets, to a different trust.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY SMITH (AC 44525)

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

Syllabus

The defendant, who had been previously convicted, following a jury trial, of various crimes, including felony murder and manslaughter in the first

[Powell-Ferri] had probable cause to commence the cross complaint, she ceased to have probable cause to continue to pursue it." Because, as discussed herein, Ferri failed to satisfy his burden of proving that Powell-Ferri lacked a reasonable, good faith belief in the facts alleged in her cross complaint or the legal validity of her claim against Ferri, these claims are unavailing.

[4] Indeed, the declaratory judgment action filed by the trustees sought "a ruling from the court that they had validly exercised their authority in transferring the assets [from the 1983 trust] and that Powell-Ferri had no interest in the 2011 trust assets." *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 226, 116 A.3d 297 (2015). The fact that such a declaration was sought by the trustees arguably supports a reasonable belief by Powell-Ferri that she had an interest in the assets that were transferred.

degree, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The trial court had merged the defendant's convictions of felony murder and manslaughter and sentenced him on the felony murder conviction. The defendant claimed that his acquittal on charges of capital felony and murder barred, on double jeopardy grounds, his prosecution during the same trial proceeding for felony murder and manslaughter and that the court had improperly sentenced him on his felony murder conviction rather than his manslaughter conviction. *Held*:

1. The defendant could not prevail on his claim that, because he had been acquitted of both capital felony and murder, his prosecution for felony murder and manslaughter was barred on double jeopardy grounds, as the motion to correct an illegal sentence failed to advance a colorable claim that invoked the jurisdiction of the trial court: rather than challenging the sentence or the sentence proceeding, the claim challenged the proceeding leading up to the defendant's underlying convictions, over which the court did not have subject matter jurisdiction; accordingly, this court concluded that the claim was properly rejected by the trial court but that the form of the judgment was improper with respect to this portion of the defendant's motion, and the case was remanded with direction to render judgment dismissing that portion of the defendant's motion.
2. The trial court did not abuse its discretion in sentencing the defendant on his felony murder conviction rather than his manslaughter conviction; pursuant to our Supreme Court's decision in *State* v. *Polanco* (308 Conn. 242), and this court's decision in *State* v. *Holmes* (209 Conn. App. 197), the trial court had authority to impose a sentence on the greater felony murder charge rather than the less serious manslaughter charge.

Argued March 10—officially released July 19, 2022

Procedural History

Substitute information charging the defendant with two counts of the crime of kidnapping in the first degree, and with the crimes of capital felony, murder, felony murder and robbery in the first degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Schimelman*, *J.*; verdict and judgment of guilty of two counts of kidnapping in the first degree, and of felony murder, robbery in the first degree and the lesser included offense of manslaughter in the first degree; thereafter, the court, *Strackbein*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this

court. *Improper form of judgment*; *reversed in part*; *judgment directed.*

Jeffrey Smith, self-represented, the appellant (defendant).

Melissa Patterson, senior assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Michael Reagan*, former state's attorney, for the appellee (state).

Opinion

LAVINE, J. The self-represented defendant, Jeffrey Smith, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court erred in denying his motion to correct an illegal sentence because (1) his acquittal on the charges of capital felony and murder barred, on double jeopardy grounds,[1] his prosecution during the same trial on the charges of felony murder and manslaughter and (2) the court improperly sentenced him on his felony murder conviction rather than on his manslaughter conviction.[2] We reject the second claim. As to the first claim, we conclude that the trial court lacked subject matter jurisdiction to consider it and it should be dismissed. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

[1] The double jeopardy clause of the United States constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const., amend. V. "The double jeopardy prohibition of the fifth amendment extends to state prosecutions through the fourteenth amendment to the United States constitution." *State* v. *Thomas*, 296 Conn. 375, 383 n.7, 995 A.2d 65 (2010).

[2] At oral argument before this court, the defendant raised an additional claim, which was not presented in his appellate brief, that he was charged with multiple homicide offenses for a single act in violation of his constitutional right against double jeopardy. We decline to review this claim. "[I]t is well settled that a claim cannot be raised for the first time at oral argument." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 797 n.12, 256 A.3d 655 (2021).

The following procedural history is relevant. Following trial, the jury found the defendant not guilty of the charges of capital felony in violation of General Statutes (Rev. to 1997) § 53a-54b (5) and murder in violation of General Statutes (Rev. to 1997) § 53a-54a. The jury found him guilty of felony murder in violation of General Statutes (Rev. to 1997) § 53a-54c, manslaughter in the first degree in violation of General Statutes § 53a-55, two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) and (B), and robbery in the first degree in violation of General Statutes § 53a-134 (a) (1). The trial court, *Schimelman*, *J.*, merged the defendant's convictions of felony murder and manslaughter and sentenced him to sixty years in prison on the felony murder conviction, which sentence was to run consecutively to both his concurrent twenty-five year sentences on each kidnapping count, as well as his concurrent sentence of twenty years on the robbery count, for a total effective sentence of eighty-five years of imprisonment. This court affirmed the defendant's conviction on direct appeal. *State* v. *Smith*, 107 Conn. App. 746, 946 A.2d 926, cert. denied, 288 Conn. 905, 953 A.2d 650 (2008).

In 2015, the defendant, representing himself, filed an amended motion to correct an illegal sentence (2015 motion) pursuant to Practice Book § 43-22,[3] in which he alleged multiple double jeopardy violations. See *State* v. *Smith*, 180 Conn. App. 371, 374–75, 184 A.3d 831 (2018) (detailing claims made in 2015 motion), rev'd on other grounds, 338 Conn. 54, 256 A.3d 615 (2021). In a June 27, 2016 memorandum of decision, the court, *Strackbein*, *J.*, denied the 2015 motion. On appeal, this court affirmed the judgment of the trial court. Id., 373. This court rejected the defendant's claims, including

[3] Practice Book § 43-22 provides in relevant part that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . ."

his claim that the sentencing court had violated the principles established by our Supreme Court in *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), and *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015), by merging his cumulative homicide convictions for felony murder and manslaughter rather than vacating his conviction for manslaughter, reasoning that *Polanco* and *Miranda* do not apply retroactively. *State* v. *Smith*, supra, 180 Conn. App. 379–84. Our Supreme Court reversed the judgment of the Appellate Court, holding that, because the sentencing court did not impose any sentence on the defendant for his merged manslaughter conviction, vacatur of that conviction would have no effect on the length, computation or structure of the sentence and, accordingly, the trial court lacked subject matter jurisdiction over the defendant's *Polanco/Miranda* claim. *State* v. *Smith*, 338 Conn. 54, 63–64, 256 A.3d 615 (2021).

The self-represented defendant filed the present motion to correct an illegal sentence, dated December 13, 2019, in which he claimed multiple double jeopardy violations and sought the vacatur of all his sentences and convictions.[4] Following several hearings on the motion, during which the defendant was asked to clarify his claims, the court, *Strackbein*, *J.*, in a December 22, 2020 memorandum of decision, denied the motion. The court incorporated into its decision the June 27, 2016 memorandum of decision denying the 2015 motion and determined that most of the defendant's arguments already had been addressed by this court in *State* v.

[4] At a November 2, 2020 hearing on the present motion to correct an illegal sentence, the defendant requested a lawyer to assist him with certain procedural issues. The court continued the case for the appointment of an assigned counsel. At a December 10, 2020 hearing, the defendant's appointed counsel explained that she previously had filed a motion to withdraw as the defendant's counsel. When asked by the court whether he wanted another counsel appointed or wanted to represent himself, the defendant responded that he would represent himself.

Smith, supra, 107 Conn. App. 746. The court rejected the defendant's claim "where again he stated he was 're-prosecuted' when the jury found him guilty on several charges but not the capital felony and murder" and reasoned that "the trial judge did not impose multiple punishments for the same crime." The court also rejected the defendant's claim that the court should have sentenced him on the manslaughter charge instead of the felony murder charge, and reasoned that "[t]he trial of this defendant predated *Polanco*, which is not retroactive—but the merger of the manslaughter conviction under the felony murder conviction serves the same purpose of explaining that the lesser included offense is subsumed under the greater offense." This appeal followed.

I

The defendant first claims that "[t]he state must not continue to overlook and give short shrift to the fact that the [defendant] was initially acquitted twice before being illegally convicted twice for a single alleged homicide . . . ." As we interpret this claim, the defendant argues that, in denying his motion to correct, the court improperly rejected his claim that his convictions for felony murder and manslaughter, after he had been acquitted of both capital felony and murder in the same trial proceeding, constituted a second prosecution for the same offense in violation of his constitutional right against double jeopardy. The state counters that the trial court did not have subject matter jurisdiction to entertain this claim. We agree with the state.

"The determination of whether a claim may be brought via a motion to correct an illegal sentence presents a question of law over which our review is plenary." *State* v. *Thompson*, 190 Conn. App. 660, 665, 212 A.3d 263, cert. denied, 333 Conn. 906, 214 A.3d 382 (2019). "A motion to correct an illegal sentence under Practice

Book § 43-22 constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates. . . . In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack. . . . [A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to . . . § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Citations omitted; internal quotation marks omitted.) *State* v. *Holmes*, 209 Conn. App. 197, 202–203, 267 A.3d 348 (2021), cert. denied, 342 Conn. 909, 271 A.3d 663 (2022).

The jurisdictional issue raised by the state requires us to "consider whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence. . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail. . . . The jurisdictional

and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. . . . In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 783–85, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

The defendant's claim attacks his convictions for felony murder and manslaughter. Because the claim challenges the proceeding leading up to the underlying conviction rather than the sentence or the sentencing proceeding, it does not fall within the purview of Practice Book § 43-22. See, e.g., *State* v. *Holmes*, supra, 209 Conn. App. 204 ("[s]imply put, our law is clear that motions to correct an illegal sentence that attack the conviction or the proceedings leading up to the conviction are not within the trial court's jurisdiction on a motion to correct an illegal sentence"). Accordingly, the trial court does not have subject matter jurisdiction over such a claim. See *State* v. *Wright*, 107 Conn. App. 152, 157, 944 A.2d 991 (claim that sentence was illegal because conviction violated double jeopardy does not fall within purview of Practice Book § 43-22), cert. denied, 289 Conn. 933, 958 A.2d 1247 (2008). Because this claim is not colorable, the trial court should have dismissed, rather than denied, the defendant's motion as to this claim. See *State* v. *Boyd*, 204 Conn. App. 446, 457, 253 A.3d 988, cert. denied, 336 Conn. 951, 251 A.3d 617 (2021).

II

The defendant next claims that he "was initially found guilt[y] of manslaughter followed by felony murder. As

a result the sentencing court had the option of sentencing the [defendant] to either conviction opting for the second conviction which—unfortunately for the [defendant]—carries a penalty three . . . times higher than that of the first conviction."[5] In other words, the defendant challenges the action of the trial court in sentencing him on the felony murder conviction rather than the manslaughter conviction. We are not persuaded.

"Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard." *State* v. *Tabone*, 279 Conn. 527, 534, 902 A.2d 1058 (2006).

Our Supreme Court in *State* v. *Polanco*, supra, 308 Conn. 245, held that, "when a defendant has been convicted of greater and lesser included offenses, the trial court must vacate the conviction for the lesser offense rather than merging the convictions . . . ." On appeal, the defendant's claim does not challenge whether his conviction for manslaughter should have been vacated instead of merged with his conviction for felony murder. Under the circumstances of the present case, the trial court would lack jurisdiction to entertain such a claim. See *State* v. *Smith*, supra, 338 Conn. 64. The defendant's claim focuses on whether the sentencing court properly sentenced the defendant on the felony murder conviction instead of the manslaughter conviction. We note

[5] The defendant additionally argues, citing the docket number for *State* v. *Smith*, supra, 180 Conn. App. 371, "[h]ere would be where the [defendant's] prior argument regarding the kidnapping and robbery convictions and sentences would be inserted . . . ." The court stated in its 2020 memorandum of decision that "most of [the defendant's] arguments have been addressed in prior motions and a decision by the Appellate Court encapsulates many of the defendant's issues." The defendant cannot prevail in raising for a second time the precise argument that we previously have rejected in our decision in *State* v. *Smith*, supra, 180 Conn. App. 376–79, as it is barred by the doctrine of res judicata. See *State* v. *Osuch*, 124 Conn. App. 572, 581, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010).

that there is authority for the imposition of a sentence on the greater felony murder charge instead of a sentence on the less serious manslaughter charge and that the analysis in *Polanco* supports the court imposing a sentence for the felony murder conviction instead of the manslaughter conviction.[6] See *State* v. *Polanco*, supra, 308 Conn. 260–61. Furthermore, this court recently rejected the very argument advanced by the defendant in this case. See *State* v. *Holmes*, supra, 209 Conn. App. 213 (concluding that "[t]he court properly vacated the manslaughter conviction because vacatur of the less serious homicide offense is proper"). We conclude that the defendant has not established that the court abused its discretion in determining that the felony murder conviction controls and sentencing him on felony murder instead of manslaughter. See id.

The form of the judgment is improper, the judgment is reversed only with respect to the trial court's denial of that portion of the defendant's motion to correct an illegal sentence claiming that his convictions for felony murder and manslaughter violated his federal constitutional right against double jeopardy, and the case is remanded with direction to render judgment dismissing that portion of the defendant's motion to correct an illegal sentence; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[6] We note that manslaughter is not a lesser included offense of felony murder but that subjecting a defendant to punishment for both the more serious class A felony of felony murder and the less serious class B felony of manslaughter in the first degree violates double jeopardy because the legislature intended that they be treated as the same offense. See *State* v. *Holmes*, supra, 209 Conn. App. 208–10.

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Motions for order of temporary custody; whether trial court improperly admitted certain hearsay statements of minor children under statutory (§ 46b-129 (g)) exception to hearsay rule; whether trial court abused its discretion in admitting testimony of witnesses, each of whom recounted various hearsay statements of minor children; claim that trial court improperly admitted exhibits that contained inadmissible hearsay statements or were authenticated by way of hearsay statements of minor children; claim that trial court improperly admitted exhibits containing photographsthrough witness who relied on inadmissible hearsay statements of minor children in attempting to authenticate photographs, rather

than her personal knowledge; whether trial court improperly admitted hearsay statements made by minor child during forensic interview under medical diagnosis or treatment exception to hearsay rule; whether trial court's evidentiary errors were harmful.

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.

Mercedes-Benz Financial *v.* 1188 Stratford Avenue, LLC. 739

Breach of contract; whether trial court abused its discretion in denying motion to open and to set aside default judgment; claim that trial court abused its discretion by denying defendants' oral motion to continue hearing on motion to open judgment.

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.* Garrison 786
Assault in first degree; motion to suppress; whether trial court properly denied defendant's motion to suppress certain statements he made to police while in hospital because statements were product of custodial interrogation and police had not advised him of his rights pursuant to Miranda *v.* Arizona *(384 U.S. 436); whether trial court properly determined that defendant was not in police custody for purposes of* Miranda*; whether officers' questioning of defendant constituted equivalent of interrogation for purposes of* Miranda *because officers should have known that questions reasonably were likely to elicit incriminating statements; claim that admission of defendant's statements into evidence was harmless beyond reasonable doubt.*

State *v.* Greer 757
Risk of injury to child; sexual assault in second degree; statute of limitations; claim that trial court improperly concluded that statute of limitations applicable to charges of sexual assault in second degree under applicable statute ((Rev. to

2001) § 54-193a, as amended by Public Acts 2002, No. 02-138) did not apply to risk of injury charges even though charges were all based on defendant's same conduct; claim that trial court improperly declined to instruct jury to apply standard of proof to determine whether defendant committed prior acts of uncharged misconduct.

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).*

State *v.* Smith 848

Kidnapping in first degree; felony murder; robbery in first degree; manslaughter in first degree; motion to correct illegal sentence; whether defendant's claim that his convictions for felony murder and manslaughter, after he had been acquitted of both capital felony and murder in same proceeding, violated constitutional prohibition against double jeopardy attacked proceedings leading up to convictions instead of sentence or sentence proceeding; whether trial court abused its discretion in sentencing defendant on his felony murder conviction rather than on his manslaughter conviction.

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.

Wallace *v.* Caring Solutions, LLC 605

Employment discrimination; Connecticut Fair Employment Practices Act (§ 46a-60); whether trial court erred in applying wrong standard in reviewing discrimination claim under § 46a-60; claim that statements in defendant's pretrial brief were judicial admissions; claim that trial court failed to give sufficient weight to different explanations offered by defendant for not hiring plaintiff; whether trial court's finding that plaintiff failed to prove that she was not hired because of her hearing disability was clearly erroneous.

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.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* CHRISTOPHER CALHOUN, SC 20497
Judicial District of New Haven

Criminal; Whether Trial Court Properly Refused to Give Jury Jailhouse Informant Instruction; Whether Witnesses' Cooperation Agreements Were Properly Admitted; Whether Trial Court Properly Limited Cross-Examination of Witness Concerning Acts of Misconduct. The defendant was charged with murder in connection with the 2011 shooting of Isaiah Gantt. At trial, there was evidence that the defendant and Gantt both sold drugs in the Church Street South housing project in New Haven. Two witnesses, Eric Canty and Jules Kierce, testified that they saw the defendant shoot Gantt after Gantt approached the defendant and his associates and accused them of stealing his customers. Canty also testified that, a couple of days after the incident, the defendant admitted to him that he shot Gantt. Canty was an associate of the defendant in the drug dealing enterprise, while Kierce was an associate of Gantt. Canty and Kierce did not contact the police regarding what they knew about Gantt's murder until 2016 and 2017, respectively, when they were both incarcerated for unrelated crimes. Both men entered into cooperation agreements with the state pursuant to which they received certain benefits in exchange for their testimony. The agreements contained consequence provisions stating that "[s]hould it reasonably be determined by a judge of the Superior Court or the State's Attorney's Office that [the individual] has given false, incomplete or misleading information . . . he shall thereafter be subject to prosecution for any state criminal offense of which this office has knowledge, including, but not limited to . . . perjury and hindering prosecution." The trial court instructed the jury to carefully scrutinize the testimony of Canty and Kierce, given that they were cooperating witnesses. The trial court rejected, however, the defendant's request that it give the jury a special credibility instruction pertaining to jailhouse informants, finding that neither man satisfied the definition of a jailhouse informant set forth in our case law because they were not testifying as to incriminating statements made to them by a fellow inmate. The defendant was convicted as charged and appealed directly to the Supreme Court. The defendant claims on appeal that the trial court erred in refusing to give the jury an instruction on the reliability of jailhouse informants. The defendant also claims that the trial court erroneously permitted

the state to vouch for the credibility of Canty and Kierce by admitting their cooperation agreements during the state's case-in-chief. Specifically, the defendant claims that consequences provisions in the agreements suggested to the jury that the state believed that the witnesses' incriminating statements were truthful. The defendant also claims that the trial court improperly prohibited him from questioning Kierce on cross-examination about certain misconduct that he committed after he agreed to cooperate with the state in order to impeach Kierce's claim that he had finally come forward to testify against the defendant because of a newfound desire to put his criminal past behind him.

KEYBANK, N.A. *v.* EMRE YAZAR, et al., SC 20648
Judicial District of Stamford-Norwalk

Foreclosure; Whether Appellate Court Correctly Concluded Mortgagee's Failure to Comply with EMAP Notice Requirement Deprives Trial Court of Subject Matter Jurisdiction; Whether Appellate Court Correctly Concluded EMAP Notice Sent in Prior Dismissed Foreclosure Action Did Not Satisfy EMAP Notice Requirement in Second Foreclosure Action Based on Same Default and Mortgage. In August, 2016, pursuant to General Statutes § 8-265ee (a), First Niagara Bank, N.A. (First Niagara), sent Emergency Mortgage Assistance Program (EMAP) notices to the defendants, Emre and Ozlem Yazar, due to their failure to make payments on a promissory note executed in favor of First Niagara. The plaintiff, KeyBank, N.A., subsequently acquired First Niagara and took possession of the note. In January, 2017, the plaintiff commended a foreclosure action against the defendants (prior foreclosure action). The prior foreclosure action was dismissed by the trial court for failure to send a mediation notice by a date certain. In August, 2017, the plaintiff commenced the present foreclosure action against the same defendants, based on the same underlying payment default. In September, 2018, the plaintiff filed a motion for summary judgment as to liability and claimed that it had complied with the EMAP notice requirement. The plaintiff was relying on the August, 2016 EMAP notices sent by First Niagara in advance of the commencement of the prior foreclosure action in support of its position. Defendant Ozlem Yazar objected to the summary judgment and argued that the plaintiff had not complied with the EMAP notice requirement because she had not received any EMAP notices with respect to the present action. On November 21, 2018, the trial court held that the mortgage note was in default and that the plaintiff had

complied with its EMAP notice obligations and granted the motion for summary judgment. On April 1, 2019, the court rendered a judgment of strict foreclosure, from which defendant Ozlem Yazar appealed. On appeal, the defendant claimed that the plaintiff's failure to comply with the EMAP notice requirement in the present foreclosure action deprived the trial court of subject matter jurisdiction. The Appellate Court (206 Conn. App. 625) held that the plaintiff had failed to comply with the jurisdictional condition precedent of the notice requirement of § 8-265ee (a) when it failed to mail the EMAP notice to the defendant in the present action, thereby depriving the trial court of subject matter jurisdiction. The Appellate Court further held that the plaintiff's reliance on the EMAP notice sent in the prior foreclosure action, which had been dismissed, did not satisfy the notice requirement of § 8-265ee (a) for the present foreclosure action. The plaintiff was granted certification to appeal, and the Supreme Court will consider the following issues: (1) Did the Appellate Court correctly conclude that a mortgagee's failure to comply with the EMAP notice requirements set forth in General Statutes § 8-265ee (a) deprives the trial court of subject matter jurisdiction over the foreclosure action? (2) Did the Appellate Court correctly conclude that an EMAP notice that had been sent by the mortgagee in the first foreclosure action, which was later dismissed, did not satisfy the notice requirements of General Statutes § 8-265ee (a) in connection with a second foreclosure action subsequently commenced against the mortgagor based on the same default under the same mortgage?

STRAZZA BUILDING & CONSTRUCTION CO. *v.* JENNIFER G. HARRIS, TRUSTEE et al., SC 20660
Judicial District of Stamford-Norwalk

Res Judicata; Privity; Whether General Contractor Was in Privity with Subcontractor; Whether *Girolametti* v. *Michael Horton Associates, Inc.* Presumption of Privity Was Inapplicable. Jennifer G. Harris is the trustee of the Jennifer G. Harris Revocable Trust, which owns real property in Greenwich. Harris hired the plaintiff to renovate the property, and the plaintiff in turn hired subcontractors including Robert Rozmus Plumbing & Heating, Inc. Harris eventually terminated the plaintiff after disputes between the parties. The plaintiff claimed that it was owed for labor and materials billed prior to the termination. The plaintiff and its subcontractors filed mechanic's liens against Harris, and the plaintiff commenced an action against Harris seeking to foreclose on its lien and alleging contract-based claims.

Harris commenced a separate action against Rozmus seeking to reduce or discharge its mechanic's lien. The trial court in that action held that the mechanic's lien was not valid where the lienable fund for the plaintiff's contract was entirely exhausted by the credits owed to Harris against the various mechanic's liens and where Rozmus could only recover to the extent that the plaintiff could recover. Harris thereafter filed a motion for summary judgment in the plaintiff's action, claiming that the finding in the Rozmus action that the lienable fund had been exhausted was entitled to preclusive effect under the doctrine of res judicata, or claim preclusion. The plaintiff argued that it could not be bound by a holding in an action in which it had not been a party and that there was insufficient privity between it and Rozmus for res judicata purposes. The trial court agreed with the plaintiff and denied the motion for summary judgment, from which Harris appealed. The Appellate Court (207 Conn. App. 649) affirmed the judgment of the trial court. It disagreed with Harris that the trial court failed to properly consider the presumption of privity set forth in *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67 (2019), where the Supreme Court held that subcontractors were in privity with a general contractor, such that arbitration between the general contractor and property owners had a res judicata effect in the owners' subsequent action against not only the general contractor but also the subcontractors. The Appellate Court concluded that *Girolametti* was distinguishable because the presumption of privity in that case arose from the "flow down" obligation owed by a general contractor to a subcontractor and that there was no corresponding "flow up" obligation that extended from a subcontractor to a general contractor. The Appellate Court further agreed with the trial court that, under the functional relationship test to establish privity, there was a genuine issue of material fact about whether the plaintiff's interests were adequately represented in Harris' action against Rozmus where Rozmus' lien was significantly less than the plaintiff's lien and where the trial court's decision in that action considered renovations in which Rozmus was not involved. In this certified appeal by Harris, the Supreme Court will decide whether the Appellate Court properly determined that there was a genuine issue of material fact on the question of privity where the trial court in Harris' action against Rozmus found that no money was due to the plaintiff and where Rozmus was statutorily subrogated to the plaintiff's rights. The Supreme Court will also decide whether the Appellate Court properly determined that the presumption of privity set forth in *Girolametti* was inapplicable.

IFTIKAR AHMED *v.* OAK MANAGEMENT COPRORATION, SC 20677
Judicial District of Stamford-Norwalk

Arbitration; Whether Application of Fugitive Disentitlement Doctrine Violated § 52-418 and Public Policy; Whether Case Should be Remanded to Modify Award to Avoid Duplicative Recovery. Iftikar Ahmed worked for Oak Management Corporation (OMC), a venture capital firm, from 2004 to 2015. His duties included identifying and recommending investment opportunities and negotiating the terms of the investment. In April, 2015, Ahmed was arrested for insider trading unrelated to his employment. OMC subsequently terminated Ahmed's employment after an investigation uncovered fraud in connection with three of his investments and, pursuant to various contracts, seized assets valued at $35 million earned by Ahmed but still in its possession. In May, 2015, the Securities and Exchange Commission (SEC) filed a civil enforcement action against Ahmed in federal court. Days later, Ahmed fled to India in violation of the terms of release in his criminal case. The SEC ordered under the fugitive disentitlement doctrine that Ahmed was barred from access to confidential materials produced in its proceedings. The doctrine provides that a fugitive from justice will be barred from seeking relief from the judicial system whose authority he evades. The federal court found that Ahmed had committed fraud in connection with ten companies, including the three uncovered by OMC, and ordered that he pay over $65 million in disgorgement, civil penalties and interest. The federal court declined to credit Ahmed for the amount seized by OMC. OMC commenced arbitration seeking to recover the damages caused by Ahmed's fraud. The arbitrator ordered that, due to Ahmed's fugitive status, he was barred from contesting OMC's allegations and prohibited from accessing confidential information. His affirmative defenses were also stricken, and his counterclaim was dismissed. Following a hearing in damages, conducted remotely over Zoom in Ahmed's absence, the arbitrator awarded OMC over $56 million in damages for gross compensation paid during Ahmed's employment, legal fees, management fees that were returned to investors as a result of his conduct, and punitive damages. Ahmed filed an application to vacate the arbitration award. The trial court denied the application, finding that, although the arbitration proceedings challenged its perspective of what a fair hearing should be, it could not conclude, given due deference to the arbitrator and Ahmed's own conduct, that the arbitrator crossed any limits when applying the fugitive disentitlement doctrine. The trial court noted Ahmed's lack of candor throughout the proceedings and repeated attempts to delay and that it was his own elective absence from the

hearing in damages, rather than any action by the arbitrator, that prevented him from presenting evidence and objecting to the claimed damages or confidentiality of certain documents. Ahmed appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. Ahmed claims on appeal that the trial court's denial of his application to vacate was improper because the arbitration award (1) violated General Statutes § 52-418, as the arbitrator exceeded his authority and committed misconduct in denying him a full and fair hearing; (2) violated the Federal Arbitration Act, which is nearly identical to § 52-418; and (3) was contrary to public policy that arbitration proceedings be fundamentally fair and that the integrity of the arbitration process be upheld. If the arbitration award is not vacated, Ahmed requests that the case be remanded to the trial court with direction to modify the award to avoid duplicative recovery.

SAIFULLAH KHAN *v.* YALE UNIVERSITY et al., SC 20705
United States Court of Appeals for the Second Circuit

Absolute Immunity; Whether Proceeding before Nongovernmental Entity May Be Deemed Quasi-Judicial for Purposes of Affording Participants Absolute Immunity. In 2015, the plaintiff, who at the time was an undergraduate at Yale University (Yale), was accused by a fellow student, Jane Doe, of sexually assaulting her in her dormitory room. Yale initiated disciplinary proceedings against the plaintiff, which were subsequently stayed after the state charged the plaintiff with sexual assault. After a jury trial, the plaintiff was acquitted of all criminal charges. In 2018, Yale resumed disciplinary proceedings against the plaintiff and convened a hearing panel. Although the plaintiff and Doe testified at the hearing, they did so outside each other's presence and neither was placed under oath or subject to cross examination. Applying a preponderance of the evidence standard of proof, Yale found the plaintiff to have violated its sexual misconduct policy and expelled him. The plaintiff then brought the present action in the United States District Court for the District of Connecticut alleging, inter alia, claims of defamation and tortious interference with contract against Doe. The district court granted Doe's motion to dismiss these claims, concluding, inter alia, that Doe enjoyed absolute immunity for her statements in this quasi-judicial proceeding. Although it acknowledged that no binding Connecticut authority had extended absolute immunity to statements made during the proceedings of a nongovernmental entity, the district court concluded that extending such immunity in the present case was warranted by the

six-factor test employed by Connecticut to identify quasi-judicial proceedings and by public policy. The plaintiff then appealed to the United States Court of Appeals for the Second Circuit. Finding no binding Connecticut authority on the question of whether quasi-judicial immunity extends to proceedings by nongovernmental entities like Yale, the Second Circuit certified the following questions, which the Supreme Court accepted pursuant to General Statutes § 51-199b: (1) Can a proceeding before a nongovernmental entity ever be deemed quasi-judicial for purposes of affording absolute immunity to proceeding participants? (2) If the answer to the first question is "yes," what requirements must be satisfied for said proceeding to be recognized as such? Specifically: (a) Must an entity apply controlling law, and not simply its own rules, to the facts at issue? (b) How, if at all, do the "powers" factors enumerated in *Kelley* v. *Bonney*, 221 Conn. 549, 567 (1992), and *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 85 (2004), apply to the identification of a nongovernmental entity as quasi-judicial; and, if they do apply, are these factors "in addition" to; id.; or independent of, a preliminary law-to-fact requirement?; (c) How, if at all, does public policy inform the identification of a nongovernmental entity as quasi-judicial and, if it does, is this consideration in addition to, or independent of, a law-to-fact requirement and the *Kelley/Craig* factors? (d) How, if at all, do procedures usually associated with traditional judicial proceedings inform the identification of a proceeding as quasi-judicial? (3) Was the 2018 Yale disciplinary proceeding in the present appeal properly recognized as quasi-judicial? (4) If the answer to the third question is "yes," would Connecticut extend absolute quasi-judicial immunity to Doe for her statements in the Yale proceeding? (5) If the answer to the third question is "no," would Connecticut afford Doe qualified immunity or no immunity at all?

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

Jessie Opinion
Chief Staff Attorney
