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sively supported the state's theory as to the defendant's motive, as motive is not an element of the crime of murder, and the court properly instructed the jury that, even if it credited certain testimony that the defendant was engaged in the sale of drugs on the night of the murder, the jury could consider that evidence only if it found that it logically and rationally supported the state's theory of motive.

Argued January 10—officially released June 14, 2022

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Gold, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Rafael Ortiz, appeals¹ from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a).² The defendant claims that (1) prosecutorial impropriety deprived him of his right to a fair trial, (2) the trial court committed evidentiary and constitutional error by precluding defense counsel from using certain prior felony convictions to impeach two of the state's witnesses, and (3) the trial court erred in its charge to the jury. We disagree with each of these claims and, accordingly, affirm the judgment of the trial court.

¹ The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

² General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person"

NOTE: These pages (343 Conn. 566 and 570) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 14 June 2022.

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The record reveals the following facts, which the jury reasonably could have found, and procedural history. On the evening of June 10, 2003, the victim, Benjamin Baez, Jr., and his friend, Enrique Lugo, were “hanging out” and smoking phencyclidine (PCP). Shortly before midnight, Lugo drove the two men in his car to Main Street in Hartford, near Salvin Shoes, to buy more PCP. Once there, the victim got out of the parked car while Lugo remained in it. Shortly after the victim returned to the car, Lugo saw the defendant, whom he had known for many years and considered a friend, approach the car, aim a gun at the victim, and shoot the victim through the front passenger side window. After the shooting, Lugo rushed the victim to Saint Francis Hospital and Medical Center, where he was later pronounced dead.

Wilbur Irizarry and Lisa Rosario also witnessed the shooting.³ Irizarry and his cousin had gone to Main Street to “hang out” with friends in front of Bashner’s Liquors, down the street from Salvin Shoes. When they arrived, Irizarry noticed that the defendant, whom he knew as “Felo,” was there with a man who went by the name “Lu-Rock.” Although Irizarry was aware that the defendant sold drugs, it was unusual to see him doing so at this location. Irizarry heard the defendant arguing with another man whom Irizarry did not know but who was later identified as the victim. Initially, he could not hear what the men were arguing about. As he got closer, however, he heard the victim ask the defendant, “[Felo], can you give me some work?” Irizarry, who previously had been involved in the sale of drugs, understood this to mean that the victim was

³ We note that neither Lugo, Irizarry, nor Rosario came forward with information about the shooting until they were contacted by investigators from the cold case unit of the Office of the Chief State’s Attorney, in late 2015 and early 2016. As discussed subsequently in this opinion, all three witnesses separately identified the defendant as the shooter in a double-blind, sequential photographic array procedure and gave statements implicating the defendant in the victim’s murder.

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ever inferences should be drawn from the defendant’s prior [mis]conduct are for the jury to determine. . . . Accordingly, we decline[d] to adopt a rule requiring that the trial court make a preliminary finding by clear and convincing evidence that prior misconduct occurred before submitting that evidence to the jury. . . .

“Thus, our conclusion . . . implicitly reject[ed] the notion that any particular standard of proof is necessary in a trial court’s jury instructions regarding prior misconduct evidence, and [made] clear that prior misconduct evidence may be considered by the jury for a proper purpose if there [is] evidence from which the jury reasonably could . . . [conclude] that the prior act of misconduct occurred and that the defendant was the actor.” (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State v. Cutler*, supra, 293 Conn. 320–21.

In *Cutler*, we relied on our reasoning in *Aaron L.* in concluding that the trial court was not required to instruct the jury that it must “find the existence of a prior act of misconduct by a preponderance of the evidence before considering it for a proper purpose.” *Id.*, 315. Although we recognized that the issue in *Aaron L.* was one of the admissibility of prior misconduct evidence, whereas, in *Cutler*, the issue before us was the propriety of jury instructions on the use of prior misconduct evidence, we concluded that such a distinction did not prevent us “from employing our well reasoned conclusion in *Aaron L.* as guidance in the present case.” *Id.*, 320. In so doing, we concluded that, “[when] the admission of prior misconduct evidence depends on the trial court’s determination that there is sufficient evidence from which the jury reasonably could conclude that the prior acts of misconduct occurred and that the defendant was the actor . . . we see 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. . . . Accordingly,

NOTE: These pages (343 Conn. 601 and 602) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 14 June 2022.

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we conclude[d] 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.” (Citations omitted; footnote omitted.) *Id.*, 321–22. We concluded, therefore, that the trial court properly instructed the jury that “it could consider the state’s prior misconduct evidence if it ‘believe[d]’ that evidence and found that it ‘logically and rationally’ supported the issue for which it was being offered.”¹³ *Id.*, 322.

Guided by this prior case law, it is apparent that the trial court properly declined to instruct the jury that it could consider the prior misconduct evidence only if

¹³ The defendant argues that *Aaron L.* and *Cutler* are inapplicable to the present case because those cases “involved the issue of whether a particular standard of proof is needed in order to establish that an act of misconduct has occurred,” whereas, here, the issue involves the omission of the word “conclusively” in a jury charge, which “does not relate to the burden of proof for an act of misconduct [and] . . . serves an entirely different function.” (Emphasis omitted; internal quotation marks omitted.) Specifically, the defendant argues that “[t]he state fails to recognize that the phrase ‘logically, rationally and conclusively’ . . . does not relate to whether an act of misconduct occurred; the phrase relates to whether the act of misconduct (if proved to the jury’s satisfaction under the ‘believe’ standard) supports the proposition or issue for which the misconduct was offered” (Citation omitted; emphasis omitted.) We are not persuaded. Although we acknowledge that *Aaron L.* differs slightly insofar as it involved the question of whether the *trial court* was required to find, by clear and convincing evidence, that the alleged prior misconduct had occurred, *Cutler* is wholly applicable to the present case as it, too, involved the question of whether a trial court was required to instruct a jury that it must find prior misconduct evidence to be proven by a heightened standard. Notably, and as we explained, this court expressly rejected that proposition and concluded 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 added.) *State v. Cutler*, *supra*, 293 Conn. 321–22.

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Vol. 344

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* JOSHUA COUNCIL
(SC 20513)

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

Syllabus

Convicted of the crimes of murder and criminal possession of a firearm in connection with the shooting death of the victim near a gas station in New Haven, the defendant appealed to this court. At trial, the state presented a witness who qualified as an expert in historical cell site analysis and testified that the defendant's cell phone utilized cell towers near the gas station around the time of the shooting. In order to corroborate the defendant's theory that he was not present at the gas station at the time of the shooting, defense counsel proffered testimony from O, an investigator for a private investigation company who had received training in cell phone analytics, as to the defendant's location at relevant times on the basis of certain cell phone carrier data. The trial court sustained the prosecutor's objections to O's proffered testimony and precluded O from testifying on the grounds that the evidence was immaterial and irrelevant, O did not possess sufficient qualifications to provide expert testimony on the cell phone carrier data, and O did not establish the reliability of the methodology on which he relied. On appeal, the defendant contended that the trial court had violated his constitutional right to present a defense by precluding O's testimony. Although the defendant acknowledged that his right to present a defense was limited by the rules of evidence, he nevertheless claimed that the trial court

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had improperly excluded O's testimony because O was qualified as an expert pursuant to the applicable provision (§ 7-2) of the Connecticut Code of Evidence, which permits testimony by a qualified expert when his or her testimony will assist the fact finder in understanding the evidence or in determining a disputed fact. *Held* that the defendant's appeal was dismissed as moot; even if this court agreed with the defendant that the trial court improperly had determined that O lacked sufficient qualifications under § 7-2 of the Connecticut Code of Evidence to provide expert testimony on the cell phone carrier data, this court could not afford the defendant any practical relief, as there were two independent grounds for the trial court's exclusion of O's testimony that the defendant did not challenge on appeal, namely, that the proffered evidence was immaterial and irrelevant and that O did not establish the reliability of the methodology on which he relied.

Argued March 22—officially released July 26, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Vitale, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Appeal dismissed.*

Richard S. Cramer, for the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, chief state's attorney, and *Stacey Miranda*, supervisory assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. In this appeal, we are asked to determine whether the trial court properly precluded the proffered testimony of the defendant's expert on cell phone location data. The defendant, Joshua Council, appeals from the judgment of conviction, rendered after a jury trial, of murder and criminal possession of a firearm by a convicted felon. At trial, defense counsel proffered testimony from an expert witness as to the defendant's location during certain relevant times on

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the basis of cell phone carrier data. The trial court precluded the witness from testifying on the grounds that (1) the evidence was immaterial and irrelevant, (2) the witness did not articulate sufficient qualifications to provide expert opinion on the data, and (3) the testimony did not establish the reliability of the data. On appeal, the defendant contends that the trial court improperly excluded the testimony because the witness was qualified as an expert pursuant to § 7-2 of the Connecticut Code of Evidence.¹ We dismiss the defendant's appeal as moot because he has not challenged all of the trial court's bases for its evidentiary ruling, and, therefore, this court cannot provide him practical relief.

The jury reasonably could have found the following facts. In January, 2018, the defendant encountered the victim, Kenneth Cooper, in the parking lot of a gas station in New Haven. After a brief interaction, the victim attempted to reenter his vehicle when the defendant fired eight shots from a .45 caliber firearm at him. The victim later died from multiple gunshot wounds to the torso and extremities. The defendant was subsequently arrested and charged with murder and criminal possession of a firearm by a convicted felon.

At trial, the state presented an expert witness, James J. Wines, to testify as to the defendant's location and movements at times relevant to the shooting. Wines is a special agent with the Federal Bureau of Investigation

¹ In his primary brief to this court, the defendant also raises a claim of error relating to the trial court's jury charge. Specifically, the defendant argues that the trial court should have instructed the jury that the defendant's *knowledge* of his previous felony conviction was an element of criminal possession of a firearm. Defense counsel expressly abandoned this claim at oral argument before this court. Specifically, when asked whether he was "still pressing" the jury instruction issue, defense counsel responded: "[W]e're not pressing that issue. . . . [T]here is a distinction between the federal [criminal possession] statute and the state statute [that] is significant. I recognize that now." Thereafter, defense counsel explicitly conceded that there was no error in this regard.

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and an expert in historical cell site analysis. Using cell phone tower data, Wines plotted the defendant's cell phone use and determined that the defendant's phone used cell towers near the gas station around the time of the shooting.

The defendant's theory of the case was predicated on his testimony that he was not present at the gas station at the time of the shooting. To corroborate the defendant's theory, and to counter the testimony from the state's witnesses, defense counsel proffered his own evidence concerning data from cell site locations. Specifically, defense counsel presented two witnesses: Linda Thomas, a trial analyst and custodian of records for AT&T, and James Oulundsen, an investigator for a private investigation company.

During the proffer, which was held outside the presence of the jury, Thomas testified that the defendant's cell phone records contained AT&T network location system or network location service (NELOS) data. Thomas testified that NELOS data comprise "historical precision location information" collected by AT&T engineers to "help maintain the network" The examination of Thomas revealed that NELOS data are "best estimate[s] of where the device was based on the unverifiable sources" that the data were retrieved from. Thomas cited possible use of the data in customer billing or customer complaints of dropped calls. Thomas was unable to articulate the sources of the NELOS points or to verify the accuracy of the points. The NELOS data records from AT&T that were the subject of Thomas' testimony contained a printed disclaimer warning that the user should "exercise caution in using [the] records for investigative purposes as location data [are] sourced from various databases [that] may cause location results to be less than exact."

Thereafter, Oulundsen testified, during the proffer, that he was a digital forensic investigator for a private

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investigation company and had received training in cell phone analytics. He offered testimony and an accompanying report that detailed his mapping of the NELOS points and their respective latitude and longitude over Google Maps to estimate the defendant's location at times relevant to the shooting.² Oulundsen was unable to verify the accuracy of the NELOS data or the methodology used to arrive at those NELOS points. Throughout Oulundsen's testimony, the prosecutor objected on the grounds of lack of foundation, lack of expert qualifications concerning the NELOS data and the accompanying exhibits,³ and lack of reliability of the methodology.

Following arguments from the prosecutor and defense counsel regarding the admissibility of the testimony and accompanying exhibits, the court sustained the prosecutor's objections. As a result, the testimony and exhibits were excluded and were not presented to the jury. Initially, the court based its ruling on the relevance and materiality of the evidence under § 4-1 of the Connecticut Code of Evidence, concluding: "The court is not persuaded that using the methods . . . [and] the information [the witness] testified to has been adequately explained to be material and relevant for the purpose for which it's being offered." The court rea-

² The exact purpose of Oulundsen's testimony is unclear from the record, as the proffer did not reach Oulundsen's conclusions beyond the identification of three known addresses in the data: the scene of the crime, the defendant's residence, and another witness' residence. The defendant asserts in his brief, however, that this evidence was to "discredit [the] highly damaging testimony [from Wines]" that placed the defendant near the gas station at the time of the shooting.

³ In addition to Oulundsen's report, the defendant also sought to admit the Scientific Working Group on Digital Evidence (SWGDE) Recommendations for Cell Site Analysis, which contained guidance on using data, such as NELOS points, for cell site analysis. The document, however, contained a disclaimer requiring that the SWGDE receive notification before the introduction of the document at any judicial or adjudicatory hearing. Oulundsen conceded that he did not notify the SWGDE prior to using the document during his testimony.

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soned that the evidence was speculative and that it would not “have a logical tendency to aid the jury in determining where the cell phone was located.” The next day, before returning to the presentation of evidence, the court amplified its ruling, adding that, in addition to the relevance and materiality concerns, “none of the factors in *State v. Edwards*, [325 Conn. 97, 156 A.3d 506 (2017)], or *State v. Steele*, 176 Conn. App. 1, [169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017)],⁴ [was] presented or articulated with a sufficient evidentiary basis on the record given the testimony from . . . Thomas and . . . Oulundsen, separately and in combination” (Footnote added.) The court also “was not persuaded . . . that . . . Oulundsen possessed any articulated background or specific training . . . using the so-called NELOS data that qualified him to render opinions on that topic.”

At the conclusion of trial, the jury found the defendant guilty on both counts, and the trial court sentenced the defendant to a total effective sentence of seventy years of incarceration. This appeal followed.

On appeal, the defendant contends that the trial court violated his sixth amendment right to present a defense⁵ by precluding Oulundsen’s testimony and related exhibits regarding the NELOS data.⁶ Although the defendant acknowledges that his right to present a defense is limited by the rules of evidence; see, e.g., *State v. Cerreta*, 260 Conn. 251, 260–61, 796 A.2d 1176 (2002); he argues that the admissibility of Oulundsen’s testimony

⁴ *Edwards* and *Steele* held that expert testimony based on scientific evidence is inadmissible unless the party offering it establishes that the underlying methodology is reliable. See *State v. Edwards*, supra, 325 Conn. 124–25; *State v. Steele*, supra, 176 Conn. App. 33–35.

⁵ The sixth amendment right to present a defense is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *State v. Andrews*, 313 Conn. 266, 272 n.3, 96 A.3d 1199 (2014).

⁶ The defendant does not challenge the exclusion of Thomas’ testimony.

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is governed by § 7-2 of the Connecticut Code of Evidence, which permits testimony by qualified experts when the testimony will assist the fact finder in understanding the evidence or in determining a disputed fact. The defendant asserts that Oulundsen's testimony was admissible pursuant to § 7-2 because Oulundsen was a qualified expert with specialized knowledge and training in cell phone analysis and his testimony, if allowed, would have assisted the trier of fact in understanding the evidence. The defendant further asserts that the nature of the NELOS data, including flaws in accuracy or specificity, goes to weight and not to admissibility.

The state argues that the defendant's claim on appeal is not reviewable because the defendant failed to challenge all of the independent bases for the trial court's evidentiary ruling. Specifically, the state contends that the defendant failed to challenge the trial court's conclusions that the evidence was immaterial, irrelevant and not reliable. The state also argues that the defendant's unpreserved claim is not reviewable under *State v. Golding*, 213 Conn. 233, 39–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), "because a trial court's ruling on the proper evidentiary foundation for admitting evidence is not an issue of constitutional dimension." Alternatively, the state maintains that, even if the defendant's claim is reviewable, the trial court acted well within its discretion in excluding the proffered expert testimony from Oulundsen because, during the proffer, defense counsel failed to establish Oulundsen's expertise, the reliability of the testimony or data points, and the relevance of the evidence under § 4-1 of the Connecticut Code of Evidence. We agree with the state that the defendant failed to challenge all of the independent bases of the trial court's evidentiary ruling, and, therefore, the defendant's claim on appeal is moot.

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The issue of mootness presents a threshold question of justiciability that we must determine prior to a review on the merits because it implicates this court's subject matter jurisdiction. See, e.g., *Lyon v. Jones*, 291 Conn. 384, 392, 968 A.2d 416 (2009). The principles underpinning the mootness doctrine and justiciability are well settled. "We begin with the four part test for justiciability established in *State v. Nardini*, 187 Conn. 109, 445 A.2d 304 (1982). . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Lyon v. Jones*, supra, 393; see also *State v. Nardini*, supra, 111–12. "In determining mootness, the dispositive question is whether a successful appeal would benefit the [complainant] . . . in any way." (Internal quotation marks omitted.) *Lyon v. Jones*, supra, 394.

"[When] an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, [this court] still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State v. Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

Here, the trial court's ruling to exclude Oulundsen's testimony rested on three separate grounds. First, the

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court concluded that the testimony was speculative and would not have a logical tendency to aid the jury in determining the location of the defendant's cell phone, therefore making it immaterial and irrelevant. See Conn. Code Evid. § 4-1. Second, the court determined that the defendant failed to establish that Oulundsen possessed the qualifications necessary to provide expert testimony about NELOS data. See Conn. Code Evid. § 7-2. Lastly, the court also held that the testimony failed to satisfy any of the factors set forth in *Steele* or *Edwards* to establish the reliability of the methodology for the proffered testimony. See footnote 4 of this opinion.

The defendant challenges only one of the trial court's bases for excluding Oulundsen's testimony, namely, the qualifications of Oulundsen as an expert under § 7-2 of the Connecticut Code of Evidence. The defendant's initial brief fails to challenge the court's exclusion of the evidence on the ground of reliability under *Steele* and *Edwards* or on the grounds of relevancy and materiality. Although the defendant makes cursory reference to reliability in his reply brief, it is well settled that we will not consider claims of error that are raised for the first time in an appellant's reply brief. See, e.g., *Barlow v. Commissioner of Correction*, 343 Conn. 347, 362 n.2, 273 A.3d 680 (2022) ("It is axiomatic that a party may not raise an issue for the first time on appeal in [his] reply brief. . . . Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." (Internal quotation marks omitted.)).

The reliability, materiality, and relevancy grounds of the trial court's ruling to exclude Oulundsen's testimony are independent bases for the exclusion, and these unchallenged bases remain binding. Regardless of whether we were to agree with the defendant in his challenge to the trial court's ruling on Oulundsen's

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expert qualifications under § 7-2 of the Connecticut Code of Evidence, we cannot provide him with any practical relief. Therefore, the defendant's claim is moot, and this court lacks subject matter jurisdiction.

The appeal is dismissed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* BROCK DAVIS
(SC 20335)

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

Syllabus

Convicted of the crime of murder in connection with the stabbing death of the victim, the defendant appealed to this court, claiming, *inter alia*, that the trial court had violated his constitutional right to the effective assistance of counsel by failing to conduct any inquiry into defense counsel's alleged conflict of interest arising from counsel's prior representation of the victim's son, D. On appeal, this court agreed with the defendant that the trial court had a duty to conduct such an inquiry when the issue was brought to that court's attention in a motion to dismiss counsel and during the defendant's sentencing hearing. This court also concluded, however, that the record was insufficient to determine whether the defendant's claim had merit and, therefore, remanded the case to the trial court for it to determine whether defense counsel had such a conflict and, if so, whether that conflict adversely affected her representation of the defendant. In light of that remand order, this court declined to reach the defendant's additional claim that the trial court had improperly admitted the testimony of three lay witnesses identifying the defendant in surveillance video footage from a store near the crime scene. The footage depicted, *inter alia*, two men, with their faces visible, approaching and entering the store together before the victim's murder. Additional footage from a different camera angle depicted the backs of two men, dressed similar to those in the other footage, making their way to, and then standing at, the intersection where the murder occurred. Subsequent footage showed one of the men attacking the other man and then running down the street toward the direction of the store. On remand, the trial court, following a hearing at which the defendant and defense counsel testified, determined that the defendant did not timely raise his conflict of interest claim and that, even if he had done so, he failed to establish that defense counsel was

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burdened by an actual conflict of interest that adversely affected her performance. After the case returned to this court, the defendant challenged the trial court's determination concerning counsel's alleged conflict of interest, and this court addressed the defendant's evidentiary claim. *Held:*

1. The trial court correctly concluded that defense counsel's prior representation of D did not create an actual conflict of interest that adversely affected her representation of the defendant: even if this court assumed that the defendant's conflict of interest claim was timely, there was no evidence that the defendant's and defense counsel's interests ever diverged with respect to any material factual or legal issue, or with respect to a course of action, or that counsel's representation of the defendant was otherwise impaired as a result of her loyalty to D; moreover, the trial court credited counsel's testimony that, during her representation of D, she learned nothing that she was prevented from using in her defense of the defendant and that the strategies and tactics she employed at trial were entirely unencumbered and uninfluenced by anything relating to her representation of D, and that court's factual findings, including that defense counsel's brief representation of D had no effect on the course of the defendant's trial, were not clearly erroneous; furthermore, there was no merit to the defendant's contention that an attorney's prior representation of a relative of the victim in a criminal case creates a per se conflict of interest.
2. The trial court did not abuse its discretion in admitting the testimony of three lay witnesses identifying the defendant in surveillance video footage: pursuant to the rule recently established in *State v. Gore* (343 Conn. 129), lay opinion testimony concerning the identification of a criminal defendant depicted in a surveillance video is admissible if, in accordance with the provision (§ 7-1) of the Code of Evidence governing the admissibility of lay opinion testimony, it is rationally based on the perception of the witness and is helpful to a clear understanding of that witness' testimony or the determination of a fact in issue; moreover, such testimony meets the requirements of § 7-1 if, in light of the totality of the circumstances, there is some basis for concluding that the witness is more likely than the jury to correctly identify the defendant from the footage; in the present case, the totality of the circumstances favored admission of the challenged testimony, as it was undisputed that all three witnesses were sufficiently familiar with the defendant, and, although the defendant was not wearing a disguise during the commission of the murder and the record did not indicate whether the defendant's appearance had changed between the time the surveillance video footage was recorded and the time of trial, the quality of the video weighed in favor of admission of the challenged testimony, as the subject in the video was wearing a hat pulled down over his ears and a winter jacket, and, at certain angles, his face was obscured by either the dark lighting or his movements; accordingly, this court could not conclude that the

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witnesses, all of whom knew the defendant exceedingly well, could be of no assistance to or were no better suited than the jury in identifying the defendant in the surveillance video footage.

3. The defendant could not prevail on his claim that it would be improper for this court to apply *Gore* retroactively to this case because *Gore* was decided on the basis of policy considerations rather than on constitutional grounds: judicial decisions generally apply retroactively to pending cases, and this court's application of the rule set forth in *Gore* did not give rise to any of the concerns highlighted in *Neyland v. Board of Education* (195 Conn. 174), which established the test for determining whether a judicial decision should be applied prospectively only, because, although *Gore* established a new principle of law by overruling past precedent holding that the rule limiting lay opinion testimony on the ultimate issue precludes the admission of lay opinion testimony identifying a defendant in video surveillance footage when that identification embraces an ultimate issue, the defendant did not argue or demonstrate that he relied to his detriment on one legal standard over another during the events underlying this case, the underlying trial, or in bringing the present appeal, despite being afforded an opportunity to do so in the supplemental briefing ordered by this court to address the applicability of *Gore* to this case; moreover, the result in this appeal would have been the same under the pre-*Gore* rule in view of the witnesses' strong familiarity with the defendant and the fact that their testimony did not address the ultimate issue in this case insofar as the witnesses did not identify the defendant from the video surveillance footage depicting the attack but identified the defendant in footage placing him near the crime scene at or around the time of the attack.

Argued November 24, 2020—officially released July 26, 2022

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the court, *Dewey, J.*, denied the defendant's motion to dismiss his counsel; thereafter, the case was tried to the jury before *Gold, J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which remanded the case for further proceedings; subsequently, the court, *Gold, J.*; issued a memorandum of decision, and the parties filed supplemental briefs. *Affirmed.*

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

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Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Gail P. Hardy*, former state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. In *State v. Davis*, 338 Conn. 458, 460, 258 A.3d 633 (2021), this court agreed with the defendant, Brock Davis, that, on two separate occasions, the trial court improperly failed to inquire into whether defense counsel, Kirstin B. Coffin, had a conflict of interest.¹ We therefore remanded the case to that court for a determination of whether Coffin did, in fact, have such a conflict and, if so, whether it adversely affected her representation of the defendant. *Id.*, 460, 475. Because a new trial would have been required if the trial court answered these two questions in the affirmative, we did not reach the defendant's additional claim that the trial court had improperly admitted into evidence testimony from lay witnesses identifying him in a surveillance video recording.² *Id.*, 479. In accordance with

¹ "In cases involving potential conflicts of interest, this court has held that [t]here are two circumstances under which a trial court has a duty to inquire . . . (1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should know that a particular conflict exists To safeguard a criminal defendant's right to the effective assistance of counsel, a trial court has an affirmative obligation to explore the possibility of conflict when such conflict is brought to the attention of the trial judge in a timely manner." (Citation omitted; internal quotation marks omitted.) *State v. Davis*, *supra*, 338 Conn. 470; see also *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994) ("[w]hen a [trial] court is sufficiently apprised of even the possibility of a conflict of interest, the court . . . has an 'inquiry' obligation").

² We did, however, address the defendant's claim that the trial court further denied his right to the effective assistance of counsel by denying his motions to dismiss Coffin without adequately inquiring into the bases for the motions. *State v. Davis*, *supra*, 338 Conn. 460. Specifically, in his May, 2017 motion to dismiss counsel, the defendant argued that Coffin did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her; that, during a meeting with her investigator and the defendant, she allowed her investigator to recommend that he

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this court's remand order, the trial court, following a hearing, determined that the defendant had failed to establish that Coffin was burdened by an actual conflict of interest that adversely affected her performance. On appeal, the defendant challenges that determination. We reject this claim, and, because we also reject the defendant's remaining claim, we affirm the judgment of the trial court.

The defendant was convicted of murder in connection with the stabbing death of the victim, Joseph Lindsey, on December 9, 2015, in Hartford. *Id.*, 460–61. Following his conviction, the defendant was sentenced to a term of incarceration of fifty years. *Id.*, 460. On appeal to this court, the defendant claimed, *inter alia*, that the trial court had violated his right to the effective assistance of counsel by failing to conduct any inquiry into Coffin's alleged conflict of interest when the issue was twice brought to the court's attention—first in a motion to dismiss counsel, which the defendant filed as a self-represented party on May 24, 2017,³ and again during the defendant's sentencing hearing on June 5,

plead guilty; and that she violated unspecified professional and ethical legal standards. *Id.*, 460, 462. We disagreed with the defendant's claim on appeal, concluding that the trial court, in the exercise of its broad discretion, adequately inquired into the bases for the defendant's motions to dismiss counsel before denying them. *Id.*, 467–69.

³The defendant's May 24, 2017 motion to dismiss counsel asserted the following four reasons why Coffin should be dismissed, only one of which is relevant to this appeal: "(1) she failed to meet professional and ethical standards established by the Connecticut Bar Association and the American Bar Association, (2) she 'refused to allow [the defendant] to view any items that would enable [him] to come to an intelligent and informed decision as to where [his] best interest[s] [lie] and . . . to aid in his own defense,' (3) she failed to investigate certain information he had provided to her, and (4) '[a] conflict of interest has arisen.'" *State v. Davis*, *supra*, 338 Conn. 462; see footnote 2 of this opinion. On June 13, 2017, the trial court, *Dewey, J.*, conducted a hearing on the defendant's motion to dismiss counsel, during which the court denied the motion without making any inquiry into the defendant's claim that Coffin was laboring under a conflict of interest. *Id.*, 462–63. The case then proceeded to trial before the court, *Gold, J.* *Id.*, 464.

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2019.⁴ Id., 460, 469. We agreed with the defendant that the trial court had a duty on both occasions to inquire into Coffin’s alleged conflict of interest. Id., 469. However, because we could not determine, on the basis of the record before us, whether the defendant’s conflict of interest claim had any merit, we remanded the case to the trial court for a determination of that question. Id., 475. Specifically, we instructed the trial court to conduct a hearing at which the defendant would have the burden of establishing “(1) that [Coffin] actively represented conflicting interests and (2) that an actual conflict of interest adversely affected [Coffin’s] performance.” (Footnote omitted; internal quotation marks omitted.) Id., 477. The court was further instructed to make findings of fact and conclusions of law in writing, to be filed with the Office of the Appellate Clerk for our review. Id., 478. We did not address the defendant’s remaining claim that the trial court had improperly admitted into evidence testimony from three lay witnesses identifying him in surveillance video footage, concluding that, if necessary, we would reach that claim when the trial court submitted its written findings to us. Id., 479.

On remand, the trial court, *Gold, J.*, conducted a hearing at which both the defendant and Coffin testified. The defendant testified that the conflict of interest alleged in his May 24, 2017 motion to dismiss counsel was premised on Coffin’s prior representation of Tristan Durant—the son of the victim in this case—which the defendant stated he learned about during a February, 2017 meeting with Coffin at the prison where he was being held. The defendant testified that he was “shocked”

⁴ “[A]t the defendant’s sentencing hearing, when asked by the trial court, *Gold, J.*, whether he wished to address the court, the defendant . . . raised the issue of [Coffin’s] alleged conflict of interest. Specifically, he stated that, on two prior occasions, he had attempted to dismiss [Coffin] because he did not have faith in her abilities and because she was ‘representing the son of [the victim].’” *State v. Davis*, supra, 338 Conn. 464.

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to learn of Coffin's prior representation of Durant and immediately asked Coffin to recuse herself, which she declined to do. When asked why he did not raise the issue with the trial court the next time he was in court, on March 29, 2017, the defendant stated that he is "a layman" and "kind of froze up."

Coffin testified that, based on her case file notes, the prison visit in question occurred on January 9, 2018, not in February, 2017, as the defendant had stated. Coffin also testified that the issue of her prior representation of Durant arose because, a day before her meeting with the defendant, while reviewing a supplemental police report in the defendant's case, it had come to her attention that Durant was the victim's son. Upon learning of Durant's connection to the case, Coffin spoke to the trial prosecutor, who assured her that Durant, with whom the police had spoken only briefly during their investigation of the victim's murder, would not be called as a state's witness because he had nothing relevant to offer about the crime. Coffin stated that, when she met with the defendant the next day, she informed him about her prior representation of Durant. According to Coffin, the defendant "didn't have a problem with it," did not ask that she withdraw her representation, and did not mention the matter again until his sentencing hearing on June 5, 2019.

On January 3, 2022, the trial court issued a memorandum of decision in which it concluded that the defendant had failed to establish that Coffin was burdened by an actual conflict of interest as a result of her prior representation of Durant. Because a court's duty to inquire into an attorney's potential conflict of interest is triggered only when the issue is raised in a timely manner; see, e.g., *State v. Vega*, 259 Conn. 374, 389, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002); the court began its analysis with findings related to that issue. Specifically, the court

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found that “Coffin’s testimony regarding when she disclosed to the defendant her prior representation of . . . Durant, and how the defendant reacted to that disclosure, provide[d] the accurate account of the events that transpired.” In so finding, the court credited Coffin’s testimony that the defendant had first learned of her representation of Durant during a prison visit on January 9, 2018, approximately nine months after the defendant filed his May, 2017 motion to dismiss counsel, and not in February, 2017, as the defendant claimed. The court observed that Coffin’s ability to pinpoint the precise date of the disclosure was not based solely on memory but, rather, on “‘very detailed notes’” she had taken for her file. On the basis of this finding, the court determined that Coffin’s representation of Durant could not have been the basis of the nondescript conflict of interest mentioned in the defendant’s May, 2017 motion.⁵ The court further found that the defendant’s objection to Coffin’s representation of Durant at the time of his sentencing was not timely raised because, by that time, the defendant had known about Coffin’s potential conflict for nearly eighteen months. In the court’s view, the defendant, for strategic reasons, had “sat silent for eighteen months waiting to see how his trial would turn out” and, then, only after being convicted, brought his alleged concern regarding Coffin’s representation of Durant to the court’s attention.

⁵The trial court was “convinced,” rather, that the conflict of interest alleged in the defendant’s May, 2017 motion to dismiss counsel, which the defendant had drafted as a self-represented party, was not, as the defendant now contends, a conflict of interest in the legal sense, thereby implicating the sixth amendment to the United States constitution, but, rather, a *disagreement* between the defendant and Coffin arising out of and related to other complaints that he had concerning Coffin’s representation. See footnotes 2 and 3 of this opinion. In the court’s view, the defendant had incorrectly used a legal term of art to describe what was, in actuality, a personal conflict between him and Coffin, entirely unrelated to her prior representation of Durant.

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The court further determined that, “[e]ven if it were to overlook the untimely nature of the defendant’s claim and [to] consider how . . . Coffin’s representation of . . . Durant may have impacted her ability to defend the defendant,” it would conclude that the defendant had “failed to sustain his burden of establishing that . . . Coffin actively represented conflicting interests that adversely affected her performance.” Specifically, the court credited Coffin’s testimony that she had represented Durant in May, 2014, in connection with misdemeanor domestic violence charges and that her representation encompassed two court appearances during that same month, the latter of which marked the resolution of the case by plea agreement. The court also credited Coffin’s testimony that she never met the victim while representing Durant and had no reason to think Durant possessed any information relevant to the defendant’s case. The court further found that (1) Coffin did not acquire any information during the course of her representation of Durant that, due to her ongoing duty of loyalty to him, she was prevented from using in her defense of the defendant, (2) Coffin was told by the prosecutor that Durant would not be called as a state’s witness during the defendant’s trial, and (3) the strategies and tactics Coffin employed on behalf of the defendant were unencumbered and uninfluenced by anything relating to her prior representation of Durant. In sum, the court credited Coffin’s testimony that she did not view her prior representation of Durant as creating any sort of conflict that would detract from her representation of the defendant. In light of these findings, the court concluded that, even if the defendant had asserted a timely objection to Coffin’s alleged conflict of interest, he failed to demonstrate that such a conflict actually existed. Additional facts and procedural history will be set forth as needed.

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I

We first consider the defendant’s claim that the trial court incorrectly concluded that Coffin’s prior representation of Durant did not create an actual conflict of interest that adversely affected her representation of the defendant. In support of this contention, the defendant asserts that “the record clearly establishes [that] there was a conflict of interest because it is undisputed that . . . Coffin represented [Durant].” The defendant further asserts that the trial court’s factual finding regarding when he first learned of Coffin’s prior representation of Durant is clearly erroneous, and, therefore, the court’s ultimate legal conclusion that the defendant’s conflict of interest claim was not timely raised is also incorrect. We are not persuaded.

“It is axiomatic that a criminal defendant’s sixth amendment right to the effective assistance of counsel includes the right to counsel that is free from conflicts of interest. . . . It is a fundamental principle . . . that an attorney owes an overarching duty of undivided loyalty to his [or her] client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, perhaps the most basic of counsel’s duties. . . . Loyalty of a lawyer to his [or her] client’s cause is the sine qua non of the [s]ixth [a]mendment’s guarantee that an accused is entitled to effective assistance of counsel. . . . That guarantee affords a defendant the right to counsel’s undivided loyalty.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *State v. Davis*, supra, 338 Conn. 469–70.

As we previously have explained, when a “defendant claims that his counsel was burdened by an actual conflict of interest . . . the defendant need not establish actual prejudice. . . . [When] there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty” (Citations omit-

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ted; internal quotation marks omitted.) *Phillips v. Warden*, 220 Conn. 112, 132–33, 595 A.2d 1356 (1991); see also *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). “An actual conflict of interest is more than a theoretical conflict. The United States Supreme Court has cautioned that the possibility of conflict is insufficient to impugn a criminal conviction. . . . A conflict is merely a *potential* conflict of interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future. . . . To demonstrate an actual conflict of interest, the [defendant] must be able to point to *specific instances* in the record [that] suggest impairment or compromise of his interests for the benefit of another party. . . . A mere theoretical division of loyalties is not enough.” (Citations omitted; emphasis in original; internal quotation marks omitted.) *Anderson v. Commissioner of Correction*, 127 Conn. App. 538, 550, 15 A.3d 658 (2011), *aff’d*, 308 Conn. 456, 64 A.3d 325 (2013); see *Aguilar-Garcia v. United States*, 517 Fed. Appx. 880, 882 (11th Cir. 2013) (“a speculative or merely hypothetical conflict of interest does not yield a [s]ixth [a]mendment violation”); see also *United States v. Coscia*, 4 F.4th 454, 475 (7th Cir. 2021) (“[a]n actual conflict, for [s]ixth [a]mendment purposes, is a conflict of interest that adversely affects counsel’s performance” (internal quotation marks omitted) (quoting *Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)), cert. denied, U.S. , 142 S. Ct. 1127, 212 L. Ed. 2d 17 (2022)).

We are mindful that, in reviewing the defendant’s claim, “the underlying historical facts found by the [trial] court may not be disturbed unless they were clearly erroneous, [but] whether those facts constituted a violation of the [defendant’s] rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the

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historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard.” (Citation omitted; internal quotation marks omitted.) *Phillips v. Warden*, supra, 220 Conn. 131. “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. . . . Because it is the trial court’s function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court’s ruling.” (Internal quotation marks omitted.) *State v. Lawrence*, 282 Conn. 141, 154–55, 920 A.2d 236 (2007).

In analyzing the defendant’s claim, “we are [also] guided by our previous definition of an attorney’s conflict of interest. We have described an attorney’s conflict of interest as that which impedes his paramount duty of loyalty to his client. . . . Thus, an attorney may be considered to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client” (Internal quotation marks omitted.) *State v. Parrott*, 262 Conn. 276, 287–88, 811 A.2d 705 (2003); see also *State v. Crespo*, 246 Conn. 665, 689–90, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). “Whether a conflict of interest exists depends on a number of factors, including, but not limited to, whether the attorney has confidential information that is helpful to one client but harmful to another; whether and how closely

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the subject matter of the multiple representations is related; how close in time the multiple representations are related; and whether the prior representation has been unambiguously terminated.” *United States v. Infante*, 404 F.3d 376, 392 (5th Cir. 2005). “This question is highly [fact sensitive].” *Id.*; see also Rules of Professional Conduct 1.9.⁶

Applying these principles to the present case, even if we assume that the defendant’s objection to Coffin’s alleged conflict of interest was timely raised, we can perceive no basis for disturbing the trial court’s finding that no actual conflict of interest existed. As the trial court stated, there is simply no evidence that Coffin’s and the defendant’s interests ever diverged with respect to any material factual or legal issue, or to a course of action, or that Coffin’s representation of the defendant was otherwise impaired as a result of her loyalty to

⁶ Rule 1.9 of the Rules of Professional Conduct provides in relevant part: “(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

* * *

“(c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

“(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

“(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.”

The commentary to rule 1.9 provides in relevant part: “The scope of a ‘matter’ for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. . . .

“Matters are ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. . . .” Rules of Professional Conduct 1.9, commentary.

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Durant. See, e.g., *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000) (“actual conflict exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client” (internal quotation marks omitted)); see also *Armienti v. United States*, 234 F.3d 820, 824 (2d Cir. 2000) (“[t]here is an actual conflict between lawyer and client when, during the course of the representation, the attorney’s and defendant’s interests diverge with respect to a material factual or legal issue or to a course of action” (internal quotation marks omitted)). To the contrary, the court credited Coffin’s testimony that, among other things, during her brief representation of Durant, she learned nothing that she was prevented from using in her defense of the defendant and that the strategies and tactics she employed at trial were entirely unencumbered and uninfluenced by anything relating to her representation of Durant. See, e.g., *State v. Martin*, 201 Conn. 74, 82, 513 A.2d 116 (1986) (“the trial court must be able, and be freely permitted, to rely [on] [defense] counsel’s representation that the possibility of . . . a conflict does or does not exist” (internal quotation marks omitted)); see also *United States v. Flynn*, 87 F.3d 996, 1001 (8th Cir. 1996) (“[i]n determining whether a conflict of interest exists, substantial weight is given to defense counsel’s representations”).

In sum, the trial court held an evidentiary hearing on the defendant’s conflict of interest claim and issued a thorough memorandum of decision, in which it found, inter alia, that Coffin’s brief representation of Durant had no effect whatsoever on the course of the defendant’s trial. The court’s underlying findings were based on credibility determinations made after hearing the testimony of both Coffin and the defendant. “As a reviewing court, our role is not to speculate about coun-

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sel's motives or about the plausibility of alternative litigation strategies. Our role is to defer to the [trial court's] factual findings unless we can conclude they are clearly erroneous." *Mickens v. Taylor*, supra, 535 U.S. 177 (Kennedy, J., concurring). Having conducted a thorough review of the record, we cannot conclude that the trial court's findings in this case were clearly erroneous.

In arguing to the contrary, the defendant cites a single case, *People v. Waite*, 145 App. Div. 3d 1098, 1103, 42 N.Y.S.3d 437 (2016), appeal denied, 29 N.Y.3d 953, 76 N.E.3d 1087, 54 N.Y.S.3d 384 (2017), which, he claims, stands for the proposition that "a conflict of interest [actually] exists when an attorney for a criminal defendant has previously represented a relative of the victim." We disagree that *Waite* supports the defendant's argument. Before explaining why, however, we note that, to the extent the defendant purports to argue that an attorney's prior representation of a relative of the victim in a criminal case creates a per se conflict of interest, we reject that contention. Indeed, "[t]he [United States] Supreme Court has . . . recognized a per se conflict of interest in only one circumstance—whe[n] defense counsel is forced to represent codefendants over [counsel's] timely objection . . . and has declined to extend the per se rule to other potential conflicts" (Citations omitted; internal quotation marks omitted.) *Cardoza v. Rock*, 731 F.3d 169, 183 n.8 (2d Cir. 2013), quoting *Mickens v. Taylor*, supra, 535 U.S. 168. The United States Court of Appeals for the Second Circuit, however, has applied a per se exclusionary rule in an additional context—"when an attorney is implicated in the crimes of his or her client because the attorney cannot be free from fear that a vigorous defense should lead the prosecutor or the trial judge to discover evidence of the attorney's own wrongdoing." (Internal quotation marks omitted.) *Cardoza v. Rock*,

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supra, 183, quoting *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993). In all other cases, however, including those in which defense counsel previously represented the victim; see e.g., *Mickens v. Taylor*, supra, 164–65; or previously represented a witness in a case; see, e.g., *United States v. Iorizzo*, 786 F.2d 52, 57–58 (2d Cir. 1986); the defendant must demonstrate that an actual conflict existed—i.e., one that “compelled [defense counsel] to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client.” *Perillo v. Johnson*, supra, 205 F.3d 781. The trial court found, and we agree, that the defendant failed to shoulder his burden in this case.

Contrary to the defendant’s assertions, *Waite* does not support, much less compel, a different conclusion. In *Waite*, the issue before the court was whether the trial court abused its discretion in disqualifying defense counsel because he previously had represented the victim’s mother, who “testified that she had shared information with [him] that she considered to be secret, and she refused to waive the confidentiality of this information or [to] agree to counsel’s representation of [the] defendant. She further stated that she was already uncomfortable about the prospect of testifying as a hostile witness at the trial and that counsel’s continued representation of [the] defendant would make this more difficult for her.” *People v. Waite*, supra, 145 App. Div. 3d 1103–1104. In light of these circumstances, “and particularly considering the unknown nature of the confidential information that the mother had provided and the concomitant difficulty of predicting its potential impact [on] the trial,” the Appellate Division of the New York Supreme Court concluded that the trial court’s decision to disqualify defense counsel was a proper exercise of that court’s authority. *Id.*, 1104. In the present case, however, unlike in *Waite*, the trial court found

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that Durant was not involved in the defendant's trial, had no information relevant to the defendant's case, and was not called as a state's witness in the case. To the extent *Waite* has any relevance at all to the present case, then, it is simply to illustrate the fact sensitive nature of the court's inquiry when a potential conflict of interest is brought to its attention.

II

We next address the defendant's claim that the trial court improperly admitted into evidence testimony from three lay witnesses identifying him in a surveillance video recording. In their principal briefs to this court, the parties framed their analysis of this issue around *State v. Finan*, 275 Conn. 60, 881 A.2d 187 (2005), which held that the ultimate issue rule set forth in § 7-3 of the Connecticut Code of Evidence⁷ precludes the admission of lay opinion testimony identifying a defendant in video surveillance footage when that identification embraces an ultimate issue in the case. *Id.*, 66–67. After issuing the remand order in the present case, this court decided *State v. Gore*, 342 Conn. 129, 269 A.3d 1 (2022), and *State v. Bruny*, 342 Conn. 169, 269 A.3d 38 (2022). In *Gore*, we overruled *Finan* and “amended § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ultimate issue rule for lay opinion testimony that relates to the identification of criminal defendants or other persons depicted in surveillance video or photographs.” *State v. Bruny*, *supra*, 181. In so doing, we held that “[l]ay opinion testimony identifying a person in surveillance video or photographs is admissible if that testimony meets the

⁷ Section 7-3 of the Connecticut Code of Evidence provides in relevant part: “(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue. . . .”

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requirements of § 7-1 of the Connecticut Code of Evidence.⁸ That is, such testimony is admissible if the opinion is ‘rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.’ Conn. Code Evid. § 7-1.” (Footnote added.) *State v. Bruny*, supra, 181. In light of these recent decisions, we ordered the parties to submit supplemental briefs, addressing the issue of whether, under *Gore* and *Bruny*, “the trial court improperly admit[ted] into evidence the testimony of [the] three lay witnesses identifying the defendant in a surveillance video” In his supplemental brief, the defendant argues that, despite the recent change in the law, “it was harmful error to admit the lay witness testimony identifying [him] in a surveillance video when the only issue at trial was the identity of the perpetrator.” The state, on the other hand, argues that the trial court properly admitted the testimony under the rule established in *Gore* and *Bruny*. We agree with the state.

The following additional facts are relevant to our resolution of this issue. Following the victim’s murder, investigating officers learned that a liquor store near the crime scene was equipped with a video surveillance system that may have recorded events surrounding the murder. Tyshawn Welborn, the owner of the store, provided the police with a flash drive containing the relevant footage.⁹ The footage encompassed five different

⁸ Section 7-1 of the Connecticut Code of Evidence provides: “If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.”

⁹ The flash drive included two versions of the surveillance footage, both of which were played for the jury. As explained hereinafter, the three lay witnesses identified the defendant in the video labeled “original video,” which had been broken down into several different clips according to the camera that was recording. Each clip lasted several minutes, and the video in its entirety was approximately twenty minutes. The second video, labeled “working copy,” was the enhanced version of the original video, and this video was not shown to the lay witnesses.

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camera views, designated as channels one, two, three, four, and eight, and captured footage from the immediate front of the liquor store, inside of the liquor store, and a larger view of the corner of Baltimore Street and Albany Avenue, where the murder occurred. The footage depicts, in relevant part, two men—one wearing a beige jacket, blue jeans, and a dark knit cap, and the other wearing a black sweatshirt and blue jeans—together, with their faces visible, approaching and entering the liquor store approximately thirty minutes before the victim’s murder. Additional footage, from a different camera angle, depicts the backs of two men—dressed similarly to those in the other footage—as they make their way to, and then stand at, the intersection of Albany Avenue and Baltimore Street.¹⁰ After several minutes, the man in the beige jacket appears to attack the man in the black sweatshirt, and, subsequently, the man in the beige jacket is shown running down Albany Avenue, toward the direction of the liquor store.

Prior to trial, the defendant filed a motion in limine to exclude the testimony of three witnesses, Robin Jackson, Everton Osbourne, and Danette Musa, whom the state intended to call to identify the defendant from the liquor store surveillance video footage. Relying on § 7-3 of the Connecticut Code of Evidence and *Finan*, the defendant argued that the court should preclude the testimony of these witnesses on the ground that they lacked a sufficient level of familiarity with him and because their testimony “would be an opinion of fact on an ultimate issue [in the case]”

A hearing was held on the defendant’s motion during which the state adduced the testimony of the three witnesses. Jackson testified that, although he had known the defendant since before 2006, the two men had grown particularly close after they were incarcer-

¹⁰ The two men’s faces are not discernable in this footage.

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ated together at Enfield Correctional Institution in 2006. Jackson described the defendant as a “good friend” whom he saw nearly every day. Osbourne similarly testified that, at the time of the victim’s murder, he had known the defendant for approximately six years and that he saw him in the neighborhood “[j]ust about every day” Musa, who was an employee of the liquor store, testified that she had known the defendant since the store first opened five or six months before the murder and that the defendant and the victim came into the store together nearly every day.

During the hearing, the state argued that *Finan* was distinguishable from the present case and, therefore, not controlling because, in that case, the witnesses—four police officers—“were asked to view [a] video of the actual incident and they didn’t identify the defendant by his face,” but, rather, they identified him by other characteristics such as a “unique walk he had” The state also argued that the Appellate Court’s decisions in *State v. Felder*, 99 Conn. App. 18, 912 A.2d 1054 (overruled in part by *State v. Gore*, 342 Conn. 129, 269 A.3d 1 (2022)), cert. denied, 281 Conn. 921, 918 A.2d 273 (2007), and *State v. Holley*, 160 Conn. App. 578, 127 A.3d 221 (2015) (overruled in part by *State v. Gore*, 342 Conn. 129, 269 A.3d 1 (2022)), rev’d on other grounds, 327 Conn. 576, 175 A.3d 514 (2018), supported admission of the testimony because those decisions clarified that, if there is a sufficient relationship between the witness and the defendant or individual pictured in the surveillance footage, “it becomes a fact rather than an opinion that they’re testifying to,” and, in the present case, the three witnesses had “fairly significant” familiarity with the defendant so as to render their testimony fact testimony rather than improper opinion testimony. The court agreed with the state and denied the defendant’s motion in limine.

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The case proceeded to trial, at which the state presented the surveillance video footage through the testimony of Welborn, who testified as to the different camera angles, explaining that channel one showed the front of the liquor store door facing outward toward Albany Avenue, channel two showed the front of the store on the right side, channel three showed the interior left side and left aisle of the store, channel four showed the counter located at the back of the store, and channel eight showed the outside of the store looking left toward the corner of Baltimore Street and Albany Avenue. During their respective testimony, Jackson, Osbourne, and Musa were shown clips of the original surveillance video footage and were asked to identify the two men depicted therein. Each witness identified the defendant as the man in the beige jacket and blue jeans, and the victim as the man in the black sweatshirt and blue jeans. With this background in mind, we turn to our analysis of the defendant's claim.

As we explained, this court recently held that lay opinion testimony identifying a defendant via surveillance video footage is no longer inadmissible so long as it meets the requirements of § 7-1 of the Connecticut Code of Evidence, namely, that “the opinion is ‘rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.’” *State v. Gore*, supra, 342 Conn. 148, quoting Conn. Code Evid. § 7-1. We further held that, in order to satisfy the “helpful” requirement of § 7-1, such testimony is admissible only “if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph [or video] than is the jury.” (Internal quotation marks omitted.) *State v. Gore*, supra, 150. In making that determination, we directed our courts to apply the totality of the circumstances test utilized by the federal courts when evaluating whether a jury

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is just as capable of identifying a defendant from video footage as a witness, which requires consideration of four factors: (1) “the witness’ general level of familiarity with the defendant’s appearance”; (2) “the witness’ familiarity with the defendant’s appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken”; (3) “a change in the defendant’s appearance between the time the surveillance video or photographs were taken and trial, or the subject’s use of a disguise in the surveillance footage”; and (4) “the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance footage.” *Id.*, 151.

In the present case, the defendant does not dispute that Jackson, Osbourne, and Musa were sufficiently familiar with him that the first two factors support the trial court’s decision to admit their testimony. The defendant focuses his argument, rather, on the third and fourth factors, arguing that the witnesses were no more likely to correctly identify him than was the jury because (1) there was no evidence that he changed his appearance prior to trial or that he wore a disguise during the commission of the offense, and (2) the surveillance video was clear and in color with “no blurriness or graininess.” We are not persuaded.

Although the record does not reflect whether the defendant’s appearance changed between the time the surveillance video footage was recorded and the time of trial, we agree with the defendant that the third factor favors his position in that he is clearly not wearing a disguise in the video. We disagree, however, that the fourth factor also weighs in his favor. Contrary to the defendant’s assertion, we conclude that the video is “[neither] so unmistakably clear [nor] so hopelessly obscure that the witness[es] [were] no [better suited] than the jury to make the identification.” (Internal quotation marks omitted.) *State v. Bruny*, *supra*, 342 Conn.

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185. In the video, the defendant is wearing a black hat pulled down over his ears and a winter jacket, and, at certain angles, his face is obscured due to either the dark lighting or his movements. Given these facts, we cannot say that the witnesses, all of whom knew the defendant exceedingly well, could be of no assistance to or were no better suited than the jury in making the identification. See, e.g., *United States v. Jackman*, 48 F.3d 1, 5 (1st Cir. 1995) (when surveillance photographs of robber, who was wearing bulky winter jacket and baseball cap, were somewhat blurred and showed only part of robber's face, identification of defendant by lay witnesses did not constitute abuse of discretion because identification conceivably was of help to jury); see also *United States v. Allen*, 787 F.2d 933, 936 (4th Cir. 1986) (when photographs used for identification were less than clear and depicted individual with blurred profile, hardhat on, and most of left half of his face hidden, identification of defendant by lay witnesses was "especially helpful" to jury), vacated on other grounds, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987). As we noted in *Gore*, because the test for evaluating whether a witness, rather than the jury, is more likely to correctly identify the defendant from a photograph or video is a totality of the circumstances test, "the failure to satisfy [a] single factor to support admitting the testimony is not fatal. That weakness may be highlighted during cross-examination and in closing argument." *State v. Gore*, supra, 342 Conn. 165 n.19. Accordingly, because the totality of relevant circumstances indisputably favors admission of the challenged testimony in this case, we conclude that the trial court did not abuse its discretion in allowing the witnesses to testify.

We note, finally, that, in his supplemental brief, the defendant argues that it would be improper for us to apply *Gore* retroactively to his case "because that deci-

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sion was based on policy considerations and not constitutional grounds.” In support of this argument, he cites *State v. Troupe*, 237 Conn. 284, 677 A.2d 917 (1996) for the proposition that we may never apply a rule retroactively when that rule is based on policy considerations rather than on constitutional grounds.¹¹ We disagree. We previously have explained that, as a general rule, “judicial decisions apply retroactively to pending cases” (Citation omitted.) *Campos v. Coleman*, 319 Conn. 36, 62, 123 A.3d 854 (2015). However, “[i]n *Neyland v. Board of Education* [195 Conn. 174, 179, 487 A.2d 181 (1985)], we discussed the [three part] test set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), for determining whether a decision must be applied prospectively only. A common-law decision will be applied nonretroactively only if: (1) it establishes a new principle of law, either by overruling past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . (2) given its prior history, purpose and effect, retrospective application of the rule would [impede] its operation; and (3) retroactive application would produce substantial inequitable results, injustice, or hardship.” (Internal quotation marks omitted.) *In re Daniel N.*, 323 Conn. 640, 652 n.7, 150 A.3d 657 (2016); see also *State v.*

¹¹ In *Troupe*, this court modified the constancy of accusation doctrine. See *State v. Troupe*, supra, 237 Conn. 287. In so doing, we “conclude[d] that the modification of the rule that we announce[d] . . . [would] apply only to those cases in which constancy of accusation testimony ha[d] not yet been admitted into evidence on the date of the publication of th[e] opinion” and emphasized that, because the decision to modify the doctrine was based solely on policy considerations rather than on constitutional grounds, and because “we have frequently given only prospective effect to changes based on policy considerations that do not carry constitutional implications . . . we [saw] no reason to order a new trial in [that] or any other case in which testimony had been properly permitted under our former version of the constancy of accusation doctrine.” (Citations omitted; footnote omitted.) *Id.*, 305–306.

Snelgrove, 288 Conn. 742, 758 n.8, 954 A.2d 165 (2008) (“[j]udgments rendered in decisions that are not limited by their terms to prospective application in other cases usually are applied retroactively to other cases pending at the time” (internal quotation marks omitted)).

Moreover, it is axiomatic that “[t]he issue of retroactivity of decisional law is a question of policy to be decided by [this court], and may be decided by the policy consideration of whether litigants could be deemed to have relied on past precedent or whether the new resolution of an old issue was foreshadowed, or whether equity, given the particular facts, requires a prospective application only.” (Internal quotation marks omitted.) *Fortin v. Hartford Underwriters Ins. Co.*, 139 Conn. App. 826, 836 n.4, 59 A.3d 247, cert. granted, 308 Conn. 905, 61 A.3d 1098 (2013) (appeal withdrawn November 26, 2014). In the present case, it is unpersuasive to suggest that this court’s present application of the standard set forth in *Gore* gives rise to any of the concerns set forth in the preceding paragraph. That is, although *Gore* does establish a new principle of law by overruling past precedent, the defendant has not argued, let alone demonstrated, that he relied to his detriment on one legal standard over another during the events underlying this case, the underlying trial, or in bringing the present appeal; see *id.*; despite being afforded an opportunity to do so in the supplemental briefing ordered by this court to address the applicability of *Gore* to this case.¹²

¹² Moreover, as we explained in *Gore*, “trial courts have struggled to apply [the pre-*Gore* version of] § 7-3 (a) of the Connecticut Code of Evidence . . . laboring both to draw an illusory distinction between fact and opinion testimony suggested by *Finan* and its progeny, and to determine when identifications of persons in video footage or still photographs embrace an ultimate issue. [Thus] [r]ather than apply an analysis that we have determined to be grounded on artificial and illusory distinctions, we believe that the better approach is to provide the trial courts with an illustration of the application of the totality of the circumstances test that we [have] adopt[ed]” (Footnote omitted.) *State v. Gore*, *supra*, 342 Conn. 138–39. We further note that, even if we were to apply the old rule and conclude that

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We recognize, however, as the defendant argues, that, were it not for the “unusual procedural posture of this case”—namely, the fact that we agreed with the defendant’s claim regarding the trial court’s failure to adequately inquire into Coffin’s alleged conflict of interest and, therefore, remanded the case to the trial court for a determination of that issue—his case would have been decided under *Finan* and its progeny, which were still good law at the time of his original appeal. It is clear, however, that the result would be the same even under *Finan*.

In *Finan*, this court held that the testimony of four police officers identifying the defendant as one of two persons depicted in video footage of a convenience store robbery violated the prohibition in § 7-3 (a) of the Connecticut Code of Evidence against the admission of opinion testimony if it embraces an ultimate issue in the case. *State v. Finan*, supra, 275 Conn. 61–63, 67; see *State v. Gore*, supra, 342 Conn. 143. We reached this conclusion because the footage depicted the robbery itself and did not capture the defendant’s face. See *State v. Gore*, supra, 142; see also *State v. Finan*, supra, 62. As a result, the officers’ testimony was “limited to their suspicions that the defendant was depicted on the [video]”; *State v. Finan*, supra, 63; based on “details such as the defendant’s profile, his mannerisms and his distinctive walk.” *State v. Gore*, supra, 142; see also *State v. Finan*, supra, 63. Because the officers’ testimony in *Finan* was clearly opinion testimony regarding the ultimate issue in the case—whether it was the defendant or someone else in the video robbing the store—this court had no reason to distinguish between fact and opinion testimony. See *State v. Gore*, supra, 143.

Post-*Finan* decisions by our Appellate Court, including *State v. Felder*, supra, 99 Conn. App. 18, and *State*

it required reversal of the judgment, it would provide the defendant with no real benefit because, at any new trial, the rule adopted in *Gore* would apply.

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v. *Holley*, supra, 160 Conn. App. 578, however, did draw such a distinction in applying *Finan* and concluded that when, as in the present case, witnesses have a high level of familiarity with the defendant, their identification of him from a video or photograph is not a matter of opinion, as it was in *Finan*, but rather one of fact.

As we explained in *Gore*: “Both the *Felder* and *Holley* decisions relied on the witness’ level of familiarity with the defendant to distinguish between factual recognition and mere opinion.

“In *Holley*, the defendant was convicted of numerous crimes, including felony murder, in connection with a home invasion. . . . At trial, the state presented testimony from Nicole Clark, a coworker of the defendant, who identified him on video surveillance footage taken on a bus he rode home with his coconspirator after committing the crimes. . . . The Appellate Court concluded that Clark’s testimony that she recognized the defendant’s face in the still photographs from the footage is not characterized accurately as *opinion* testimony as to whether the photograph depicted the defendant. Clark recognized the defendant’s face as it appeared in the still image based on the fact of her past acquaintance with him; she did not merely offer an opinion as to whether the still image depicted the defendant. Thus, her testimony was based on the *fact* that she recognized the defendant, not on an opinion that the photograph depicted him. . . .

“In *Felder*, the defendant was convicted of robbery in the first degree and larceny in the third degree in connection with a bank robbery. . . . At trial, his girlfriend and former roommate, Michelle Mills, testified that she recognized him in photographs taken from the bank surveillance video. . . . Mills testified that her recognition of the defendant was based on his head covering, sneakers, nose and posture. . . . On appeal,

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the defendant relied on this court's decision in *Finan* to argue that Mills' testimony should have been excluded as lay opinion testimony that went to the ultimate issue. . . . The Appellate Court rejected the defendant's claim on the ground that Mills' testimony did not constitute opinion testimony. . . . Although the court did not explain the reasoning that led it to that conclusion, in the facts section, the court specifically detailed Mills' level of familiarity with the defendant, listed the bases of her recognition, and stated that she testified that she recognized the defendant." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State v. Gore*, supra, 342 Conn. 143–45.

Based on the foregoing, in the present case, application of the *Finan* rule would lead to the same result that we have reached under the *Gore* standard. Specifically, given the witnesses' strong familiarity with the defendant—which the defendant himself does not dispute—we would be obliged to conclude that, even under *Finan*, the trial court properly admitted the challenged testimony. Moreover, the witnesses' testimony did not address, in violation of *Finan* and the pre-*Gore* version of § 7-3 of the Connecticut Code of Evidence, the ultimate issue in this case—namely, whether the defendant committed the offense—because the witnesses did not identify the defendant from the surveillance video footage depicting the assault; rather, the jury was left to conclude on its own whether, based on the totality of the state's evidence, the defendant was the individual who assaulted the victim on the corner of Baltimore Street and Albany Avenue.¹³ See, e.g., *State v. Holley*, supra, 160 Conn. App. 618 (“[The witness’] testimony that she recognized the defendant as depicted in the

¹³ This fact especially makes the holding in *Finan* limited to its facts and, thus, inapplicable to the present case, as the lay witnesses in *Finan* identified the defendant in surveillance video footage depicting the robbery itself. See *State v. Finan*, supra, 275 Conn. 62.

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photograph at issue was not tantamount to a legal opinion about his criminal culpability. The state's case rested on circumstantial evidence and [the defendant's] presence . . . on the bus . . . shortly after the victim's murder certainly was integral to the state's theory of the case and to the issue of whether the defendant was criminally liable for the several offenses at issue in the case. [His] presence on the bus, however, did not directly shed light on his conduct at the victim's residence, whether the defendant had the criminal intent related to the offenses with which he was charged, or whether he had entered into a conspiracy Thus, we do not conclude that his presence on the bus was the essence of the matters to be decided by the jury."'). These two facts taken together compel the conclusion that the witnesses' testimony in the present case was properly admitted under *Finan*, its progeny, and the pre-*Gore* version of § 7-3 of the Connecticut Code of Evidence, and, thus, the result in this appeal remains the same regardless of the rule applied.

The judgment is affirmed.

In this opinion the other justices concurred.

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under rule established in State v. Gore (343 Conn. 129), trial court abused its discretion in admitting challenged testimony; whether it was proper for this court to apply rule established in Gore retroactively to present case.

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Sexual assault first degree; risk of injury to child; whether trial court improperly denied defendant's pretrial motion to dismiss for failure to prosecute within five year limitation period set forth in applicable statute of limitations ((Rev. to 2001) § 54-193a); whether trial court's finding that defendant was not available for arrest between issuance and execution of arrest warrant was not clearly erroneous.

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Sexual assault first degree; attempt to commit sexual assault first degree; risk of injury to child; claim that trial court had abused its discretion in admitting evidence of defendant's uncharged misconduct in connection with allegations of sexual abuse; unpreserved claim by state that judgment of conviction could be affirmed on alternative ground that uncharged misconduct evidence was admissible to show propensity under applicable provision (§ 4-5 (b)) of Connecticut Code of Evidence; whether trial court abused its discretion in admitting uncharged misconduct evidence under applicable provision (§ 4-5 (c)) of Connecticut Code of Evidence to show intent and absence of mistake or accident on part of defendant; whether admission of uncharged misconduct evidence was harmful.

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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In re Paulo T.

IN RE PAULO T.*
(AC 45111)

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

Syllabus

The respondent father appealed to this court from, inter alia, the judgment of the trial court granting the motion for reinstatement of guardianship rights filed by the petitioner mother with respect to their minor son, P. P lived with the mother for most of his life. After she pleaded nolo contendere to the allegation that P had been uncared for due to her homelessness, the trial court vested primary custody and sole guardianship of P in the father and ordered the mother to comply with certain specific steps, including participating in substance abuse treatment and obtaining adequate housing and legal income. Following her participation in an intensive outpatient treatment program and her residence in a sober house, the trial court granted the mother's motion for reinstatement of her guardianship rights and ordered that the parties have joint guardianship of P, with primary physical custody vested in the mother. The trial court also issued orders with respect to the father's visitation rights. Thereafter, the father filed a motion to open the judgment on the ground that the mother had failed to comply with the trial court's visitation orders. The trial court declined to exercise jurisdiction over the motion, and the father appealed to this court. *Held*:

1. Contrary to the father's claim, the trial court did not apply a presumption that reinstatement of the mother's rights was in the best interests of P: the presumption established by our Supreme Court in *In re Zakai F.* (336 Conn. 272), that reinstatement is in the best interests of the child when a parent who has filed a motion to reinstate his or her guardianship rights has demonstrated that the reasons that led to the removal of his or her guardianship rights have been resolved satisfactorily, did not apply to this case because it was a dispute between two parents and the presumption applies only when the current guardian is a nonparent; moreover, although the trial court mentioned the presumption in its decision, it did not apply the presumption in determining whether the restoration of the mother's guardianship rights was in P's best interests but, instead, carefully considered and applied the relevant statutory (§ 46b-56 (c)) criteria.

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

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2. The trial court correctly identified the factors that led to the removal of the mother's rights and found that such factors had been resolved satisfactorily: a review of the entire record supports the trial court's determination that the mother lost her guardianship rights due to her homelessness and alcohol abuse, despite the record also having referenced other matters; moreover, the trial court's finding regarding the satisfactory resolution of those issues was not clearly erroneous because it was supported by evidence of the mother's sobriety, full-time employment and stable housing situation, and the father's arguments to the contrary constituted a request for this court to reweigh the evidence, which it could not do.
3. The evidence was sufficient to support the trial court's findings that the restoration of the mother's guardianship rights and transfer of custody to the mother were in P's best interests: the best interests determination was not based on a single factor but, rather, on consideration of the factors set forth in § 46b-56 (c); moreover, the evidence demonstrated that, contrary to the father's claims and despite the mother's difficulties, P had done well in her care prior to the loss of her guardianship rights and the transfer of custody would not result in a loss of P's educational opportunities, as other public schools had programs similar to the gifted and talented program in which P had been enrolled while residing with the father.
4. The trial court properly declined to exercise its jurisdiction to consider the arguments set forth in the father's motion to open the judgment: after the trial court reinstated the mother's guardianship rights and issued orders regarding visitation, it explicitly stated that it would not retain jurisdiction over any future visitation matters, which would need to be addressed in the family court; accordingly, the father was required to present any visitation matters to the family court and was required to file a motion to modify custody, rather than a motion to open, in order to pursue his request that the court award him sole custody of P.

Argued March 10—officially released July 18, 2022**

Procedural History

Motion for reinstatement of guardianship rights, filed by the petitioner mother with respect to her minor child, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters, where the matter was tried to the court, *Maronich, J.*; judgment granting the motion and issuing orders with respect to the visitation rights of the respondent father; thereafter, the court,

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

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Maronich, J., dismissed the respondent's motion to open the judgment, from which the respondent appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant (respondent father).

Robert C. Koetsch, assigned counsel, for the appellee (petitioner mother).

Opinion

ALEXANDER, J. The respondent father, Horace W., appeals from the granting of the motion for reinstatement of guardianship rights filed by the petitioner mother, Mae T., with respect to their minor child, Paulo T. On appeal, the respondent claims that the court (1) improperly applied a presumption that reinstatement of the petitioner's guardianship rights was in the best interests of Paulo, (2) erroneously found that the factors that had led to the removal of the petitioner's guardianship rights had been resolved satisfactorily, (3) erroneously found that reinstatement of the petitioner's guardianship rights was in the best interests of Paulo, and (4) improperly dismissed the respondent's motion to open the judgment. We disagree with these claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On February 17, 2019, the Department of Children and Families (department) received a referral alleging that then ten year old Paulo was physically neglected as a result of the petitioner's homelessness and abuse of alcohol. The Commissioner of Children and Families (commissioner) subsequently filed a petition for an order of temporary custody and a petition alleging that Paulo had been neglected and uncared for. During the department's investigation, the petitioner admitted that she had been evicted from her apartment, Paulo had not been attending school, and

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she had consumed alcohol for coping purposes in the presence of Paulo. The respondent indicated that he lived in a senior citizen building and could not be a resource for Paulo. On February 26, 2019, the court, *Randolph, J.*, issued an order vesting temporary custody of Paulo in the respondent's adult daughter, Tachelle C.¹

On June 10, 2019, the petitioner pleaded nolo contendere to the allegation that Paulo had been uncared for due to her homelessness.² The court issued orders vesting primary custody and sole guardianship of Paulo in the respondent.³ Additionally, the court ordered the petitioner to comply with certain specific steps, including participating in substance abuse treatment and obtaining adequate housing and legal income.

On November 20, 2020, the petitioner filed a motion for reinstatement of her guardianship rights⁴ with the Superior Court for juvenile matters.⁵ The petitioner also alleged that Paulo had been physically abused by the respondent. The petitioner sought full legal and physical

¹ General Statutes § 46b-129 (j) (2) provides in relevant part: "Upon finding and adjudging that any child or youth is uncared for . . . the court may . . . (B) vest such child's or youth's legal guardianship . . . with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage"

² See General Statutes § 46b-120 (6) (A) (child who is homeless may be found uncared for).

³ In a court study prepared by the department, it was noted that, "[i]n June, 2019, [Paulo] came to live with [the respondent] as [Tachelle] could no longer care for him."

⁴ See General Statutes § 46b-129 (n) (parent may file motion to reinstate guardianship).

⁵ "General Statutes § 46b-1 prescribes family relations matters within the jurisdiction of the Superior Court. . . . Juvenile matters, as provided in General Statutes § 46b-121, include all proceedings concerning uncared-for, neglected or abused children within this state" (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *In re Teagan K.-O.*, 335 Conn. 745, 760, 242 A.3d 59 (2020).

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custody. On February 22, 2021, the department completed a court study for the reinstatement of guardianship.⁶ It recommended that (1) the court grant the petitioner's motion to reinstate her guardianship rights, (2) the court grant the respondent regular contact and visitation, and (3) the parties participate in counseling to address their communication and interactions with respect to Paulo.

The court, *Maronich, J.*, conducted a hearing on September 7 and 8, 2021. After considering the testimony and evidence, and hearing the arguments of counsel, the court issued an oral decision. At the outset, the court noted that Paulo had been removed from the petitioner's care due to "the immediate problem of homelessness, secondary to a more serious problem of alcohol abuse" The court then discussed the procedural context of the petitioner's motion: "The instant petition for restoration of parental guardianship was filed by [the petitioner] on November 20, 2020. In order to prevail on this petition, a parent must demonstrate that the factors that resulted in the removal of the parent as guardian have been resolved satisfactorily. The parent is entitled to a presumption that reinstatement of guardianship rights is in the best interest of the child."

The court next summarized the evidence and made findings with respect to whether the petitioner had resolved the reasons for her removal as a guardian. Specifically, the court noted that the petitioner had entered an intensive outpatient therapy program in March, 2019, and transitioned to a "sober house" in April, 2019, where she remained until September 5, 2020. The court stated that her record at both programs

⁶ See General Statutes § 46b-129 (n) (court may order commissioner to investigate home conditions and needs of child or youth, and home conditions of person seeking reinstatement of guardianship, and to make recommendations to court).

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was exemplary and that the house manager of the sober house described the petitioner as “a model resident.” The court also indicated that the petitioner continued to attend Alcoholics Anonymous (AA) meetings and had maintained her sobriety since January, 2020. Additionally, the petitioner obtained full-time employment, had secure housing, and was in a stable relationship. In conclusion, the court stated: “This court is under no illusions about [the petitioner’s] past history and long struggle with alcohol. The court, however, is satisfied that she has demonstrated a reasonable period of sobriety and is able to meet the needs of . . . Paulo. The court finds that the petitioner has met her burden of proof, that the causes for removal of Paulo from her care have been satisfactorily resolved.”

The court then addressed the best interests of Paulo and considered the relevant factors set forth in General Statutes § 46b-56.⁷ It found that both parents were prepared to meet Paulo’s needs. The court noted that Paulo

⁷ General Statutes § 46b-56 (c) provides: “In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so, may consider, but shall not be limited to, one or more of the following factors: (1) The physical and emotional safety of the child; (2) the temperament and developmental needs of the child; (3) the capacity and the disposition of the parents to understand and meet the needs of the child; (4) any relevant and material information obtained from the child, including the informed preferences of the child; (5) the wishes of the child’s parents as to custody; (6) the past and current interaction and relationship of the child with each parent, the child’s siblings and any other person who may significantly affect the best interests of the child; (7) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (8) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents’ dispute; (9) the ability of each parent to be actively involved in the life of the child; (10) the child’s adjustment to his or her home, school and community environments; (11) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child’s family home *pendente lite* in order to alleviate stress in the household; (12) the stability of the child’s existing or proposed residences,

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consistently had expressed a desire to live with the petitioner and that for the majority of his life he had been in the care of the petitioner. In its findings, the court noted that there had been extended periods of time with little contact between Paulo and the respondent. The court acknowledged, however, that during the past two years, the respondent had “stepped up to the plate during very difficult times and provided [Paulo] a home.” The court indicated that, given the petitioner’s sobriety, long-term relationship, stable housing situation, and employment, she would be able to meet Paulo’s needs and provide him with stability. The court found that Paulo would be able to transfer to a school in Milford, where the petitioner lived. Finally, the court determined that Paulo would be able to transition back to the petitioner’s care and not suffer undue stress in doing so.

“In balance, this court finds that it is in Paulo’s best interest for physical custody to be vested in [the petitioner]. In reaching this difficult decision, the court is most persuaded by the length of time in [the petitioner’s] care prior to removal, the demonstrated devotion she has shown in overcoming her demons, the recommendation of three separate [department] workers and the guardian ad litem, and finally by Paulo’s own expressed wishes. Paulo is far more intelligent and

or both; (13) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (14) the child’s cultural background; (15) the effect on the child of the actions of an abuser, if any domestic violence, as defined in section 46b-1, has occurred between the parents or between a parent and another individual or the child; (16) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (17) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision.”

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grown up than his [age] would suggest. As a child becomes a teenager and [a] young adult, the court accords a greater weight to his or her wishes.

“The court is also—also knows that each parent here has a vastly different style of parenting. As Paulo enters his teenage years, the court believes that primary physical custody with [the petitioner] would be a better fit. The court would be remiss if it did not acknowledge that [the respondent] has been a good father to his son, Paulo. . . . For the following reasons, the court will grant this petition, [the petitioner and the respondent] will have joint guardianship of Paulo, primary physical custody will be vested in [the petitioner].”

After delivering its oral decision, the court recessed to provide the parties with the opportunity to come to an agreement with respect to visitation. After resuming the proceeding, the court noted on the record that the parties had been unable to reach an agreement. The court issued orders with respect to the issue of visitation.⁸ At the conclusion of the proceeding, the court stated: “This court will not retain jurisdiction over any visitation issues. Any disputes or necessary modifications will be addressed to the family court.”

On September 27, 2021, the respondent filed a motion to open the judgment on the ground that the petitioner had failed to comply with the court’s visitation orders. The respondent additionally alleged that he had been prevented from contacting and communicating with Paulo. The respondent also filed a motion for contempt on that same day, in which he alleged that the petitioner had violated the court’s orders by preventing him from

⁸ The court ordered that, effective September 8, 2021, the respondent would have visitation with Paulo every Wednesday at 5 p.m. through Thursday morning and that the petitioner was responsible for providing transportation. Effective September 17, 2021, the respondent would have visitation with Paulo on alternating weekends, commencing on Friday at 5 p.m. through Sunday at 6 p.m. and the respondent was responsible for transportation.

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visiting with Paulo. In her October 4, 2021 objection to the motion to open, the petitioner countered, *inter alia*, that the respondent's motion constituted an improper attempt to relitigate the matter.

The court held a hearing on the respondent's motions on October 28, 2021. Pursuant to its previous order stating that it would not retain jurisdiction, the court dismissed the respondent's contempt motion. The court also declined to exercise jurisdiction over the respondent's motion to open the judgment. This appeal followed.⁹ Additional facts will be set forth as necessary.

I

The respondent first claims that the court improperly applied a presumption that reinstatement of the petitioner's guardianship rights was in the best interests of Paulo as established by our Supreme Court in *In re Zakai F.*, 336 Conn. 272, 255 A.3d 767 (2020). Specifically, he argues that the presumption regarding best interests, and the requirement that the party opposing the reinstatement of guardianship must rebut this presumption by clear and convincing evidence, do not apply in cases between two parents and that the court improperly applied this presumption in the present case. Although we agree with the respondent that the presumption set forth in *In re Zakai F.*, *supra*, 288, does not apply in disputes involving two parents, we nevertheless conclude that the court did not apply this presumption in favor of the petitioner in the present case.

We begin our analysis by setting forth the applicable standard of review. The respondent contends that this claim involves the determination of the proper legal standard and warrants plenary review by this court. The

⁹ The guardian ad litem and the attorney for the minor child both have adopted the appellate brief and position of the petitioner.

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petitioner maintains that this claim involves a review of the testimony and evidence and discusses both the abuse of discretion and clearly erroneous standards. We conclude that the claim raised by the respondent consists of a determination regarding the proper legal standard to be applied and an interpretation of the oral decision rendered by the court. Accordingly, we agree with the respondent that our review is plenary. See *Hartford v. CBV Parking Hartford, LLC*, 330 Conn. 200, 214, 192 A.3d 406 (2018) (“[w]hether the trial court applied the proper legal standard is subject to plenary review on appeal”); *Kunz v. Sylvain*, 159 Conn. App. 730, 748, 123 A.3d 1267 (2015) (“[w]e apply a plenary standard of review to the issue of whether the correct legal standard was used by the trial court”); see also *Cunningham v. Cunningham*, 204 Conn. App. 366, 373, 254 A.3d 330 (2021) (plenary review applies to interpretation of judgment); *In re Jacquelyn W.*, 169 Conn. App. 233, 241, 150 A.3d 692 (2016) (interpretation of court’s memorandum of decision presents question of law subject to plenary review).

A review of the relevant legal principles will facilitate our discussion. The present case involves the restoration of the guardianship rights of a parent. Guardianship of a minor is statutorily defined as “(A) The obligation of care and control; (B) the authority to make major decisions affecting the minor’s education and welfare, including, but not limited to, consent determinations regarding marriage, enlistment in the armed forces and major medical, psychiatric or surgical treatment; and (C) upon the death of the minor, the authority to make decisions concerning funeral arrangements and the disposition of the body of the minor” General Statutes § 45a-604 (5); see also *In re Adelina A.*, 169 Conn. App. 111, 121 n.12, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016); *In re Michelle G.*, 52 Conn. App. 187, 192, 727 A.2d 226 (1999).

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Our statutes further provide that “[t]he father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and duties of the father and the mother in regard to the minor shall be equal. If either father or mother dies or is removed as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor.” General Statutes § 45a-606; see also *Stevens’ Appeal*, 157 Conn. 576, 577, 255 A.2d 632 (1969) (married parents of child, by statute, are joint guardians of child).

Our statutes and rules of practice provide mechanisms to remove an individual, including a parent, as the guardian of a minor. See, e.g., General Statutes §§ 45a-610 and 46b-129 (j) (2); Practice Book § 35a-12A. Likewise, opportunities exist for the reinstatement of a guardian. General Statutes §§ 45a-611 and 46b-129 (n); Practice Book §§ 35a-20 and 35a-20A; see, e.g., *In re Adelina A.*, supra, 169 Conn. App. 120–21; cf. General Statutes § 45a-611 (d) (parent removed as guardian may not petition for reinstatement if court established permanent guardianship); General Statutes § 45a-616a (Probate Court may appoint individual as permanent guardian for minor following removal of parent as guardian).

Our Supreme Court has stated that § 46b-129 (n) is similar to § 45a-611; *In re Zakai F.*, supra, 336 Conn. 285 n.11; and that these statutes provide the procedures through which a parent may seek reinstatement of guardianship of his or her child. See *In re DeLeon J.*, 290 Conn. 371, 379, 963 A.2d 53 (2009). Section 46b-129 (n) provides: “If the court has ordered legal guardianship of a child or youth to be vested in a suitable and worthy person pursuant to subsection (j) of this section, *the child’s or youth’s parent or former legal guardian may file a motion to reinstate guardianship of the child or youth in such parent or former legal guardian.* Upon the filing of such a motion, the court may order

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the [commissioner] to investigate the home conditions and needs of the child or youth and the home conditions of the person seeking reinstatement of guardianship, and to make a recommendation to the court. A party to a motion for reinstatement of guardianship shall not be entitled to court-appointed counsel or representation by Division of Public Defender Services assigned counsel, except as provided in section 46b-136. *Upon finding that the cause for the removal of guardianship no longer exists, and that reinstatement is in the best interests of the child or youth, the court may reinstate the guardianship of the parent or the former legal guardian.* No such motion may be filed more often than once every six months.” (Emphasis added.) See also Practice Book § 35a-20.¹⁰ Guided by these principles, we address each aspect of the respondent’s claim in turn.

A

We first consider the respondent’s assertion that, in a reinstatement of guardianship rights case, the presumption that reinstatement is in the best interests of

¹⁰ Practice Book § 35a-20 provides: “(a) Whenever a parent whose guardianship rights to a child or youth were removed and transferred to another person or an agency other than the [department] by the Superior Court for juvenile matters seeks reinstatement as that child’s or youth’s guardian, the parent may file a motion for reinstatement of guardianship with the court that ordered the transfer of guardianship.

“(b) The clerk shall assign such motion a hearing date and issue a summons to the current guardian and the nonmoving parent or parents. The moving party shall cause a copy of such motion and summons to be served on the child’s or youth’s current legal guardian(s) and the nonmoving parent or parents.

“(c) Before acting on such motion, the judicial authority shall determine if the court still has custody jurisdiction and shall request, if necessary, that the [commissioner] conduct an investigation and submit a home study that sets forth written findings and recommendations before rendering a decision.

“(d) The hearing on a motion for reinstatement of guardianship is dispositional in nature. If the parent seeking reinstatement of guardianship demonstrates that the factors that resulted in the parent’s removal as guardian are resolved satisfactorily, the parent is entitled to a presumption that reinstatement is in the best interest of the child or youth. The party opposing reinstatement

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the child does not apply in a dispute between two parents. We agree with the respondent that this presumption does not apply in such a situation.

By way of background, we note that our Supreme Court recently conducted a detailed analysis of “whether there is a constitutional presumption that reinstatement of guardianship rights to a parent . . . is in the best interests of the child and, if so, whether a heightened standard of proof is required to rebut that presumption.” (Footnote omitted.) *In re Zakai F.*, supra, 336 Conn. 275–76. In that case, the respondent mother voluntarily agreed that her sister, the petitioner, would care for the respondent’s minor child, Zakai, after an incident in which the boyfriend of the respondent mother physically assaulted Zakai. *Id.*, 277. When the respondent mother, less than one week later, requested that the petitioner return Zakai to her care, the petitioner sought immediate temporary custody and the removal of the respondent mother’s guardianship rights in Probate Court. *Id.* The Probate Court granted the petitioner’s custody request but did not rule on her motion for removal of the guardianship rights of the respondent mother. *Id.* The matter was transferred to the family division of the Superior Court and, eventually, to the juvenile division of the Superior Court.¹¹ *Id.*, 277–78. After various proceedings and the completion of a guardianship study, the court approved an agreement of the parties that guardianship was transferred to the petitioner. *Id.*, 278–79.

ment of guardianship has the burden of proof to rebut this presumption by clear and convincing evidence.”

¹¹ “To promote an efficient use of judicial resources, the Superior Court has been divided into four divisions: Family, civil, criminal and housing. Each division is further divided into parts.” *In re Shonna K.*, 77 Conn. App. 246, 252, 822 A.2d 1009 (2003); see also *State v. Ledbetter*, 263 Conn. 1, 4 n.9, 818 A.2d 1 (2003) (Connecticut has unified court system and, therefore, all criminal and civil matters, including juvenile matters, fall within subject matter jurisdiction of Superior Court).

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Approximately nine months later, the respondent mother moved to reinstate her guardianship rights to Zakai. *Id.*, 279. The court ordered another guardianship study pursuant to § 46b-129 (n). In its memorandum of decision, the court concluded that the respondent mother had ameliorated the reasons and events that had prompted the agreement to transfer guardianship of Zakai to the petitioner. *Id.*, 280. The court determined, however, by a fair preponderance of the evidence, that it was not in Zakai’s best interests to return to the care of the respondent mother. *Id.*, 282.

On appeal, our Supreme Court noted that, once a parent established that the cause for removal no longer existed, a presumption that reinstatement of that parent’s guardianship rights was in the child’s best interests was constitutionally required. *Id.*, 288. To support this conclusion, the court first reviewed the language of the relevant statute and rule of practice. *Id.*, 284–85. “We begin with the text of § 45a-611 (b), which provides in relevant part: If the court determines that the factors which resulted in the removal of the parent have been resolved satisfactorily, the court may remove the guardian and reinstate the parent as guardian of the person of the minor, if it determines that it is in the best interests of the minor to do so. . . . Nothing in the language of the statute itself requires a presumption that reinstatement with a parent is in the best interests of the child.

“Practice Book § 35a-20 also governs the procedure by which a parent can seek reinstatement of guardianship. Practice Book [2020] § 35a-20 (d) provides: The hearing on a motion for reinstatement of guardianship is dispositional in nature. The party seeking reinstatement of guardianship has the burden of proof to establish that cause for transfer of guardianship to another person or agency no longer exists. The judicial authority shall then determine if reinstatement of guardianship

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is in the child's or youth's best interest. Practice Book [2020] § 35a-20, like § 45a-611, does not address whether there is a presumption in place."¹² (Internal quotation marks omitted.) *Id.*, 284–85; see generally *In re Avirex R.*, 151 Conn. App. 820, 828, 96 A.3d 662 (2014) (rules of practice implement relevant statutory scheme).

The court then looked to analogous cases, namely, *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 420 A.2d 875 (1979), which relied on *Claffey v. Claffey*, 135 Conn. 374, 64 A.2d 540 (1949). *In re Zakai F.*, *supra*, 336 Conn. 285–88. Specifically, the court noted that in *Claffey v. Claffey*, *supra*, 377, it had explained: “[A]t least, where the controversy is not between the father and the mother . . . the mother has a prior right to custody unless the circumstances are such that to give it to her would not be for the best interests of the child.” (Internal quotation marks omitted.) *In re Zakai F.*, *supra*, 287. Similarly, our Supreme Court relied on the following statement from *In re Juvenile Appeal (Anonymous)*, *supra*, 662: “[I]n any controversy between a parent and [anyone who was not a parent—including relatives, friends or child care agencies] the parent . . . should have a strong initial advantage, to be lost only [when] it is shown that the child's welfare plainly requires custody to be placed in the [other party].” (Internal quotation marks omitted.) *In re Zakai F.*, *supra*, 287–88.

Ultimately, our Supreme Court concluded that, with respect to a motion to reinstate guardianship rights, a parent who successfully demonstrated that the factors that resulted in his or her removal as guardian were resolved satisfactorily is entitled to a presumption that reinstatement is in the best interests of the child. *Id.*,

¹² We note that Practice Book § 35a-20 (d) was amended, effective January 1, 2022, to specify that a parent is entitled to a presumption, consistent with the decision in *In re Zakia F.*, *supra*, 336 Conn. 272. See Practice Book § 35a-20, commentary; see also footnote 10 of this opinion.

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288. The cases primarily relied on by our Supreme Court in reaching this conclusion contained a caveat that this presumption applies only when the matter to be resolved is not between the mother and the father. See *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 662; *Claffey v. Claffey*, supra, 135 Conn. 377.¹³ It then determined that the burden shifted to the nonparent to rebut the presumption in reinstatement of guardianship cases. *In re Zakai F.*, supra, 336 Conn. 289. Finally, our Supreme Court held that a nonparent must rebut the presumption by clear and convincing evidence. *Id.*, 306.

On the basis of the reasoning and rationale set forth by our Supreme Court in *In re Zakai F.*, supra, 336 Conn. 272, a parent who has filed a motion to reinstate his or her guardianship rights and who has demonstrated that the reasons that led to the removal of that parent's guardianship rights have been resolved satisfactorily is entitled to a presumption that reinstatement

¹³ The respondent's brief further directs us to the following language from *Fish v. Fish*, 285 Conn. 24, 939 A.2d 1040 (2008), where our Supreme Court stated: "We first note that third party custody disputes differ from those in which both parents seek custody because, in the latter case, each party possesses a constitutionally protected parental right. . . . In cases in which both parents seek custody, [n]either parent has a superior claim to the exercise of [the] right to provide care, custody, and control of the children. . . . Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions. Thus, in evaluating each parent's request for custody, the parents commence as presumptive equals and a trial court undertakes a balancing of each parent's relative merits to serve as the primary custodial parent; the child's best interests [tip] the scale in favor of an award of custody to one parent or the other."

"Where the dispute is between a fit parent and a private third party, however, both parties do not begin on equal footing in respect to rights to care, custody, and control of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Id.*, 45–46.

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is in the best interests of the child when the current guardian is a nonparent. We agree with the respondent, however, that this presumption does not apply in a dispute between two parents.

B

We now turn to the respondent's claim that the court improperly applied the presumption that reinstatement of the petitioner's guardianship rights was in the best interests of Paulo. Specifically, the respondent contends that the court applied an incorrect legal standard and that the appropriate remedy is a new trial. After a careful review of the court's memorandum of decision, we conclude that it did not apply this presumption in favor of the petitioner. Accordingly, the respondent's claim must fail.

At the outset of its oral decision, the court stated: "The instant petition for restoration of parental guardianship was filed by [the petitioner] on November 20, 2020. In order to prevail on this petition, a parent must demonstrate that the factors that resulted in the removal of the parent as guardian have been resolved satisfactorily. *The parent is entitled to a presumption that reinstatement of guardianship rights is in the best interest of the child.* In addition to the restoration of guardianship, [the petitioner] is seeking physical custody of Paulo as well as the restoration of parental guardianship." (Emphasis added.) The court then determined that the petitioner had met her burden of establishing that the cause for the removal of her guardianship rights had been satisfactorily resolved. Ultimately, the court reinstated the petitioner's guardianship rights and awarded her primary custody of Paulo.

With respect to the best interests analysis,¹⁴ the court considered the statutory factors set forth in § 46b-56

¹⁴ The court appears to have merged its best interests analysis with respect to the restoration of the petitioner's guardianship rights and determination of physical custody.

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(c), and discussed the most relevant factors, namely, the temperament and development needs of the child, the capacity and disposition of the parents to understand and meet the needs of the child, any relevant and material information obtained from the child, including his informed preferences, the past and current interaction and relationship of the child with each parent, the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent, any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute, the length of time that the child has lived in a stable and satisfactory environment, and the stability of the child's existing or proposed residences. See General Statutes § 46b-56 (c) (2), (3), (4), (6), (7), (8), (11) and (12).

After discussing and balancing these factors, the court concluded that it was in Paulo's best interests to restore the petitioner's guardianship rights and award her physical custody. In doing so, the court expressly relied on the length of time Paulo had been in the petitioner's care prior to the removal of her guardianship rights, her "demonstrated devotion . . . in overcoming her demons," the recommendations of the guardian ad litem and various employees of the department, Paulo's own expressed wishes, and the petitioner's parenting style as Paulo entered his teenage years. At no point in its analysis did the court, explicitly or implicitly, address, mention, or apply a presumption in favor of the petitioner. Rather, the court considered and balanced the most relevant factors set forth in § 46b-56 (c) in accordance with our law.

The respondent points to the court's statement that "[t]he parent is entitled to a presumption that reinstatement of guardianship rights is in the best interest of the child." We acknowledge that this is not a precisely accurate statement of our law. In cases in which a

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parent seeks to restore his or her guardianship rights involving a nonparent, be it another family member, third party, or government agency, the statement made by the court would be accurate. See *In re Zakai F.*, supra, 336 Conn. 288. In a restoration of guardianship rights case involving two parents, however, no such presumption exists. See part I A of this opinion.

The respondent, as the appellant, bears the burden of establishing that the court applied an incorrect legal standard; we will not engage in speculation or presume such error. See, e.g., *DiBerardino v. DiBerardino*, 213 Conn. 373, 385, 568 A.2d 431 (1990); *Comeroli v. Kutz*, 183 Conn. App. 401, 416 n.4, 193 A.3d 64 (2018). In fact, in a similar context, our Supreme Court recognized that a court's misstatement regarding the correct legal standard does not require a reversal and new proceeding in every instance. In *Cookson v. Cookson*, 201 Conn. 229, 231–33, 514 A.2d 323 (1986), the parties were involved in a custody and visitation dispute. The plaintiff mother appealed from the decision of the trial court awarding custody to the defendant father and granting her specific visitation rights with certain conditions imposed. *Id.*, 233. In its memorandum of decision, the court had referred to a “‘least detrimental alternative’ standard” *Id.*, 241. In her appeal, the plaintiff claimed, inter alia, that the court had failed to apply the statutorily mandated best interests standard. *Id.*

In rejecting this claim, our Supreme Court reasoned: “The trial court was, however, obviously searching to accommodate the best interests of the children, *and on the record before us we have no reason to believe that it did not ultimately apply the best interests of the child standard to its decision.* Least detrimental alternative was manifestly alternate phraseology utilized by the trial court to describe the compelling concerns involved in the difficult custody decision it faced. Significantly, later in its memorandum of decision, the

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trial court recognized that the defendant was asking the court to consider the present best interests of the children and, in promulgating its orders, the trial court summarized its conclusions in the following manner. Return to the home of the parent who obstructed the children's relationship with their father, who permitted someone other than herself to impose humiliating and frightening punishments for relatively minor misbehaviors, and who lied and defied court orders, is inconsistent with the best interests of these children.

“The fact that the least detrimental alternative was mentioned in the trial court’s decision as a desirable goal and may have culminated in the same result as the statutory criteria does not require a conclusion that the court based its decision on that standard. Any ambiguity notwithstanding, and no clear evidence to the contrary having been introduced, it was implicit in the trial court’s award that it was based on the statutory standard of the best interests of the child.” (Emphasis added; internal quotation marks omitted.) *Id.*, 241–42.

In the present case, although the court mentioned the best interests presumption that applies in many, but not all, restoration of guardianship disputes, we are unable to discern any example of the court applying that presumption. Rather, the court carefully considered and applied the relevant statutory criteria in determining whether the restoration of the petitioner’s guardianship rights was in the best interests of Paulo. See, e.g., *D’Amato v. Hart-D’Amato*, 169 Conn. App. 669, 678, 152 A.3d 546 (2016) (statutorily incumbent on court issuing orders regarding custody and visitation to be guided by best interests of child).

As this court has observed: “Although the court’s oral decision does not clearly set forth the defendant’s burden of proof, *we nevertheless interpret the decision*

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by considering it in its entirety, rather than by considering certain statements in artificial isolation.” (Emphasis added.) *State v. Anderson*, 163 Conn. App. 783, 796, 134 A.3d 741, cert. denied, 321 Conn. 909, 138 A.3d 931 (2016); see also *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012) (opinion must be read in its entirety, without particular portions read in isolation, to determine parameters of its holding, and ambiguous trial record was read to support, rather than contradict, trial court’s judgment); *Bisson v. Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 630 n.11, 195 A.3d 707 (2018) (“this court will presume [that] trial court acted properly in performance of its duties”). For these reasons, we reject the respondent’s assertion that the court applied a presumption in favor of the petitioner when it determined that the restoration of her guardianship rights was in the best interests of Paulo.

II

The respondent next claims that the court incorrectly determined that the factors that led to the removal of the petitioner as guardian of Paulo had been resolved. Specifically, he argues that the court failed to identify all of the factors that led to the petitioner’s removal and improperly found that these factors had been resolved satisfactorily. We disagree.

The following additional facts are necessary for our discussion of this claim. The petitioner has a long history of alcohol abuse. On February 17, 2019, the department received a referral alleging physical and educational neglect of Paulo. Specifically, this referral alleged that the petitioner was homeless and abusing alcohol and that Paulo had not been enrolled in school for three weeks. The department commenced an investigation, and the petitioner admitted to having been evicted from her apartment on February 1, 2019. She and Paulo had moved to another town, but, due to her homelessness,

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the petitioner had been unable to register Paulo in a new school. Paulo also stated that the petitioner drove an automobile while intoxicated and that he had to ask her to “stop driving fast.” The petitioner and Paulo had been staying with a family member, but, as a result of the petitioner’s alcohol abuse, they were asked to leave.

At a subsequent meeting, a member of the department discussed the issues of homelessness and alcohol abuse with the petitioner. The petitioner admitted to consuming alcohol in the presence of Paulo for “coping purposes” Furthermore, the petitioner acknowledged the concern of the department with respect to the lack of stable housing for herself and Paulo. These concerns—the petitioner’s homelessness and alcohol use—were identified specifically as the reasons for the department’s request for an out of home placement.¹⁵ The court determined that Paulo was neglected and uncared for and vested his temporary care and custody in Tachelle, the respondent’s adult daughter.

Following the petitioner’s motion for reinstatement of her guardianship rights, the department conducted a study dated February 22, 2021. This study documented the petitioner’s extensive history with the department, beginning in 2009. At the time of this study, the petitioner lived in a condominium with her boyfriend. Paulo had his own room at this residence, which was described as “nicely furnished, clean and there is ample food . . . [and no] safety concerns were noted”

The study also noted that the petitioner had “successfully completed substance abuse treatment.” Specifically, she completed an intensive outpatient program and then resided in a sober house. The petitioner “obtained a sponsor right away, jumped into the [AA] program by attending daily meetings and participated

¹⁵ The department specifically listed these concerns in an addendum to the order of temporary custody and neglect filed with the court.

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in a 12-step program. She also worked very close with her counselor twice a week her entire time. Her drug/alcohol testing are all negative.” The petitioner’s psychotherapist reported that she participated in her treatment, demonstrated her willingness and openness to work through her issues, and recognized the seriousness of her addiction and the resulting consequences. The psychotherapist specifically noted the petitioner’s “dedication to regaining her role in [Paulo’s] life and reuniting with him.” Finally, the petitioner’s sponsor indicated that the petitioner had been compliant with her sobriety services and that she continued to grow and live a good life that she shared with Paulo.

In the “Assessment and Recommendation” section of the study, it was noted that the petitioner “needed to address her alcohol addiction and needed to be in a stable situation before motioning the court for [r]einstatement.” With respect to the former, the study observed that the petitioner’s clinicians had reported her to be rehabilitated and doing well in her recovery. As to the latter, the study stated that the petitioner had obtained steady employment and stable housing. It concluded: “[The department], based on the information available at this time recommends [that] the petition for reinstatement be granted.”

As we have noted, a parent seeking reinstatement of guardianship rights must demonstrate that the factors that resulted in the removal of those rights have been resolved satisfactorily and that it is in the best interests of the child to reinstate those rights. *In re Brian W.*, 124 Conn. App. 787, 792, 6 A.3d 136 (2010). “The award of the custody of a minor child is a matter within the sound discretion of the trial court. . . . We review the award to determine whether that discretion has been abused and whether the trial court, in the exercise of its discretion, has overlooked or misapplied some established principle of pertinent law. . . . When the factual

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basis of the trial court's decision is challenged on appeal, the role of this court is to determine whether the facts set out in . . . the decision . . . are clearly erroneous. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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." (Citation omitted; internal quotation marks omitted.) *Id.*, 792–93; see generally *In re Patricia C.*, 93 Conn. App. 25, 32–33, 887 A.2d 929, cert. denied, 277 Conn. 931, 896 A.2d 101 (2006).¹⁶

A

The respondent first argues the court failed to identify all of the factors that led to the petitioner's removal. Specifically, he contends that the court incorrectly found that only the petitioner's alcohol abuse and homelessness constituted the bases for the loss of her guardianship rights and ignored other matters set forth in the order of temporary custody and neglect petitions, such as allegations of physical neglect, a history of poor decisions related to proper parenting, inadequate supervision of Paulo, family violence matters, and her criminal history. We are not persuaded.

¹⁶ The respondent summarily asserts that this claim requires us to construe § 45a-611 and, therefore, that our review is plenary. First, despite his reference to § 45a-611, the controlling statute in this case is § 46b-129 (n). Second, we disagree with the respondent's assertion regarding plenary review. We note that the respondent also argues that "this court should conclude that *the trial court's finding regarding the factors leading to Paulo's removal from the [petitioner's] custody in February, 2019, is clearly erroneous, in that it is not supported by the evidence, or this court is left with the definite and firm conviction that a mistake has been made.*" (Emphasis added.) We agree that this standard applies and will review the reasons for the loss of guardianship rights in the present case under the clearly erroneous standard.

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At the outset of its oral decision, the court stated that the present matter originated from a neglect petition and that an order of temporary custody was issued on February 26, 2019. It then identified the two reasons for Paulo's removal from the petitioner's care: "[T]he immediate problem of homelessness, secondary to a more serious problem of alcohol abuse on the part of [the petitioner]. Paulo was adjudicated neglected on the basis of homelessness, and custody and guardianship was transferred to [the respondent] on June 10 of 2019."

We acknowledge that the affidavits attached to the petitions filed by the commissioner contain a detailed recitation of the petitioner's past parenting difficulties and her involvement with the criminal justice system. A review of the entire record, however, supports the court's determination that the two reasons for the loss of the petitioner's guardianship rights were her homelessness and alcohol abuse. Those exigent matters caused the department, acting through the commissioner, to take action and initiate the proceedings that led to the removal of the petitioner's guardianship rights and transfer of custody to Tachelle and, eventually, to the respondent. Although the record referenced other matters, we conclude that the court properly identified the two bases for the removal of the petitioner's guardianship rights of Paulo.

B

The respondent next argues that the court incorrectly found that the factors that led to the removal of the petitioner's guardianship rights had been resolved satisfactorily. Specifically, he contends that her housing situation remained uncertain because she had moved in with an individual with whom she had recently entered into a romantic relationship and that there was "scant" evidence with respect to her sobriety. We conclude that

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the court's findings regarding the satisfactory resolution of the reasons for the loss of the petitioner's guardianship rights are not clearly erroneous, because they are supported by the evidence, and that the court properly concluded that the factors that led to the loss of the petitioner's guardianship rights had been resolved.

Yolanda Kearney, a social worker employed by the department, testified that the department supported the reinstatement of the petitioner's guardianship rights. The petitioner testified that she engaged in recovery efforts with the ultimate goal of regaining her guardianship rights and custody of Paulo. In order to achieve this, the petitioner went to an intensive outpatient treatment center with a structured environment to learn the tools necessary for her to establish and maintain her sobriety. A treating clinician at the intensive outpatient treatment center testified that the petitioner was an "active participant" in the program following her self-referral. The clinician further stated that the petitioner successfully had completed fourteen of the twenty-four sessions of the program and then transferred to the sober house due, in part, to the emergence of the COVID-19 pandemic. While at this treatment center, the petitioner's weekly drug tests were negative for alcohol, and the clinician indicated that the petitioner had "displayed insight regarding the consequences of her past use [of alcohol] and was highly motivated to maintain sobriety."

The petitioner then went to a sober house, which afforded her the opportunity to attend group and individual counseling and daily AA meetings at various locations. Through these processes, the petitioner learned to identify the specific triggers that led to her abuse of alcohol. The manager of the sober house testified that all of the petitioner's random drug tests were negative. The manager further described the petitioner as a "model resident to have at the house. . . . She did

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everything that we required of her and beyond. She obtained—she obtained a job right away and started becoming a contributing member of society and was working towards her goals immediately of getting her son back in her life.” The manager also noted that the petitioner helped other residents by providing them with transportation and speaking with new members. The petitioner actively engaged with her counselor. After leaving the sober house, the petitioner returned several times to participate in weekly dinners as a former resident.

The petitioner stated that she had been sober since January, 2020. She also continued to attend weekly AA meetings and described her sobriety as “pretty solid” The petitioner further stated that she was residing with her fiancé in a two bedroom condominium. She indicated that she had obtained employment as an office administrator, earning \$600 per week.

In his principal and reply briefs, the respondent contends that the petitioner’s housing situation has not been resolved because “she moved into the apartment of a man who she met a few months earlier” and that she would be unable to afford that apartment on her own. The respondent further argues that “the evidence of [the petitioner’s] sobriety is scant” and points to her history of drug abuse and her criminal record. These arguments, distilled to their essence, constitute a request for this court to reweigh the evidence and reach a contrary conclusion to that of the trial court. Our role, however, is more limited. “In the absence of clearly erroneous factual findings that are material to the decision, the question is not simply whether there is some evidence that would support the granting of the petition. Rather, we must review whether, in light of the facts found by the court and the evidence it credited, the only rational outcome would have been for the court to grant the petition. *We cannot reweigh the evidence*

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or reevaluate the credibility of witnesses to determine whether, in our own view, the evidence could have warranted [the denial of the motion to reinstate the petitioner's guardianship rights]. *Every reasonable presumption must be made in favor of the trial court's ruling As indicated, we are bound by the trial court's subordinate factual findings, which are reviewable only for clear error.*" (Citation omitted; emphasis added; footnote omitted.) *In re Mariana A.*, 181 Conn. App. 415, 428–29, 186 A.3d 83 (2018); see also *In re Quanitra M.*, 60 Conn. App. 96, 106, 758 A.2d 863 (function of appellate court is to review, not retry, proceedings of trial court), cert. denied, 255 Conn. 903, 762 A.2d 909 (2000). Stated differently, "we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." *In re Shane M.*, 318 Conn. 569, 593, 122 A.3d 1247 (2015). In light of the evidence before the court, we cannot conclude that its finding that the petitioner had resolved the issues that led to the removal of her guardianship rights was clearly erroneous.

III

The respondent next claims that the court erroneously found that reinstatement of the petitioner's guardianship rights was in the best interests of Paulo. Specifically, he argues that the best interests of Paulo were not supported due to the loss of educational opportunities and lack of evidence that Paulo had thrived in the first ten years of his life when he had resided with the petitioner. We conclude that the evidence was sufficient to support the court's findings that the restoration of the petitioner's guardianship rights and transfer of custody to the petitioner were in Paulo's best interests.

This court recently has stated: "[Section] 46b-56 provides the legal standard for determining child custody issues. The statute requires that the court's decision

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serve the child's best interests. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . Our Supreme Court has consistently held in matters involving child custody . . . that while the rights, wishes and desires of the parents must be considered it is nevertheless the ultimate welfare of the child [that] must control the decision of the court. . . . In making this determination, the trial court is vested with broad discretion which can . . . be interfered with [only] upon a clear showing that that discretion was abused. . . . Thus, a trial court's decision regarding child custody must be allowed to stand if it is reasonably supported by the relevant subordinate facts found and does not violate law, logic or reason. . . . Under § 46b-56 (c), the court, in determining custody, must consider the best interests of the child and, in doing so, may consider, among other factors, one or more of the [seventeen] factors enumerated in the provision.

“[T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] this court, but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference.” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Coleman v. Bembridge*, 207 Conn. App. 28, 47–49, 263 A.3d 403 (2021); see also *In re Averiella P.*, 146 Conn. App. 800, 803, 81 A.3d 272 (2013); *In re Karl J.*, 110 Conn. App. 22, 26, 954 A.2d 231, cert. denied, 289 Conn. 954, 961 A.2d 420 (2008).

Francis Santoro, a Bridgeport police officer, testified that he spoke with a visibly upset Paulo on May 27, 2021, following an incident involving the respondent.

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Kearney testified that Paulo had informed her that he wished to live with the petitioner. The department's "Court Study for Reinstatement of Guardian" noted that Paulo had lived with the petitioner for most of his life and that the petitioner presented as "stable and appears to have Paulo's best interest at heart." The study further concluded that Paulo appeared to have a "very good relationship" with both parents, but he had expressed a desire to live with the petitioner.¹⁷ The guardian ad litem testified¹⁸ that Paulo appeared to be much more relaxed at the petitioner's condominium where he is engaged in a "very happy routine" Paulo expressed no reservations about changing schools. Ultimately, the court concluded that restoration of the petitioner's guardianship rights and awarding her primary custody were in Paulo's best interests.¹⁹

The petitioner testified that Paulo did not have his own room, kept his clothes in black plastic bags, and slept on a couch while residing with the respondent. She further stated that during her visits with Paulo, they would go to the beach and use "boogie board[s]," kayaks, and "long boards." The two would ride bicycles, play basketball, exercise at a gym, cook, and bake together. The petitioner also helped Paulo with his math homework.

The respondent argues that there was no evidence to support the court's finding that Paulo had thrived

¹⁷ We recognize that, "[a]lthough the child's wish is one factor for the court to consider in making that decision, it is certainly not the only one." (Internal quotation marks omitted.) *Brown v. Brown*, 132 Conn. App. 30, 38, 31 A.3d 55 (2011).

¹⁸ See *Zhou v. Zhang*, 334 Conn. 601, 628–30, 223 A.3d 775 (2020) (court may rely on testimony from guardian ad litem in determining best interests of child with respect to custody); *Zilkha v. Zilkha*, 180 Conn. App. 143, 177, 183 A.3d 64 (in making custody determination, court is permitted to seek advice and accept recommendations from guardian ad litem, whose role is to act as representative of child's best interests), cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

¹⁹ See part I B of this opinion.

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during the first ten years of his life when he lived with the petitioner. We do not agree. The petitioner testified that Paulo was an excellent student during their six years in Berlin. Paulo also participated in numerous sports, including football, basketball, and wrestling. In a 2019 study, the department concluded Paulo was a “fairly healthy child” who had excelled at school. The study also noted that Paulo interacted well with family and his peers in school. “Paulo appears to be a typical preteen boy that is happy and loving. He appears to be knowledgeable about his surroundings and has experiences that have matured him a little earlier than most children his age.” The evidence demonstrated that, despite the petitioner’s difficulties, Paulo had done well in her care prior to the loss of her guardianship rights.

The respondent also contends that the court’s “implicit finding that Paulo’s transfer from a select, admission-only gifted and talented program in Bridgeport to the Milford school system is in Paulo’s best interest is clearly erroneous, in that there is no record evidence to support it.” We disagree with this assertion.

First, the guardian ad litem testified that other public schools had programs that would challenge Paulo and provide him with extra assistance in his educational pursuits. The guardian ad litem also described Paulo as “very smart” and “a voracious reader.” The respondent’s argument that there was no evidence in the record regarding a school transfer, therefore, is unavailing. Second, we iterate that the best interests determination is not based on a single factor but, rather, consideration of those set forth in § 46b-56 (c). See, e.g., *Weaver v. Sena*, 199 Conn. App. 852, 864, 238 A.3d 103 (2020) (court does not abuse its discretion when it focuses on certain § 46b-56 (c) factors in best interests analysis); *Watrous v. Watrous*, 108 Conn. App. 813, 825, 949 A.2d 557 (2008) (language of § 46b-56 (c) does not compel consideration of any particular factor or factors when

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determining best interests). For these reasons, we reject the respondent's contention that the court's findings were clearly erroneous and that it abused its discretion with respect to its conclusion regarding Paulo's best interests.

IV

The respondent's final claim is that the court improperly dismissed his motion to open the judgment. Specifically, he contends that the court improperly failed to consider its merits. Under the facts and circumstances of this case, we conclude that the court properly declined to exercise its jurisdiction to consider the arguments set forth in the respondent's motion to open.

We begin with our standard of review. "We review a trial court's ruling on motions to open under an abuse of discretion standard. . . . Under this standard, we give every reasonable presumption in favor of a decision's correctness and will disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion." (Internal quotation marks omitted.) *People's United Bank, National Assn. v. Purcell*, 187 Conn. App. 523, 525–26, 202 A.3d 1112 (2019). Additionally, we note that "[t]he manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did. . . . When exercising its discretion on a motion to open, the court may consider the totality of the circumstances under which the motion to open is filed" (Citations omitted; internal quotation marks omitted.) *Zilkha v. Zilkha*, 167 Conn. App. 480, 494, 144 A.3d 447 (2016).

The following additional facts are necessary for our discussion of this claim. At the conclusion of the September 8, 2021 hearing, the court reinstated the petitioner's guardianship rights, awarded her primary physical custody, and issued orders regarding visitation. The court then stated: "Let me add . . . as long as we're

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still on the record [that this] court will not retain jurisdiction over any visitation issues. Any disputes or necessary modifications will be addressed to the family court.”

On September 27, 2021, the respondent filed a motion to open the judgment pursuant to Practice Book § 17-4.²⁰ In this motion, he alleged that the petitioner had disregarded the court’s visitation orders and that he had been unable to contact and communicate with Paulo. In support of these allegations, the respondent stated that the petitioner had sent him a text claiming that she lacked the resources to transport Paulo to a scheduled visitation with the respondent on September 15, 2021. The respondent further insisted that the petitioner had not permitted him to have any contact with Paulo. In conclusion, the respondent argued that the petitioner’s conduct following her restoration of her guardianship rights and physical custody of Paulo demonstrated her lack of regard for the court’s orders and that she will “apply her best efforts to destroy the relationship between [the respondent] and his son.”

On October 4, 2021, the petitioner filed an objection to the respondent’s motion to open the judgment. She argued, *inter alia*, that the respondent was free to file postjudgment motions in the family division of the Superior Court and that the respondent was attempting to relitigate the matter.

The court conducted a hearing on October 28, 2021. At the outset, the court discussed a motion for contempt that the respondent had filed. The court dismissed that motion on the basis of its prior directive that it had

²⁰ Practice Book § 17-4 (a) provides in relevant part: “Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. . . .”

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not retained jurisdiction. The court then addressed the respondent's motion to open, which it described as a "motion to modify the disposition." It then stated: "If you intend to file a petition for restoration of parental guardianship, which we call an RPG, you need to do that in proper form, you need to file the petition, it needs to be served, and then the court will order [the department] to do a study."²¹ The court then offered to communicate directly with the family court to resolve any questions regarding the matter. After a further colloquy with the respondent's counsel and the guardian ad litem, the court indicated that if the respondent wanted to modify the September 8, 2021 order so that he had physical custody, he would need to file a new petition. The court further explained that "[a]nything that has to do with custody—anything that has to do with custody and guardianship, we have to keep. We keep that because we entered the orders here. But once we enter a visitation order and we do not retain jurisdiction, the visitation part will go to the family court So . . . the motion to modify is dismissed. You need to file a new petition."

In his motion to open, the respondent alleged that the petitioner had disregarded the court's visitation orders. In response, the court indicated that it would not exercise its jurisdiction to consider claims regarding visitation, as it previously had indicated that such matters would need to be presented to the family court. The respondent also requested that the court award him sole custody of Paulo. The court responded that if

²¹ General Statutes § 46b-6 provides in relevant part: "In any pending family relations matter the court or any judge may cause an investigation to be made with respect to any circumstance of the matter which may be helpful or material or relevant to a proper disposition of the case. Such investigation may include an examination of the parentage and surroundings of any child, his age, habits and history, inquiry into the home conditions, habits and character of his parents or guardians and evaluation of his mental or physical condition. . . ."

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the respondent wanted to pursue that goal, he would be required to file a motion to modify custody, the motion would need to be served, and a study would need to be completed before such an order could issue. In short, the court declined to consider altering or modifying its custody order on the basis of conduct alleged to have occurred *after* the court's September 8, 2021 order reinstating the petitioner's guardianship rights and awarding her primary physical custody of Paulo. Instead, the court provided the respondent with options to pursue his claims, namely, by raising the visitation issue with the family court and filing a new motion to modify custody. On the basis of the totality of these circumstances, we conclude that the court did not abuse its discretion in dismissing the respondent's motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

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	<i>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.</i>	
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trial court's finding that plaintiff failed to prove that she was not hired because of her hearing disability was clearly erroneous.

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**CONNECTICUT
APPELLATE REPORTS**

Vol. 214

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE OMAR I. ET AL.*
(AC 45092)

Alvord, Prescott and DiPentima, Js.

Syllabus

The respondent father, whose parental rights to his three minor children previously had been terminated, appealed to this court from the judgment of the trial court denying his motion to open and set aside the adoptions of the children, claiming that he had not received timely and proper notice of the court's prior ruling regarding his amended petition for a new trial. *Held* that, although the trial court properly determined that the respondent father lacked standing to challenge the adoption decrees, that court having correctly determined that, because notice of its ruling regarding his amended petition for a new trial had been sent timely and properly, the father's parental rights had been adjudicated fully and fairly prior to its issuance of the decrees, the court should have dismissed the father's motion rather than denied it on its merits.

Argued May 25—officially released July 20, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' three minor children

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

** July 20, 2022, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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neglected, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Lobo, J.*; judgments adjudicating the minor children neglected and committing them to the custody of the Commissioner of Children and Families; thereafter, petitions by the three minor children to terminate the respondent parents' parental rights, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session, and tried to the court, *Burgdorff, J.*; subsequently, the court, *Burgdorff, J.*, denied the respondent father's motions to revoke the court's order committing the minor children to the custody of the Commissioner of Children and Families and rendered judgments terminating the respondents' parental rights, from which the respondent father appealed to this court, *Lavine, Keller and Bishop, Js.*, which affirmed the judgments of the trial court; thereafter, the trial court, *Huddleston, J.*, rendered judgment denying the motion of the respondent father to open and set aside adoption decrees issued for the minor children, from which the respondent father appealed to this court. *Improper form of judgment; reversed; judgment directed.*

Ammar I., self-represented, the appellant (respondent father).

Andrei Tarutin, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner Commissioner of Children and Families).

Brian T. Walsh, assigned counsel, with whom, on the brief, were *Katarzyna Maluszewski*, assigned counsel, and *Robert W. Lewonka*, assigned counsel, for the appellees (minor children).

Opinion

PER CURIAM The self-represented respondent, Ammar I., whose parental rights had been terminated in a prior

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proceeding,¹ appeals from the judgment of the trial court denying his motion to open and set aside the adoptions of his three minor children, Omar I., Safiyah I. and Muneer I.,² on the ground that he lacked standing under *In re Zen T.*, 165 Conn. App. 245, 252–54, 138 A.3d 469, cert. denied, 322 Conn. 905, 138 A.3d 934 (2016), cert. denied sub nom. *Heather S. v. Connecticut Dept. of Children and Families*, 580 U.S. 1135, 137 S. Ct. 1111, 197 L. Ed. 2d 214 (2017). On appeal, the respondent claims that he did not receive timely and proper notice of the court’s July 27, 2021 ruling regarding his amended petition for a new trial so that the court incorrectly determined that he lacked standing to challenge the adoption decrees issued on August 20, 2021. We conclude that, because the court correctly determined that notice of its July 27, 2021 decision had been sent properly to the respondent the same date as its issuance, the respondent’s parental rights had been adjudicated fully and fairly prior to the issuance of the adoption decrees. Thus, the court properly determined that the respondent lacked standing to challenge the adoption decrees.³ See *In re Zen T.*, supra, 252–54; see also Practice Book § 7-5 (“[t]he clerk shall give notice, by mail or by electronic delivery, to the attorneys of record and self-represented parties” (emphasis added)).

We further conclude, however, that the form of the court’s judgment is improper. The court should have

¹ See *In re Omar I.*, 197 Conn. App. 499, 504, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I. v. Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020).

² The three minor children, each of whom is represented by separate counsel, filed a single brief. Counsel for the Commissioner of Children and Families and counsel for Omar participated in oral argument before this court.

³ In light of our conclusion that he lacked standing to pursue his motion to open and set aside the adoptions, we need not address the respondent’s claim that his procedural due process rights were violated by the court’s failure to hold a hearing.

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dismissed, rather than denied, the motion to open and set aside. Accordingly, we reverse the judgment and remand the case to the trial court with direction to dismiss the motion to open and set aside. See *State v. Tabone*, 301 Conn. 708, 715, 23 A.3d 689 (2011) (“[w]hen a trial court mistakenly denies a motion instead of dismissing it for lack of subject matter jurisdiction, the proper remedy is to reverse the order denying the motion and remand the case with direction to dismiss the motion”).

The form of the judgment is improper; the judgment is reversed and the case is remanded with direction to render judgment dismissing the motion to open and set aside the adoption decrees.

CHERYL ABBOTT OLSON v. BRIAN
MATTHEW OLSON
(AC 44033)

Elgo, Clark and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved pursuant to a foreign judgment of dissolution, appealed to this court from the judgment of the trial court dismissing his motion for modification of alimony for lack of subject matter jurisdiction. The parties, who were United States citizens, had been married in Pennsylvania. The parties moved to the United Kingdom, where a court later dissolved the parties' marriage, incorporating the parties' consent order into its final judgment. The consent order provided for the distribution of the parties' property and assets and for the payment of maintenance, including spousal and child support. The parties thereafter moved back to the United States, and the plaintiff filed the United Kingdom divorce decree with the trial court in Connecticut. The plaintiff filed a motion, seeking to enforce the parties' judgment of dissolution and to approve two qualified domestic relations orders, which the trial court granted. Both parties subsequently filed motions for modification of alimony, which the trial court considered but denied on the basis of a failure of supporting evidence and procedural defects in the plaintiff's motion. Thereafter, the defendant filed another motion for modification of alimony on the basis of the plaintiff's cohabitation with a third party. The plaintiff filed her own

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motion to modify alimony and child support, seeking an increase of both, then filed a motion to dismiss the defendant's motion for modification of alimony for lack of subject matter jurisdiction. The court granted the plaintiff's motion to dismiss on the basis of its belief that the United Kingdom had continuing, exclusive jurisdiction over the spousal support order. Specifically, the court, relying on an order of the United Kingdom regarding the reciprocal enforcement of maintenance orders with the United States, concluded that neither party provided it with evidence that the courts of the United Kingdom released or waived their exclusive jurisdiction over its spousal support order. *Held* that the trial court improperly dismissed the defendant's motion for modification of alimony on the basis that it lacked subject matter jurisdiction: it was unclear whether the provisions in the United Kingdom order relied on by the plaintiff were even applicable to the circumstances presented in this case, as certain conditions precedent to its application had not been fulfilled, and, even assuming that the provisions of the order were applicable, nowhere in the context of the order was it manifest that the United Kingdom retained exclusive, rather than concurrent, jurisdiction to modify the spousal support order at issue; moreover, the trial court did not rely on any particular provisions of the order to support its conclusion that it lacked jurisdiction and, instead, cited to an explanatory note that was not part of the order and should not have been considered; furthermore, this court found no other United Kingdom authority that made clear that the United Kingdom retained exclusive jurisdiction, and, therefore, the trial court had subject matter jurisdiction to consider the defendant's motion pursuant to the applicable statute (§ 46b-321).

(One judge dissenting)

Argued January 12—officially released July 26, 2022

Procedural History

Action to register a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Wenzel, J.*, granted the plaintiff's motion seeking to enforce the judgment of dissolution and approve certain qualified domestic relations orders; thereafter, the court, *S. Richards, J.*, denied the parties' motions for modification of alimony; subsequently, the court, *McLaughlin, J.*, dismissed the defendant's motion for modification of alimony for lack of subject matter jurisdiction, and the defendant appealed to this court. *Reversed; further proceedings.*

Alexander J. Cuda, for the appellant (defendant).

Thomas M. Shanley, for the appellee (plaintiff).

Opinion

BISHOP, J. The defendant, Brian Matthew Olson, appeals from the judgment of the trial court granting a motion to dismiss filed by the plaintiff, Cheryl Abbott Olson, in which the court concluded that it lacked subject matter jurisdiction to modify the parties' spousal support order that had been issued by a court of the United Kingdom. On appeal, the defendant claims that the trial court erred in dismissing his motion for modification of alimony on the basis that it lacked subject matter jurisdiction, and argues that (1) the court misapplied the Uniform Interstate Family Support Act, General Statutes § 46b-301 et seq., in determining that the United Kingdom had continuing, exclusive jurisdiction over the spousal support order; (2) the United Kingdom could not have continuing, exclusive jurisdiction because it lost its exclusiveness when the trial court, *S. Richards, J.*, decided motions to modify alimony in 2013; (3) the application of the doctrine of comity demonstrates that Connecticut courts have jurisdiction to modify the foreign country order in this case; (4) the trial court erred in its reliance on this court's decision in *Hornblower v. Hornblower*, 151 Conn. App. 332, 94 A.3d 1218 (2014); and (5) the court erroneously relied on a United Kingdom statutory instrument, the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007, in determining that the United Kingdom had continuing, exclusive jurisdiction to modify the support order. On the basis of our thorough review of the record and the applicable law, we agree with the defendant that the court erred in concluding that it lacked subject matter jurisdiction to modify the spousal support order at issue. Accordingly, we reverse the judgment of the trial court.

The record reveals the following facts and procedural history. The parties, who are United States citizens,

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were married on May 30, 1998, in Doylestown, Pennsylvania. The parties later moved to the United Kingdom and were present there in November, 2009. On December 16, 2009, a court of the United Kingdom dissolved the parties' marriage and incorporated the parties' November 19, 2009 consent order into its final judgment. The consent order was a separation agreement, which provided for the distribution of the parties' property and assets and for the payment of spousal and child support.

In or around 2010, the parties moved back to the United States. The plaintiff relocated to Connecticut and the defendant moved to New York. On April 5, 2010, the plaintiff filed the United Kingdom divorce decree with the trial court in Connecticut under principles of comity. On January 25, 2011, the plaintiff filed a motion seeking an order to enforce the parties' foreign judgment of dissolution and approve two Qualified Domestic Relations Orders (QDROs) prepared by an attorney retained by both parties. On March 7, 2011, the court, *Wenzel, J.*, granted, by agreement of the parties, the plaintiff's motion for order to enforce judgment, postjudgment, and entered the two QDROs as orders of the court.

Subsequently, in May, 2011, the plaintiff sought a modification of alimony in the Superior Court for the judicial district of Stamford-Norwalk. She argued, among other things, that the parties' marital judgment provides that "[e]ither party will remain at liberty during the continuation of the periodical payments to apply for an upward or downward variation, or termination or capitalism of such maintenance." (Internal quotation marks omitted.) Accordingly, she argued that a "substantial change of circumstances has arisen since the entry of the orders of the [United Kingdom] court on December 16, 2009, in that the defendant's income from

employment, salary, and bonus structure have significantly changed such that the plaintiff's receipt of alimony is greatly reduced based upon the present formula."

On July 5, 2012, the defendant similarly sought a modification of the spousal support order in the same court as the plaintiff's filing, alleging that the plaintiff began living with another person, resulting in a change in the circumstances contemplated in General Statutes § 46b-86 (b).

The trial court, *S. Richards, J.*, considered the motions for modification but ultimately denied them in a memorandum of decision dated October 4, 2013. The court did not deny the motions for modification on the basis of a want of jurisdiction; rather, the motions were denied because of a failure of supporting evidence and procedural defects in the plaintiff's motion.¹ The court stated that the "the plaintiff requests a modification of the court-ordered alimony under paragraph 2 (d) of the parties' separation agreement based on a substantial change in circumstances. Upon reviewing the plaintiff's pleading, the court denies the plaintiff's motion for modification on the grounds that the plaintiff failed to state the specific factual and legal basis for the claimed modification in accordance with Practice Book § 25-26 (e), failed to provide the court with the applicable substantive law of the controlling jurisdiction and failed to provide the court with currency conversion calculations." The court similarly denied the defendant's motion for modification, concluding that the "defendant did not provide the court with any evidence of the applicable substantive law of the controlling jurisdiction that would permit the modification of alimony on the basis

¹ During oral argument before this court and in her appellate brief, the plaintiff asserted that the court in 2013 had denied the parties' respective motions for modification on the basis that the court lacked jurisdiction. This is not an accurate portrayal of the court's memorandum of decision.

of a showing of cohabitation or a substantial change in circumstances pursuant to Connecticut law.” However, the court exercised jurisdiction over the marital judgment by ordering the defendant to make specific payments in accordance with it, to wit, payments of \$8552 and \$184,479, which represented the plaintiff’s share of certain stock owed to her.

On August 19, 2019, the defendant filed a new motion for modification of alimony asking the court to modify alimony due to the plaintiff’s cohabitation. On September 11, 2019, the plaintiff also filed her own motion to modify alimony and child support seeking an increase of both. In October, 2019, the parties worked with the caseflow office of the Superior Court for the judicial district of Stamford-Norwalk to schedule the motions to be heard on January 28, 2020.

On January 23, 2020, five days before the scheduled hearing, the plaintiff filed a motion to dismiss the defendant’s motion to modify alimony, arguing for the first time that the court lacked subject matter jurisdiction to modify the judgment. On January 27, 2020, the defendant filed an objection to the plaintiff’s motion through which he argued, *inter alia*, that the court had jurisdiction to consider the motion and that “the plaintiff’s position sets up a double standard that cannot possibly be sustained: that when the plaintiff sought modification of the existing alimony order in 2011, this court had jurisdiction to consider such motion but now that the defendant seeks the same relief, the court lacks jurisdiction to act.” (Emphasis omitted.) He argued that the “plaintiff’s sole purpose in filing the motion to dismiss is to delay the impending hearing on the defendant’s motion to modify. . . . If the plaintiff genuinely had a question as to this court’s subject matter jurisdiction, that objection would have, and should have, been raised in 2010 when the plaintiff asked this court to domesticate the judgment, in 2011 when the plaintiff

filed her first motion to modify alimony, or prior to the plaintiff filing her pending motion seeking a modification of alimony and child support, rather than five days before the scheduled hearing.” (Emphasis omitted.) The defendant also noted that the plaintiff filed a motion to dismiss solely with respect to the defendant’s motion for modification despite her also having filed a motion for modification.

In a memorandum of decision dated February 21, 2020, the trial court, *McLaughlin, J.*, concluded that the court did not have subject matter jurisdiction to modify the parties’ foreign country spousal support order on the basis of its belief that the United Kingdom had continuing, exclusive jurisdiction over it. In particular, the court stated that, “under the United Kingdom’s Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 ([REMO]), the courts of the United Kingdom keep exclusive jurisdiction over all maintenance orders.” In support of this conclusion, the court quoted the explanatory note to the REMO, which states in relevant part: “The principal modification effected by [the REMO] is that a maintenance order made in the United States of America may not be varied or revoked in the United Kingdom and that a maintenance order made in the United Kingdom may not be varied or revoked in the United States of America (see sections 5 and 9 in Schedule 2).” The court, however, recognized that the explanatory note is not a part of the REMO itself. The court then stated: “Neither party provided the court with evidence that the courts of the United Kingdom have released or waived their exclusive jurisdiction to modify the maintenance orders in the consent order. While the court recognizes that all parties currently reside in the United States of America, including the minor children, which may make modification of support orders more complicated, based on the clear language of [General Statutes] § 46b-321 (b),

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this court lacks subject matter jurisdiction to modify the United Kingdom’s spousal support orders.” The defendant timely appealed.

This case requires us to interpret the Uniform Interstate Family Support Act (UIFSA) to determine whether Connecticut courts lack subject matter jurisdiction to modify spousal support orders issued by a court of the United Kingdom. See General Statutes § 46b-301 et seq. The plaintiff argues that the court properly interpreted UIFSA in reaching its conclusion that the court lacked subject jurisdiction. The defendant argues that the court’s determination was erroneous. We agree with the defendant.

We begin with the standard of review governing a trial court’s disposition of a motion to dismiss that challenges jurisdiction. “A determination regarding a trial court’s subject matter jurisdiction is a question of law.” (Internal quotation marks omitted.) *Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 276, 105 A.3d 857 (2015). “[O]ur review of the court’s ultimate legal conclusion[s] and resulting [determination] of the motion to dismiss will be de novo.” (Internal quotation marks omitted.) *Feehan v. Marcone*, 331 Conn. 436, 446, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019). “In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged.” (Internal quotation marks omitted.) *Markley v. State Elections Enforcement Commission*, 339 Conn. 96, 106, 259 A.3d 1064 (2021). “[T]he Superior Court of this state as a court of law is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it and of all others cognizable by any law court of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive

jurisdiction in any matter is sufficient to give the Superior Court jurisdiction over that matter.” (Internal quotation marks omitted.) *In re Joshua S.*, 260 Conn. 182, 215, 796 A.2d 1141 (2002). “[T]he general rule of jurisdiction . . . is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and . . . nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly so alleged. . . . [N]o court is to be ousted of its jurisdiction by implication.” (Internal quotation marks omitted.) *Raftopol v. Ramey*, 299 Conn. 681, 695, 12 A.3d 783 (2011).

“When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [we] first . . . 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” (Internal quotation marks omitted.) *Kinsey v. Pacific Employer Ins. Co.*, 277 Conn. 398, 405, 891 A.2d 959 (2006).

As background, UIFSA is one of numerous uniform acts drafted by the National Conference of Commissioners on Uniform State Laws in the United States. “UIFSA,

which has been adopted by all states,² including Connecticut, governs the procedures for establishing, enforcing and modifying child and spousal support, or alimony, orders, as well as for determining parentage when more than one state is involved in such proceedings.” (Footnote added; footnote omitted.) *Hornblower v. Hornblower*, supra, 151 Conn. App. 333; see also General Statutes § 46b-301 et seq.; *Studer v. Studer*, 320 Conn. 483, 487, 131 A.3d 240 (2016).

In this appeal, we are asked to determine whether § 46b-321 (b) divested the court of subject matter jurisdiction to modify the United Kingdom spousal support order that is at the heart of this dispute. Section 46b-321 (b) provides: “A tribunal of this state may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country.”³ From this text, it is clear that, although Connecticut courts do not have subject matter jurisdiction over a spousal support order issued by a court of another state or a foreign country having *continuing, exclusive jurisdiction* over that order, a Connecticut court *does* have subject matter jurisdiction to modify a spousal support order issued in another state or a foreign country if that state or foreign country

² In 1996, Congress mandated the enactment of UIFSA as a precondition to states’ eligibility for obtaining federal grant money to fund child and spousal support programs. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 321, 110 Stat. 2105, 2221, codified as amended at 42 U.S.C. § 666 (f). Congress later passed the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301 (f), 128 Stat. 1919, 1944–95 (2014), requiring states to adopt amendments to UIFSA, again as a precondition to certain federal funding. Connecticut adopted these amendments pursuant to No. 15-71 of the 2015 Public Acts, titled “An Act Adopting the Uniform Interstate Family Support Act of 2008.”

³ We note that the jurisdictional rules under UIFSA differ for child support orders. See General Statutes § 46b-393; see also General Statutes §§ 46b-315 and 46b-388.

does not, by the terms of its laws, maintain continuing, *exclusive* jurisdiction over the spousal support order at issue. Accordingly, we must determine whether the United Kingdom, under its laws, has continuing, *exclusive* jurisdiction to modify the spousal support order in question.⁴

Both before the trial court and this court, the plaintiff argued that the REMO⁵ makes clear that the United Kingdom retains continuing, exclusive jurisdiction to modify the spousal support order at issue and that the trial court correctly so held. The defendant argues that the United Kingdom does not have continuing, exclusive jurisdiction to modify the spousal support order, and argues that the REMO does not preclude a Connecticut court from modifying the United Kingdom support order at issue.

The trial court, in determining that the United Kingdom maintained exclusive jurisdiction over the present spousal support order, stated: “[U]nder the United Kingdom’s Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 . . . the courts of the United Kingdom keep exclusive jurisdiction over all maintenance orders. There is no distinction in the [REMO] of spousal support [versus] child support. The term ‘maintenance orders’ appears to apply to both.

⁴ Although not material to the question before us, it appears that all the states of the United States, by adopting UIFSA, maintain continuing, exclusive jurisdiction to modify spousal support orders originally issued in each respective state. See Thomson Reuters, *Alimony, Maintenance, and other Spousal Support*, 50 STATE STATUTORY SURVEYS: Family Law: Divorce and Dissolution (May 2021); see also General Statutes § 46b-321 (a) (“[a] tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation”).

⁵ REMO is a United Kingdom order, which, among other things, designates the United States of America as a reciprocating country with the United Kingdom for the purposes of the Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18 (U.K.).

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Moreover, the court found the explanatory notes of this order instructive. The explanatory notes state in pertinent part “[t]he principal modification effected by [the REMO] is that a maintenance order made in the United States of America may not be varied or revoked in the United Kingdom and that a maintenance order made in the United Kingdom may not be varied or revoked in the United States of America (see sections 5 and 9 in Schedule 2).” (Emphasis in original; footnote omitted.)

Our review of the REMO mandates a different conclusion. First, there is a serious question as to whether the provision in the REMO relied on by the plaintiff for her contention that the United Kingdom retains exclusive jurisdiction to modify the order is even applicable to the circumstances presented. Section 5 of Schedule 2 of the REMO, titled “Variation and revocation of maintenance order made in United Kingdom,” begins: “(1) This section applies to *a maintenance order certified copies of which have been sent in pursuance of section 2 to the United States of America for enforcement.*” (Emphasis added.) Reciprocal Enforcement of Maintenance Orders (United States of America) Order, 2007, S.I. 2007/2005, schedule 2, § 5 (U.K.). Section 2 of Schedule 2 details the process by which a party may obtain and send certified copies to the United States.⁶ It thus

⁶ Section 2 of Schedule 2 provides: “(1) Subject to subsection (2) below, where the payer under a maintenance order made, whether before, on or after 1st October 2007, by a court in the United Kingdom is residing or has assets in the United States of America, the payee under the order may apply for the order to be sent to the United States of America for enforcement.

“(2) Subsection (1) above shall not have effect in relation to an order made by virtue of a provision of Part II of this Act.

“(3) Every application under this section shall be made in the prescribed manner to the prescribed officer of the court which made the maintenance order to which the application relates.

“(4) If, on an application duly made under this section to the prescribed officer of a court in the United Kingdom, that officer is satisfied that the payer under the maintenance order to which the application relates is residing or has assets in the United States of America, the following documents, that is to say—

appears that fulfillment of the requirements under section 2 is a condition precedent to section 5's application. None of those conditions was fulfilled in this case because, as noted, the United Kingdom judgment was simply registered in Connecticut pursuant to common-law notions of comity.

Second, even if we were to assume that the provisions in the REMO relied on by the plaintiff are applicable to the circumstances presented here, nowhere in the context of the REMO is it manifest that the United Kingdom retains *exclusive* jurisdiction to modify the spousal support order at issue. Section 5 of Schedule 2 of the REMO further provides: “(2) The jurisdiction of a court in the United Kingdom to revoke, revive or vary a maintenance order shall be exercisable notwithstanding that the proceedings for the revocation, revival

“(a) three certified copies of the maintenance order;

“(b) a certificate signed by that officer certifying that the order is enforceable in the United Kingdom;

“(c) a certificate of arrears so signed or, in Scotland, signed by the applicant or his solicitor;

“(d) a sworn statement signed by the payee giving the following information—

“(i) the address of the payee;

“(ii) such information as is known as to the whereabouts of the payer; and

“(iii) a description, so far as is known, of the nature and location of any assets of the payer available for execution;

“(e) a statement giving such information as the officer possesses for facilitating the identification of the payer; and

“(f) where available, a photograph of the payer;

shall be sent by that officer, in the case of a court in England and Wales or Northern Ireland, to the Lord Chancellor, or, in the case of a court in Scotland, to the Scottish Ministers, with a view to their being transmitted by him to the responsible authority in the United States of America if he is (or they are) satisfied that the statement relating to the whereabouts of the payer and the nature and location of his assets gives sufficient information to justify that being done.

“(5) Nothing in this section shall be taken as affecting any jurisdiction of a court in the United Kingdom with respect to a maintenance order to which this section applies, and, subject to section 5 below, any such order may be enforced, varied or revoked accordingly.” Reciprocal Enforcement of Maintenance Orders (United States of America) Order, 2007, S.I. 2007/2005, schedule 2, § 2 (U.K.).

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or variation, as the case may be, of the order are brought by or against a person residing in the United States of America.” Section 5 then sets forth certain conditions related to notice that a court of the United Kingdom must undergo before it makes any variation or revocation to an order originally made in the United Kingdom.

Although it appears from these provisions that the United Kingdom maintains continuing jurisdiction to modify a spousal support order initiated in the United Kingdom, as noted, we have not found any language in the REMO that demonstrates that the United Kingdom keeps *exclusive*, rather than *concurrent*, jurisdiction to modify the spousal support order in this case. To import language into the REMO that is not present would, in our view, not only be legally incorrect, but it would work an unreasonable burden on the parties in this case—two citizens of the United States who have returned home to the United States with no indication that they intend to return to the United Kingdom. While the states of the United States have made explicit in their laws that their jurisdiction over such orders is “exclusive,”⁷ the United Kingdom’s REMO is conspicuously devoid of similar limiting language.

We note, in particular, that in rendering its decision, the trial court did not cite to any particular provisions of the REMO to support its conclusion that it lacked

⁷ See, e.g., General Statutes § 46b-321 (a) (“[a] tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, *exclusive* jurisdiction to modify the spousal support order throughout the existence of the support obligation” (emphasis added)); Mass. Gen. Laws c. 209D, § 2-211 (a) (Cum. Supp. 2021) (“[a] tribunal of the commonwealth issuing a spousal support order consistent with the law of the commonwealth has continuing, *exclusive* jurisdiction to modify the spousal support order throughout the existence of the support obligation” (emphasis added)); N.Y. Jud. Ct. Acts § 580-211 (a) (McKinney Cum. Supp. 2021) (“[a] tribunal of this state issuing a spousal-support order consistent with the law of this state has continuing, *exclusive* jurisdiction to modify the spousal-support order throughout the existence of the support obligation” (emphasis added)).

jurisdiction. Rather, it cited to an “Explanatory Note” published at the end of the order, which states in no uncertain terms: “This note is not part of the Order.” See *Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (explanatory notes not legally binding in international tariff dispute). Connecticut courts “cannot, by judicial construction, read into legislation provisions that clearly are not contained therein.” (Internal quotation marks omitted.) *Regan v. Regan*, 143 Conn. App. 113, 121, 68 A.3d 172, cert. granted, 310 Conn. 923, 77 A.3d 140 (2013) (appeal dismissed October 15, 2014). Because the order was clear and unambiguous as written, it was inappropriate for the court to go beyond the text of the law. See *Apple, Inc. v. United States*, 964 F.3d 1087, 1095–96 (Fed. Cir. 2020) (explanatory notes “cannot be used to . . . create ambiguity”).⁸

In addition to our review of the REMO, we similarly have found no other United Kingdom authority that makes clear to this court that the United Kingdom retains exclusive jurisdiction over the spousal support order at issue. We note that the plaintiff provided very little to both this court and the trial court about the foreign law and how it demonstrates the United Kingdom’s exclusivity to modify the order. Other than providing a brief history of UIFSA and a copy of the REMO, it provided little or no context, cases, or analysis of how the REMO, a 2007 United Kingdom order, is interpreted by United Kingdom courts; how it was affected, if at all, by the ratification of the Hague Convention on the International Recovery of Child Support and Other

⁸ Although the dissent has found some United Kingdom case law to suggest that some United Kingdom courts in some contexts have used explanatory notes as aids to statutory construction in the United Kingdom, it is far from clear that this practice is commonplace there, and, even if so, whether judges in the United States should yield their well trodden methods of statutory construction to the preferences of a foreign legislative body and judiciary.

Forms of Family Maintenance by the European Union in 2014; or if there was any impact on the REMO in light of the United Kingdom's withdrawal (or rather the then anticipated withdrawal) from membership in the European Union.

At bottom, “[i]t is not the court’s duty, unaided by the [plaintiff], to scour the annals of the law of the . . . United Kingdom in an effort to locate or to fashion a hook upon which [her motion] can be hung.” *Heath v. American Sail Training Assn.*, 644 F. Supp. 1459, 1471 (D.R.I. 1986). In light of the foregoing, and in light of the well-known maxim that “every presumption favoring jurisdiction should be indulged”; (internal quotation marks omitted) *Financial Consulting, LLC v. Commissioner of Ins.*, 315 Conn. 196, 226, 105 A.3d 210 (2014); we conclude that the trial court did not lack subject matter jurisdiction to entertain the defendant’s motion to modify alimony.⁹

⁹ The defendant makes various other arguments in support of his claim that the court erred in determining that it lacked subject matter jurisdiction. Among these arguments is his contention that the plaintiff should be precluded, under the rationale employed in *Sousa v. Sousa*, 322 Conn. 757, 143 A.3d 578 (2016), from challenging subject matter at this late juncture because it amounts to an impermissible collateral attack. See *id.*, 771–72 (“[A]lthough challenges to subject matter jurisdiction may be raised at any time, it is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . [A]t least where the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if [she] did have such an opportunity, whether there are strong policy reasons for giving [her] a second opportunity to do so.” (Citations omitted; emphasis omitted; internal quotation marks omitted.)). The defendant argues that raising subject matter jurisdiction at this late stage, especially when the plaintiff herself previously has filed multiple motions for modification, results in an impermissible attack of Judge Richards’ 2013 judgment deciding the parties’ motions to modify alimony.

In light of our resolution of this case, we need not reach this very interesting question (or the other arguments proffered by the defendant), and we leave for another day the question of whether finality considerations should preclude a plaintiff, like the plaintiff in this case, from challenging a court’s

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The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion CLARK, J., concurred.

ELGO, J., dissenting. The issue presented in this appeal is whether the Superior Court lacked subject matter jurisdiction over a motion to modify a spousal support decree that was issued in the United Kingdom. In resolving that issue, I believe that the trial court properly considered the explanatory note to the statutory instrument in question, the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 of the United Kingdom (order). Reciprocal Enforcement of Maintenance Orders (United States of America) Order, 2007, S.I. 2007/2005, (U.K.). The explanatory note provides necessary context to the enactment of that order and convinces me that the trial court properly determined that it lacked subject matter jurisdiction over the spousal support decree due to the continuing, exclusive jurisdiction of the United Kingdom. Accordingly, I respectfully dissent.

The underlying facts are largely undisputed and are aptly set forth in the majority opinion. The jurisdictional challenge presented in this appeal involves a question of statutory construction, over which our review is plenary. See *Nelson v. Dettmer*, 305 Conn. 654, 662, 46 A.3d 916 (2012).

I

In Connecticut, our courts are guided by the familiar maxim that “[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the

subject matter jurisdiction to modify an alimony order when the trial court previously exercised jurisdiction over the plaintiff’s own motion to modify that same alimony order, even in a case, such as this, in which the court did not modify the original order.

apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case In seeking to determine that meaning . . . [a reviewing court must] first . . . 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.” (Citation omitted; internal quotation marks omitted.) *State v. Kalil*, 314 Conn. 529, 557–58, 107 A.3d 343 (2014). Statutory language is ambiguous when, read in context, it is susceptible to more than one reasonable interpretation. See *Foisie v. Foisie*, 335 Conn. 525, 531–32, 239 A.3d 1198 (2020). In such instances, our courts “may consult extratextual sources” to resolve the issue. *State v. Fernando A.*, 294 Conn. 1, 17, 981 A.2d 427 (2009).

As this court has observed, the Uniform Interstate Family Support Act (UIFSA), General Statutes § 46b-301 et seq., “has been adopted by all states, including Connecticut . . . [and] governs the procedures for establishing, enforcing and modifying child and spousal support, or alimony, orders, as well as for determining parentage when more than one state is involved in such proceedings.” (Footnote omitted.) *Hornblower v. Hornblower*, 151 Conn. App. 332, 333, 94 A.3d 1218 (2014). Relevant to this appeal is General Statutes § 46b-321 (b), which provides: “A tribunal of this state may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country.”¹ The plaintiff, Cheryl

¹ General Statutes § 46b-302 (5) defines “[f]oreign country” in relevant part as “a country . . . other than the United States, that authorizes the issuance of support orders and (A) which has been declared under the law of the United States to be a foreign reciprocating country . . . or (D) in which the [Convention on the International Recovery of Child Support and

Abbott Olson, submits, and the trial court agreed, that the order establishes the continuing, exclusive jurisdiction over spousal support decrees that are issued in the United Kingdom.

The critical issue, then, concerns the proper construction of the order. The order is a “statutory instrument” that was issued pursuant to the powers conferred by §§ 40 and 45 (1) of the Maintenance Orders (Reciprocal Enforcement) Act, 1972 (act),² a legislative enactment

Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007 (convention); see General Statutes § 46b-302 (3)] is in force with respect to the United States.” The United States Secretary of State has declared the United Kingdom to be a “foreign reciprocating country” for the purpose of family support obligations. See 42 U.S.C. § 659a (2018); Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 73 Fed. Reg. 72,555 (November 28, 2008). Moreover, as the North Carolina Court of Appeals has noted, “[r]eciprocity currently exists under UIFSA between all American states and the following foreign jurisdictions: Australia, Austria, Bermuda . . . United Kingdom (England, Wales, Scotland, Northern Ireland).” (Internal quotation marks omitted.) *Foreman v. Foreman*, 144 N.C. App. 582, 585, 550 S.E.2d 792, review denied, 354 N.C. 68, 553 S.E.2d 38 (2001). In addition, the convention has been ratified by both the United States and the United Kingdom.

² Section 40 of the act provides: “Where Her Majesty is satisfied—

“(a) that arrangements have been or will be made in a country or territory outside the United Kingdom to ensure that maintenance orders made by courts in the United Kingdom against persons in that country or territory can be enforced in that country or territory or that applications by persons in the United Kingdom for the recovery of maintenance from persons in that country or territory can be entertained by courts in that country or territory; and

“(b) that in the interest of reciprocity it is desirable to ensure that maintenance orders made by courts in that country or territory against persons in the United Kingdom can be enforced in the United Kingdom or, as the case may be, that applications by persons in that country or territory for the recovery of maintenance from persons in the United Kingdom can be entertained by courts in the United Kingdom,

“Her Majesty may by Order in Council make provision for applying the provisions of this Act, with such exceptions, adaptations and modifications as may be specified in the Order, to such orders or applications as are referred to in paragraphs (a) and (b) above and to maintenance and other orders made in connection with such applications by courts in the United Kingdom or in that country or territory.” Maintenance Orders (Reciprocal

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of Parliament that specifically pertains to the reciprocal enforcement of maintenance orders in the United Kingdom or a reciprocating country. In the United Kingdom, statutory instruments are used to “fill in the details of Acts” and, when so authorized by Parliament, “to amend existing laws.” See UK Parliament, “What Is Secondary Legislation?,” available at <https://www.parliament.uk/about/how/laws/secondary-legislation/> (last visited July 20, 2022). They “are published with an explanatory memorandum, which outlines the purpose of the [statutory instrument] and why the change is necessary.” *Id.*

The order was issued on July 25, 2007, at which time UIFSA had been adopted in every state in the United States. See, e.g., *O'Donnell v. Abbott*, 393 F. Supp. 2d 508, 514 n.14 (W.D. Tex. 2005) (noting that “[e]very state has adopted either the 1996 or 2001 version of [UIFSA]”), *aff'd*, 481 F.3d 280 (5th Cir. 2007); *Bouquety v. Bouquety*, 933 So. 2d 610, 611 n.1 (Fla. App. 2006) (noting that “Congress required all states to enact UIFSA by January 1, 1998,” and that “[b]y the year 2000, UIFSA was in effect in all states”). The order begins by stating that “Her Majesty is . . . satisfied that arrangements have been made in the United States of America to ensure that maintenance orders made by courts in the United Kingdom can be enforced in the United States of America. Her Majesty is also satisfied that in the interests of reciprocity it is desirable to ensure that maintenance orders made by courts in the United States of America can be enforced in the United

Enforcement) Act, 1972, c. 18, § 40 (U.K.), available at <https://www.legislation.gov.uk/ukpga/1972/18/section/40/enacted> (last visited July 20, 2022).

Section 45 (1) of the act provides: “An Order in Council under section 1, section 25 or section 40 of this Act may be varied or revoked by a subsequent Order in Council thereunder, and an Order made by virtue of this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient for the purposes of that section.” Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18, § 45 (1) (U.K.).

Kingdom. . . .” Schedule 2, § 1 (1), of the order similarly provides in relevant part that “Her Majesty, if satisfied that, in the event of the benefits conferred by the Part of the Act being applied to . . . maintenance orders made by the courts of any country or territory outside the United Kingdom, similar benefits will in that country or territory will be applied to . . . maintenance orders made by the courts of the United Kingdom”

The order then outlines procedures for two distinct scenarios. The first involves the “[t]ransmission of [a] maintenance order made in the United Kingdom for enforcement in the United States of America.” Schedule 2, § 2 (1), of the order provides in relevant part: “[W]here the payer under a maintenance order made . . . by a court in the United Kingdom is residing or has assets in the United States of America, the payee under the order may apply for the order to be sent to the United States of America *for enforcement*.” (Emphasis added.) The order then addresses the “[v]ariation and revocation of [a] maintenance order made in the United Kingdom” and Schedule 2, § 5 (1), of the order specifically indicates that “[t]his section applies to a maintenance order certified copies of which have been sent in pursuance of [§] 2 to the United States of America for enforcement.” Section 5 (2) of the order further provides that “[t]he jurisdiction *of a court in the United Kingdom* to revoke, revive or vary a maintenance order shall be exercisable notwithstanding that the proceedings for the revocation, revival or variation, as the case may be, of the order are brought by or against a person residing in the United States of America.” (Emphasis added.) Schedule 2, § 5, of the order then addresses various situations in which a modification order is varied or revoked by a court in the United Kingdom. By its plain language, the order contemplates only the *enforcement* of a maintenance order made in the United Kingdom

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by a court in the United States. It does not contemplate the revocation or variance of such an order by a United States court.

The second scenario addressed by the order involves the “[r]egistration in [a] United Kingdom court of [a] maintenance order made in the United States of America.” Schedule 2, § 6, of the order provides that “a maintenance order made . . . by a court in the United States of America” shall be registered in a United Kingdom court upon receipt of a certified copy thereof. Schedule 2, § 8, of the order then addresses the enforcement of such a maintenance order registered in the United Kingdom and § 9 addresses the “[v]ariation and revocation of [a] maintenance order registered in [a] United Kingdom [c]ourt,” stating in relevant part: “(1) Where a registered order *has been varied by a court in the United States of America*, the registered order shall . . . have effect as varied by that order. . . . (2) Where a registered order *has been revoked by a court in the United States of America*, the registered order shall . . . be deemed to have ceased to have effect.” (Emphasis added.) The order thus expressly contemplates a United States court revoking or varying a maintenance order that originally was made by a United States court.

Because the order by its plain terms is amendatory in nature, in that it expressly sets forth numerous “modifications” to the act with respect to the United States and orders the amendment or substitution of various sections, I believe it is necessary to also consider the relevant provisions of the act, as originally enacted in 1972. See 1A N. Singer & J. Singer, *Sutherland Statutory Construction* (7th Ed. 2009) § 22:29, p. 349 (“[t]o ascertain the meaning of amendatory language, courts must look to prior law”); *id.*, § 22:32, p. 377 (“[t]he original act must be compared with the amendment to determine what defect or defects in the original act the legislature intended to remedy”); see also *State v. AFSCME*,

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Council 4, Local 1565, 249 Conn. 474, 478–80, 732 A.2d 762 (1999) (comparing text of statute and recent amendment to that statute to construe its meaning); *Turner v. Turner*, 219 Conn. 703, 717, 595 A.2d 297 (1991) (“[a]ccording to well established principles of statutory construction, an amendment that construes and clarifies a prior statute operates as the legislature’s declaration of the meaning of the original act”). Significantly, § 9 of the act, as enacted in 1972, authorized a United Kingdom court to vary or revoke a maintenance order that originally was made in a reciprocating country and registered in a United Kingdom court.³ The order, however, eliminates the authority of a United Kingdom court to vary or revoke a maintenance order made by a United States court.⁴

Section 5 of the act, as originally enacted in 1972, likewise permitted “a competent court in a reciprocating country” to vary or revoke a maintenance order made by a United Kingdom court.⁵ By contrast, § 5 of the order, which is titled “Variation and revocation of maintenance order made in United Kingdom,” omits all such references to “a competent court in a reciprocating country” and recognizes only the authority of “a court in the United Kingdom” to vary or revoke a maintenance order made by a United Kingdom court.

It is axiomatic that statutory provisions are not to be read in isolation, but must be read in light of their

³ Section 9 (1) of the act previously provided in relevant part that a court of the United Kingdom in which a maintenance order made in a reciprocating country was registered “(a) shall have the . . . power, on an application made by the payer or payee under a registered order, to vary or revoke the order as if it had been made by the registering court and as if that court had had jurisdiction to make it; and (b) shall have power to vary or revoke a registered order by a provisional order.” Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18, § 9 (1) (U.K.).

⁴ In both the act and the order, § 9 is titled “Variation and revocation of maintenance order registered in United Kingdom Court.”

⁵ See Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18, § 5 (7) and (8) (U.K.).

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“relationship to the broader statutory scheme.” *Foisie v. Foisie*, supra, 335 Conn. 531; see also *Norris v. Trumbull*, 187 Conn. App. 201, 219, 201 A.3d 1137 (2019) (“[w]e do not read statutory language in isolation, but rather must consider it within the context of the statute as a whole and in harmony with surrounding text”). Schedule 2, § 5 (2), of the order specifically provides that “[t]he jurisdiction of a court in the United Kingdom to revoke, revive or vary a maintenance order *shall be exercisable* notwithstanding that the proceedings for the revocation, revival or variation, as the case may be, of the order are brought by or against a person residing in the United States of America.” (Emphasis added.) When viewed in relation to the broader statutory scheme set forth in the order and the act—which both provide for the reciprocal enforcement of domestic maintenance orders as a matter of international law—I would conclude that Schedule 2, § 5, of the order is susceptible to more than one reasonable interpretation as to whether it recognizes the “continuing, exclusive jurisdiction”; see General Statutes § 46b-321 (b); of United Kingdom courts over maintenance orders that were made in the United Kingdom and subject to enforcement in the United States. For that reason, I believe that Schedule 2, § 5, is ambiguous, and thus resort to extratextual materials is warranted. See *Foisie v. Foisie*, supra, 531; *State v. Fernando A.*, supra, 294 Conn. 17.

Appended to the order is an “Explanatory Note” (note) that states in relevant part: “The principal modification effected by this Order is that a maintenance order made in the United States of America may not be varied or revoked in the United Kingdom and that a maintenance order made in the United Kingdom may not be varied or revoked in the United States of America” In addition, the United Kingdom’s Ministry of Justice prepared an “Explanatory Memorandum” to the order

(memorandum) that was “laid before Parliament by Command of Her Majesty.”⁶ That memorandum similarly explains that the order “remove[s] the power of courts in the United Kingdom to vary or revoke incoming orders which makes the application consistent as *the competent authorities in the United States do not have a power to vary orders from the United Kingdom.*” (Emphasis added.) See Explanatory Memorandum to the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 and the Recovery of Maintenance (United States of America) Order 2007, available at https://www.legislation.gov.uk/uksi/2007/2005/pdfs/uksiem_20072005_en.pdf (last visited July 20, 2022). In opposing the motion to dismiss, the defendant, Brian Matthew Olson, provided no extratextual material to rebut the proposition set forth in the note and the memorandum.⁷

To my mind, those explanatory materials resolve any issue as to the intent of the order and persuade me that the trial court properly determined that it lacked subject matter jurisdiction over the spousal support decree in question due to the continuing, exclusive jurisdiction of the United Kingdom.

II

The foregoing analysis is predicated on the assumption that the analytical framework for statutory interpretation under Connecticut law governs the present

⁶ Explanatory memoranda are prepared by government officials to supplement an explanatory note. J. Caird, *Public Legal Information and Law-Making in Parliament, Parliament and the Law* (A. Horne & G. Drewry eds., 2d Ed. 2018) p. 158.

⁷ I also observe that, in *Hornblower v. Hornblower*, supra, 151 Conn. App. 333, this court “examine[d] the provisions” of UIFSA. At issue in that appeal was the proper interpretation of General Statutes § 46b-212d (c). *Id.*, 336. Although this court did not find any provision of that statute ambiguous, it did not confine its review to the text of the statute itself and its relationship to other statutes. Rather, the court discussed the “historical and statutory notes” to that statute; *id.*, 337; and then extensively detailed certain comments to the uniform code on which UIFSA was modeled. See *id.*, 337–38.

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dispute. I respectfully submit that this assumption may be flawed and that a reviewing court tasked with construing a statutory enactment of a foreign country instead must apply the precepts applicable in that foreign jurisdiction.

As one noted treatise has observed, “[o]ne question that arises [when construing a foreign statute] is whether to follow the forum state’s or the state of origin’s rules of construction. Some courts look to their own . . . rules of statutory interpretation to resolve the issue. But probably the better approach invokes the state of origin’s interpretive rules Courts are more likely to achieve uniform application of statute law and avoid some of the uncertainties entailed by foreign suits if they apply the interpretive rules to which a foreign statute ordinarily is subject.” (Footnotes omitted.) 2 S. Singer, *Statutes and Statutory Construction* (8th Ed. 2022) § 38:5, pp. 124–25; see also *Magee v. Huppini-Fleck*, 279 Ill. App. 3d 81, 88, 664 N.E.2d 246 (1996) (in case involving interpretation of foreign statute, court applied “principles of statutory construction adhered to” by courts of that foreign jurisdiction); *Alropa Corp. v. Smith*, 240 Mo. App. 376, 381, 199 S.W.2d 866 (1947) (“[i]n ascertaining the effect of . . . the foreign statutes, courts of the forum will construe the statutes of the [foreign] state as construed by its courts and follow the rules of law of the [foreign] state” (internal quotation marks omitted)).

In *Carbone v. Nxegen Holdings, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-13-6039761-S (October 3, 2013) (57 Conn. L. Rptr. 36), the Superior Court noted that it “could find no Connecticut authority concerning what rules of construction should apply in

Given this court’s reliance on those “statutory notes” and the comments to a model code in interpreting a provision of our General Statutes, I fail to see how the trial court’s reliance on the note in the present case was improper.

interpreting the meaning of another state’s statute. As a matter of first impression, the court believes it would be illogical for a Connecticut statute to determine how a [foreign] statute should be interpreted. It is presumed that each set of legislators had their own rules of statutory interpretation in mind when drafting their respective statutes, so [that foreign jurisdiction’s] rules of statutory interpretation should be applied to best implement the intended meaning of the [foreign] statute.” *Id.*, 42 n.4. I concur with that assessment, particularly in a case such as this, which involves foreign relations and international agreements. See *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 388 (4th Cir. 2012) (“[w]here a statute touches upon foreign relations and the United States’ treaty obligations, we must proceed with particular care in undertaking this interpretive task”); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S. Ct. 216, 220, 81 L. Ed. 255 (1936) (foreign relations is “vast external realm” that presents “important, complicated, delicate and manifold problems”); *de Fontbrune v. Wofsy*, 838 F.3d 992, 994 (9th Cir. 2016) (“this appeal illustrates the difficulty that can arise in determining foreign law and the confusion surrounding the role of foreign law in domestic proceedings”); *Al-Bihani v. Obama*, 619 F.3d 1, 39 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (“[c]ourts are . . . rightly hesitant to construe foreign affairs statutes more narrowly than the text indicates”).

When construing a statutory enactment, Connecticut’s courts are guided by “considerations of the constitutional separation of powers [and] respect for the authority of a coordinate branch of government” *Mueller v. Tepler*, 312 Conn. 631, 661, 95 A.3d 1011 (2014). Principles of judicial restraint, as well as the legislative mandate of General Statutes § 1-2z, preclude our courts from considering extratextual evidence when no ambiguity exists. See, e.g., *Marciano v. Jiminez*,

324 Conn. 70, 75–76, 151 A.3d 1280 (2016) (“we . . . will not consider extratextual evidence of the meaning of a statute unless the text is ambiguous or would yield an absurd or unworkable result”); *State v. Cayo*, 143 Conn. App. 194, 202, 66 A.3d 887 (2013) (“[i]f the meaning is clear and workable, we do not consider extratextual evidence”).

The legislative process in the United Kingdom is altogether different, as the legislative and executive branches of government frequently work in tandem to craft and amend legislative acts. For that reason, the analytical framework that governs statutory interpretation in Connecticut is inapposite when construing statutory instruments. Indeed, statutory instruments in the United Kingdom are akin to executive orders issued by our governor pursuant to authority conferred by the General Assembly. The statutory instrument at issue here was promulgated not by Parliament, but rather by the executive branch pursuant to the authority granted under §§ 40 and 45 (1) of the act. See footnote 2 of this dissenting opinion.

Whereas acts of Parliament are considered “primary legislation” in the United Kingdom, statutory instruments are considered “secondary” or “delegated” legislation that are enacted pursuant to authority conferred by an enabling act of Parliament. Statutory instruments are drafted by ministerial agencies and, depending on the authorization contained in the enabling act, are scrutinized by Parliament in a manner described as either an affirmative or negative procedure. The order here was “subject to [the] negative resolution procedure”; see Explanatory Memorandum to the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 and the Recovery of Maintenance (United States of America) Order 2007, *supra*; and was automatically approved when Parliament took no action to annul. See UK Parliament, *supra*. Significantly,

“Parliament can either approve or reject [a statutory instrument], but cannot amend it.” *Id.* For that reason, explanatory notes and explanatory memoranda to statutory instruments play a major role in facilitating parliamentary scrutiny. See J. Caird, *Public Legal Information and Law-Making in Parliament, Parliament and the Law* (A. Horne & G. Drewry eds., 2d Ed. 2018) p. 158.

Although explanatory notes routinely incorporate the caveat that they are “not part” of legislation, decisional law from the United Kingdom indicates that explanatory notes nonetheless are “admissible” as aids to statutory construction of both primary and secondary legislation.⁸ In the seminal case of *Westminster City Council v. National Asylum Support Service*, [2002] UKHL 38 (H.L.), Lord Steyn observed: “In 1999 a new [legislative practice] was introduced. It involves publishing [e]xplanatory [n]otes alongside the majority of public bills introduced The texts of such notes are prepared by the [g]overnment department responsible for the legislation. The [e]xplanatory [n]otes do not form part of the [b]ill, are not endorsed by Parliament and cannot be amended by Parliament. The notes are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and

⁸ As the majority correctly notes, the plaintiff in this case provided very little to the trial court and this court about the foreign law in question. At the same time, “because foreign law interpretation and determination is a question of law, independent judicial research does not implicate the judicial notice and ex parte issues spawned by independent factual research undertaken by a court.” *de Fontbrune v. Wofsy*, *supra*, 838 F.3d 999. “Independent research . . . together with extracts of foreign legal materials, has been and will likely continue to be the basic mode of determining foreign law.” (Internal quotation marks omitted.) *Id.*, 997. “Although our common law system relies heavily on advocacy by the parties, judges are free to undertake independent *legal* research beyond the parties’ submissions. It is no revelation that courts look to cases, statutes, regulations, treatises, scholarly articles, legislative history, treaties and other legal materials in figuring out what the law is and resolving legal issues.” (Emphasis in original.) *Id.*, 999.

to ease the task of assimilating the law. . . . The [e]xplanatory [n]otes accompany the [b]ill on introduction and are updated in the light of changes to the [b]ill made in the parliamentary process. Explanatory [n]otes are usually published by the time the legislation comes into force. Unlike [legislative history] material there are no costly researches involved. . . .

“The question is whether in aid of the interpretation of a statute the court may take into account the [e]xplanatory [n]otes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. . . . [I]n his important judgment in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912–13, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. . . .

“Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. Insofar as the [e]xplanatory [n]otes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose [e]xplanatory [n]otes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, [g]overnment green or white papers, and the like. After all, the connection of [e]xplanatory [n]otes with the shape of the proposed

legislation is closer than pre-parliamentary aids which in principle are already treated as admissible” (Citations omitted.) *Id.*, ¶¶ 4–5.

Following that decision, United Kingdom courts often have considered explanatory notes when construing statutory instruments. See, e.g., *9 Cornwall Crescent London Ltd. v. Kensington & Chelsea*, Docket No. B2/2004/1560, 2005 WL 607512 (EWCA (Civ.) March 22, 2005) (“Courts have moved away from a purely literal approach to statutory interpretation. . . . By ‘context’, I mean the legislative context, and the policy context, as shown by any admissible material, such as . . . explanatory notes”); *R v. Montila*, [2004] UKHL 50, 35, available at <https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd041125/mont.pdf> (last visited July 20, 2022) (“[i]t has become common practice for their Lordships to ask to be shown the [e]xplanatory [n]otes when issues are raised about the meaning of words used in an enactment”); *Confederation of Passenger Transport UK v. Humber Bridge Board*, 2002 WL 31422280 (EWCH (Admin.) November 1, 2002) (relying in part on explanatory note to statutory instrument to support conclusion that lower court properly supplied language inadvertently omitted from order); R. Munday, “In the Wake of ‘Good Governance’: Impact Assessments and the Politicisation of Statutory Interpretation,” 71 *Mod. L. Rev.* 385 (2008) (noting growing willingness of United Kingdom judges to employ explanatory notes as aid to interpretation); D. Greenberg, “All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting,” 7 *Eur. J. L. Reform* 31, 37–38 (2005) (discussing use of explanatory notes as aid to statutory construction and observing that “the courts have appeared to be increasingly relaxed about the use of a wide range of material produced by the executive”). As one commentator on statutory interpretation in the

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United Kingdom has observed, “[i]t is the present practice that almost every [b]ill introduced [in] . . . Parliament is accompanied by a set of [e]xplanatory [n]otes, prepared by the [g]overnment, and although these [n]otes declare that they are not necessarily authoritative, the courts early on established their willingness to have regard to them . . . for the purpose of determining the context within which the emerging Act is construed” (Footnote omitted.) 96 Halsbury’s Laws of England (5th Ed. 2018) p. 483.

That authority suggests that, unlike the framework for statutory interpretation under Connecticut law, courts in the United Kingdom may consider an explanatory note to a statutory instrument irrespective of whether an ambiguity exists. In the present case, the note and memorandum both provide necessary context to the enactment of the order, and leave little doubt that it was intended to memorialize the continuing, exclusive jurisdiction of the United Kingdom courts over maintenance orders made in their courts. Accordingly, I would conclude that the trial court properly determined that it lacked subject matter jurisdiction over the spousal support decree in the present case.

For the foregoing reasons, I respectfully dissent.

OMAR J. MILLER *v.* JON DOE ET AL.
(AC 43845)

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

Syllabus

The plaintiff, an inmate in a state correctional institution, sought to recover damages from the defendant M, an employee of the Department of Correction, in his individual capacity, pursuant to federal law (42 U.S.C. § 1983), for the alleged violation of his federal constitutional rights in connection with a motor vehicle accident during which he sustained injuries. The plaintiff, who was being transported to and from a medical appointment in a vehicle operated by M, was placed in full restraints

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in the rear seat of the vehicle, in which there was not enough room for the plaintiff to sit upright. The plaintiff informed M that the vehicle was too small, but M said that he could not obtain a larger vehicle. The plaintiff did not ask M to secure his seat belt, and M did not check to see if the seat belt was fastened. On the return trip, M drove erratically and in excess of the speed limit, ultimately colliding with another vehicle. The plaintiff alleged that M had violated his civil rights under the eighth amendment to the United States constitution, claiming that M's failure to abide by reasonable safety standards while transporting him gave rise to a claim of deliberate indifference. The trial court denied M's motion for summary judgment, finding that there was a disputed question of fact as to whether M knew and was indifferent to an excessive risk to the plaintiff's health and safety. On M's appeal to this court from the denial of his motion for summary judgment, *held* that the trial court erred in holding that M was not entitled to qualified immunity, as the allegations in the plaintiff's complaint and the record before the court did not give rise to a claim for deliberate indifference because no federal precedent clearly established that M's conduct violated the eighth amendment constitutional right against cruel and unusual punishment: the Court of Appeals for the Second Circuit, in *Jabbar v. Fischer* (683 F.3d 54), held that the failure of prison officials to provide inmates with seat belts does not, without more, violate the eighth amendment, and other federal courts have held the same and largely have held that dangerous road conditions, distracted driving and speeding while transporting inmates do not give rise to a claim for deliberate indifference; moreover, in the few instances in which a federal court has found that a constitutional violation occurred during the transportation of an inmate, the plaintiff typically has alleged that he was not seat belted, the defendant purposefully drove in a reckless manner and the plaintiff asked the defendant to fasten his seat belt or to drive more safely but the defendant ignored the requests, and, in the present case, the plaintiff neither alleged nor presented evidence that he requested to be seat belted, requested that M drive more safely or requested that M obtain a larger vehicle for safety rather than for comfort; furthermore, M's conduct was not severe enough to constitute an obvious constitutional violation in the absence of clearly established law, as the present case involved a motor vehicle accident with circumstances under which no federal court has found an eighth amendment violation.

Argued March 9—officially released July 26, 2022

Procedural History

Action to recover damages for the alleged violation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo, J.*, denied

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the motion to dismiss filed by the defendant Joshua Medina; thereafter, the court, *Moukawsher, J.*, denied the motion for summary judgment filed by the defendant Joshua Medina, and the defendant Joshua Medina appealed to this court. *Reversed; judgment directed.*

Janelle R. Medeiros, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellant (defendant Joshua Medina).

Omar J. Miller, self-represented, the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant Joshua Medina, a central transportation unit officer for the Department of Correction (department), appeals from the trial court's denial of his motion for summary judgment in the action brought by the self-represented plaintiff, Omar J. Miller, pursuant to 42 U.S.C. § 1983, alleging deliberate indifference in violation of the eighth amendment to the United States constitution.¹ On appeal, the defendant claims that the court improperly denied his motion for summary judgment because he is entitled to qualified immunity from the plaintiff's claim.² We agree and, accordingly, reverse the judgment of the trial court.

¹ Although the plaintiff originally brought this action against both the defendant and Captain Jon Doe, Doe never was identified, never properly served, and has not appeared in this action. Accordingly, Doe is not participating in this appeal, and the appeal is brought only on behalf of the defendant.

² As a general rule, "[t]he denial of a motion for summary judgment . . . is an interlocutory ruling, and, accordingly, not a final judgment for purposes of appeal." (Internal quotation marks omitted.) *Brown & Brown, Inc. v. Blumenthal*, 288 Conn. 646, 653, 954 A.2d 816 (2008). The denial of a defendant's motion for summary judgment on the basis of qualified immunity, however, is an exception to this rule and is an appealable final judgment. See *Morgan v. Bubar*, 115 Conn. App. 603, 608–609, 975 A.2d 59 (2009). Accordingly, the defendant's claim that he is entitled to qualified immunity is properly before this court. See *id.*

The record before the court, when viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. At the time of the events underlying the present case, the plaintiff was an incarcerated inmate in the custody of the department at the MacDougall-Walker Correctional Institution (MacDougall-Walker) in Suffield.³ On July 3, 2013, the plaintiff was transported by the defendant from MacDougall-Walker to the University of Connecticut's Jack Dempsey Hospital (hospital) in Farmington for a medical appointment. Prior to the trip, the defendant placed the plaintiff in full restraints, which included "handcuffs, leg irons, a belly chain, a tether chain, and a 'black box.'"⁴

After the defendant placed those restraints on the plaintiff, the defendant escorted him outside to a Ford Crown Victoria motor vehicle (vehicle), which had been assigned to the defendant for the plaintiff's transportation. The defendant did not choose that particular vehicle or have the authority or ability to obtain a different vehicle. The vehicle had been modified to include a metal barrier between the front and rear seats. Because of that barrier, there was not enough space for the plaintiff to sit upright in the rear seat. Upon seeing the vehicle's modified interior, the plaintiff informed the defendant that the vehicle was too small, but the defendant told him just to lie down on the rear seat instead of sitting upright. The plaintiff then asked the defendant if he could get a larger vehicle, to which the defendant responded, "No," and again told the plaintiff to lie down on the rear seat, which he did.

³ While this appeal was pending, the plaintiff was extradited to New York and is now incarcerated in a correctional facility there.

⁴ According to a department administrative directive, which was attached to the defendant's motion for summary judgment, a black box is "[a] lockable plastic cover designed to limit tampering with a handcuff locking mechanism." Conn. Dept. of Correction, Administrative Directive 6.4 (3) (A) (effective November 13, 2012).

Once in the vehicle, the plaintiff was unable to put his seat belt on because of his restraints and how he was forced to lie on the rear seat. The defendant never checked to see if the plaintiff's seat belt was fastened or offered to fasten his seat belt, despite a department policy that requires inmates to be seat belted during transit. The plaintiff also never asked the defendant to secure his seat belt.

While traveling to the hospital, the defendant exceeded the speed limit, but he and the plaintiff reached the hospital without incident. After the plaintiff's appointment, he was placed in the same vehicle and again lay down on the rear seat. During the trip back to MacDougall-Walker, the defendant drove "erratically" by weaving in and out of traffic, making sharp turns, and, at one point, driving thirty miles per hour above the speed limit. The plaintiff never commented on the defendant's driving or asked him to slow down.

While traveling along Route 159 in Windsor Locks, the defendant noticed a car ahead at the traffic light that had stopped in both the left and right lanes and appeared to be attempting to make a left hand turn from the right lane. The defendant thought that there was enough room for him to continue straight in the right lane and slip past the stopped car. He was mistaken, however, and struck the right rear side of the stopped car. During the collision, the plaintiff was launched into the metal barrier and lost consciousness. After he regained consciousness, "his body was wedged between the [rear] seat and the metal barrier and his head was pinned between the metal barrier and the [vehicle] door."

Immediately after the crash, the defendant called emergency services and department personnel, who quickly responded to the scene of the accident. The

defendant then checked on the driver of the other car⁵ and the plaintiff. According to the defendant's evaluation of the plaintiff, the plaintiff was not at risk of immediate harm. The plaintiff later was transported by ambulance to Hartford Hospital so that he could receive medical treatment for the injuries he had suffered in the crash. According to the plaintiff, the accident caused injuries and pain to his head, neck, back, knee, and shoulder.

Thereafter, on September 12, 2013, the plaintiff filed a complaint against the defendant and Jon Doe; see footnote 1 of this opinion; alleging that the defendant had violated the plaintiff's civil rights under the eighth amendment to the United States constitution.⁶ Specifically, the plaintiff claimed that the defendant and Doe's failure to abide by reasonable safety standards while transporting him gave rise to a claim for deliberate indifference pursuant to § 1983.⁷ On January 23, 2014, the plaintiff filed an amended complaint. The defendant then filed a request for the plaintiff to revise his complaint, wherein he asked him to "[s]eparate [the] claims against each defendant into separate counts." On June 23, 2014, in accordance with that request to revise,

⁵ The driver of the other car was uninjured in the crash.

⁶ The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Emphasis added.) U.S. Const., amend. VIII.

⁷ Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ."

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the plaintiff filed the operative complaint,⁸ in which he alleged in relevant part that the defendant had acted with deliberate indifference to his safety while transporting him from the hospital to MacDougall-Walker (count two).⁹ That claim was brought against the defendant in his individual capacity.

The defendant then filed a motion to dismiss, alleging that the plaintiff's claim was "barred by qualified immunity" because the allegations in the operative complaint did not establish that the defendant had violated clearly established law, given that federal precedent does not require an inmate to be seat belted during transit. The plaintiff opposed the defendant's motion to dismiss, arguing that the defendant had violated his constitutional right to be free from cruel and unusual punishment when the defendant's "reckless behavior led to [the plaintiff] being subjected [to] physical harm when [the defendant] was 'driving erratically and in excess of speed limits.'" The plaintiff further argued that, because he had sued the defendant in his individual capacity, qualified immunity did not apply.

On May 5, 2017, by way of a memorandum of decision, the court, *Elgo, J.*, denied the defendant's motion to

⁸ On April 12, 2016, the plaintiff filed a motion to amend and an amended complaint. The motion to amend, however, was never ruled on by the court. Accordingly, the June 23, 2014 revised complaint is the operative complaint in this action.

⁹ In the operative complaint, the plaintiff also pleaded a state common-law recklessness claim (count four), alleging that the defendant had acted wantonly and recklessly when transporting him. The plaintiff later abandoned that claim in his objection to the defendant's motion for summary judgment, stating, "[the plaintiff] is not suing the [defendant] . . . pursuant to [Connecticut] common law [The plaintiff] is suing [the defendant] pursuant to 42 U.S.C. § 1983" (Emphasis added.) Accordingly, that claim was not argued before the trial court and is not before us on appeal.

The operative complaint further pleaded two counts (counts one and three) against Doe. As explained in footnote 1 of this opinion, however, Doe has never participated in this action. Accordingly, these counts also were not argued before the trial court and, thus, are not before us on appeal.

dismiss after finding that the plaintiff had “alleged sufficient facts to support the claim that it was not objectively reasonable for the defendant to believe his acts were lawful.” The court specifically held: “[T]he plaintiff has . . . meticulously and carefully alleged that the defendant was not only aware of the risk of harm to the plaintiff but then disregarded that risk by acting with deliberate indifference to his physical safety, specifically in his failure to abide by [department] administrative directives requiring [seat belts]. . . . Given the allegations that the defendant knew that the plaintiff would be at serious risk of injury in the event of a collision, given that the defendant was alleged to be aware of the requirement that inmates must be seat belted, and given the allegations that the defendant drove erratically and unsafely while the plaintiff was not safely secured, this court concludes that the plaintiff’s action is not barred by qualified immunity.” (Internal quotation marks omitted.)

On May 25, 2017, the defendant filed a motion for reconsideration of the court’s denial of his motion to dismiss, reiterating his claim that he had not violated a clearly established right and was thus entitled to qualified immunity. In a memorandum of decision dated November 24, 2017, the court granted the defendant’s motion for reconsideration but again denied the defendant’s motion to dismiss.

In its memorandum of decision, the court specifically addressed the defendant’s contention that he had not violated a clearly established constitutional right, stating: “Although there were no published decisions from the [United States Court of Appeals for the] Second Circuit addressing [the] specific factual situation [in the present case] at the time of the alleged conduct . . . the absence of case law directly on point is not dispositive.” The court then held, based largely on precedent from the Eighth Circuit, that the plaintiff’s complaint

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sufficiently alleged “a violation of a clearly established constitutional right—namely, that prison employees may not subject an inmate to a substantial risk of serious harm while transporting them in a vehicle. Given that the plaintiff has alleged that the defendant drove erratically and recklessly, notwithstanding the defendant’s knowledge of regulations requiring seat belts as well as the plaintiff’s expressed concern for his safety, the court concludes that the defendant is not entitled to qualified immunity.”

Thereafter, the defendant filed a motion for summary judgment, wherein he again argued that he was entitled to qualified immunity because he had not violated a clearly established constitutional right.¹⁰ The plaintiff filed an objection to the defendant’s motion for summary judgment, arguing that the defendant was not entitled to qualified immunity because (1) he was being sued in his personal capacity, not his official capacity, and (2) his failure to follow department policies when transporting the plaintiff demonstrated the defendant’s deliberate indifference to the plaintiff’s health and safety.

On January 13, 2020, the court, *Moukawsher, J.*, held a hearing on the defendant’s motion for summary judgment. At the hearing, the defendant argued that summary judgment was proper because he was entitled to qualified immunity on the plaintiff’s deliberate indifference claim, given that he had not violated a clearly established right and that “the circumstances [in the present case do not] rise to the level of an obvious excessive risk to the plaintiff’s safety.” In response, the

¹⁰ The defendant also argued in his motion for summary judgment that the plaintiff had failed to exhaust his administrative remedies before bringing the underlying action. In ruling on the defendant’s motion for summary judgment, the court concluded that the plaintiff had exhausted his administrative remedies, and the defendant does not challenge that ruling in this appeal.

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plaintiff argued that the defendant's actions constituted deliberate indifference because the defendant had put the plaintiff in the vehicle fully shackled and without a seat belt and then had driven "fast and erratically."¹¹

After the hearing, the court denied the defendant's motion for summary judgment from the bench, stating: "I find that there's a disputed question of fact as to whether the officer knew and was indifferent to an excessive risk to the inmate's health and safety. And for those reasons, summary judgment [is] denied." The court further explained its decision in a written ruling that was issued the same day: "[T]here is a genuinely disputed question of fact as to whether the officer knew and was indifferent to an excessive risk to the inmate's health and safety. A reasonable jury could believe such was the case. If it does, any immunity claim would . . . fail as a matter of law and reckless conduct would be proved." The court did not, in either its oral or written ruling, analyze whether the plaintiff had alleged a constitutional right that was clearly established at the time of the challenged conduct. The defendant then appealed from the court's denial of his motion for summary judgment.

We begin by setting forth the applicable standards of review. "The standard of review of a trial court's [ruling on] summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine

¹¹ At the hearing on the defendant's motion for summary judgment, the plaintiff did not argue that the defendant was not entitled to qualified immunity because he had been sued in his personal capacity. The plaintiff also does not make that argument on appeal. Therefore, we need not consider that claim. We do note, however, that the Second Circuit has held that "qualified immunity shields a defendant official *sued in his individual capacity* from liability for civil damages . . ." (Emphasis added; internal quotation marks omitted.) *Frank v. Relin*, 1 F.3d 1317, 1327–28 (2d Cir.), cert. denied, 510 U.S. 1012, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993).

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issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Our review of the trial court's decision to [deny] the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Gonzalez v. O & G Industries, Inc.*, 341 Conn. 644, 679–80, 267 A.3d 766 (2021). Moreover, "[w]hether an official is entitled to qualified immunity presents a question of law that must be resolved de novo on appeal." *Fleming v. Bridgeport*, 284 Conn. 502, 518, 935 A.2d 126 (2007).

We now set forth the relevant law with regard to qualified immunity. "[A] claim for qualified immunity from liability for damages under § 1983 raises a question of federal law . . . and not state law. Therefore, in reviewing these claims of qualified immunity we are bound by federal precedent, and may not expand or contract the contours of the immunity available to government officials. . . . Furthermore, in applying federal law in those instances where the United States Supreme Court has not spoken, we generally give special consideration to decisions of the Second Circuit" (Internal quotation marks omitted.) *Morgan v. Bubar*, 115 Conn. App. 603, 625, 975 A.2d 59 (2009).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808,

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172 L. Ed. 2d 565 (2009). “[The] standard for determining whether an officer is entitled to qualified immunity . . . is forgiving and protects all but the plainly incompetent or those who knowingly violate the law.” (Internal quotation marks omitted.) *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010). “Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.” (Internal quotation marks omitted.) *Braham v. Newbould*, 160 Conn. App. 294, 302, 124 A.3d 977 (2015); see also *Morgan v. Bubar*, supra, 115 Conn. App. 625 (“[q]ualified immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known” (internal quotation marks omitted)). Courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, supra, 236; see also *Edrei v. Maguire*, 892 F.3d 525, 532 (2d Cir. 2018) (plaintiff’s “[f]ailure to establish either prong” entitles defendant to qualified immunity), cert. denied, U.S. , 139 S. Ct. 2614, 204 L. Ed. 2d 263 (2019). In this opinion, we focus on the second prong of the test, namely, whether the alleged constitutional right was clearly established at the time of the defendant’s conduct.

“To determine whether a right is clearly established, we look to (1) whether the right was defined with reasonable specificity; (2) whether Supreme Court or court of appeals case law supports the existence of the right in question, and (3) whether under preexisting law a reasonable defendant would have understood that his

or her acts were unlawful. . . . Even if [the Second Circuit] or other circuit courts have not explicitly held a . . . course of conduct to be unconstitutional, the unconstitutionality of that . . . course of conduct will nonetheless be treated as clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue . . . even if those decisions come from courts in other circuits” (Citations omitted; internal quotation marks omitted.) *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010). “Courts do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” (Internal quotation marks omitted.) *Walker v. Schult*, 717 F.3d 119, 125–26 (2d Cir. 2013). Moreover, “[t]he right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense.” (Internal quotation marks omitted.) *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); see also *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (“clearly established law should not be defined at a high level of generality”). “If an official’s conduct did not violate a clearly established constitutional right . . . then he is protected by qualified immunity.” *Walker v. Schult*, supra, 126.

We next set forth the relevant law with regard to the eighth amendment and deliberate indifference, on which the plaintiff’s § 1983 claim is based. “The [e]ighth [a]mendment’s prohibition against cruel and unusual punishment requires prison conditions to be humane, though not necessarily comfortable.” (Internal quotation marks omitted.) *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012). “A denial of safe and humane conditions can result from an officer’s deliberate indifference to a prisoner’s safety.” *Brown v. Fortner*, 518 F.3d 552, 558 (8th Cir. 2008). “[D]eliberate indifference includes

both subjective and objective components. First, the alleged deprivation must be, in objective terms, sufficiently serious. . . . Second, the [government official] must act with a sufficiently culpable state of mind. . . . An official acts with . . . deliberate indifference when that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” (Internal quotation marks omitted.) *Braham v. Newbould*, supra, 160 Conn. App. 302–303. “Deliberate indifference requires more than mere negligence, but does not require acting for the very purpose of causing harm or with knowledge that harm will result. . . . [A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.” (Citation omitted; internal quotation marks omitted.) *Brown v. Fortner*, supra, 558.

In the operative complaint, the plaintiff claims that the defendant violated his constitutional rights under the eighth amendment when the defendant subjected him to cruel and unusual punishment by transporting him in reckless disregard of reasonable safety standards, including by (1) failing to fasten the plaintiff’s seat belt, despite the defendant’s knowledge that department policy required inmates to be seat belted, (2) refusing to acquire a larger vehicle in which the plaintiff could sit properly, and (3) driving erratically and well in excess of the speed limit.¹² Given that the plaintiff brings this claim pursuant to § 1983, and not

¹² To the extent that, in his brief, the plaintiff frames the alleged constitutional right at issue as a right to be free from an unreasonable and substantial risk of harm, we conclude that such a description is too broad. See *Escondido v. Emmons*, U.S. , 139 S. Ct. 500, 503, 202 L. Ed. 2d 455 (2019) (“clearly established right must be defined with specificity”). Accordingly, we have narrowed the plaintiff’s description of the constitutional right at issue.

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state common law,¹³ we must determine whether it is clearly established under federal law that such conduct violates the constitution. See *Morgan v. Bubar*, supra, 115 Conn. App. 625. Accordingly, we begin with an overview of federal case law concerning the transportation of inmates.

Very few cases from either the United States Supreme Court or the Second Circuit have resolved constitutional questions involving inmates and vehicles. Indeed, the sole relevant case is *Jabbar v. Fischer*, supra, 683 F.3d 58–59. In *Jabbar*, the plaintiff, an incarcerated inmate, was transported to and from a medical appointment on a “‘hub bus’ that did not have seatbelts for inmate[s]” while “shackled from his wrists to his ankles.” *Id.*, 56. While in transit, “[t]he bus made a forceful turn and [the plaintiff] . . . was thrown from his seat. He hit his head on another seat and was knocked unconscious. He sustained injuries to his face, head, and back.” *Id.* Thereafter, the plaintiff sued the defendants, “contending that their failure to provide a bus seatbelt violated his [e]ighth . . . [a]mendment rights.” *Id.* The defendants filed a motion to dismiss in the United States District Court for the Southern District of New York, arguing that the failure to provide inmates with seat belts does not violate the constitution, which the District Court granted. *Id.* The plaintiff then appealed to the Second Circuit. *Id.*

On appeal, the Second Circuit concluded that “the failure of prison officials to provide inmates with seatbelts does not, without more, violate the [eighth amendment]” because “the failure to provide a seatbelt is not . . . sufficiently serious to constitute an [e]ighth [a]mendment violation . . . [and] because the absence of seatbelts on inmate bus transport is itself not an excessive risk, without more, deliberate indifference—

¹³ See footnote 7 of this opinion.

that is, that defendants knew of, and disregarded, an excessive risk to inmate safety—cannot be plausibly alleged.” (Citations omitted; internal quotation marks omitted.) *Id.*, 58. This holding arguably left open the possibility that conduct in addition to failing to provide inmates with seat belts could give rise to a constitutional violation, but the Second Circuit did not, and still had not at the time of the challenged conduct in the present case, elaborated on what specific additional conduct would constitute a violation of the eighth amendment.

Other federal courts overwhelmingly have held that the failure to provide an inmate with a seat belt does not, on its own, give rise to a constitutional claim for deliberate indifference. See, e.g., *Dexter v. Ford Motor Co.*, 92 Fed. Appx. 637, 643 (10th Cir. 2004) (“failure to seatbelt an inmate does not violate the [c]onstitution”); *Spencer v. Knapheide Truck Equipment Co.*, 183 F.3d 902, 906 (8th Cir. 1999) (same), cert. denied sub nom. *Spencer v. Board of Police Commissioners*, 528 U.S. 1157, 120 S. Ct. 1165, 145 L. Ed. 2d 1076 (2000); *Daily v. CCA-WCFA Whiteville Transportation Officers*, United States District Court, Docket No. 3:18-CV-0146 (WLC) (M.D. Tenn. April 2, 2018) (listing federal cases that have held that transporting inmates without seat belts does not amount to deliberate indifference); see also *Dexter v. Ford Motor Co.*, supra, 641 (“The risk of a motor vehicle accident is dependent upon a host of factors unrelated to the use of seatbelts, viz., vehicular condition, time of day, traffic, signage, warning lights, emergency circumstances, weather, road conditions, and the conduct of other drivers. The eventuality of an accident is not hastened or avoided by whether an inmate is seatbelted.”).

Although at the time of the challenged conduct, the Second Circuit had considered only whether the failure

to provide inmates with seat belts gave rise to a constitutional violation, other federal courts had considered whether factual scenarios involving inmates and a lack of seat belts in addition to other factors, including dangerous road conditions, distracted driving, and speeding, gave rise to a claim for deliberate indifference. Those courts largely have held that such facts do not amount to a violation of the eighth amendment.

For example, in *Carrasquillo v. New York*, 324 F. Supp. 2d 428, 434 (S.D.N.Y. 2004), the plaintiff, an incarcerated inmate, brought a § 1983 claim for deliberate indifference after he was injured while being transported to a courthouse. The plaintiff alleged that the defendant's conduct gave rise to a constitutional violation because the plaintiff "was handcuffed and was not provided with a seatbelt" and, during transit, the defendant "was traveling at an excessive [rate of] speed . . . despite icy conditions." (Internal quotation marks omitted.) *Id.* The United States District Court for the Southern District of New York concluded that the alleged conduct did not amount to deliberate indifference and dismissed the plaintiff's claim, holding that (1) the constitution does not guarantee an inmate's "right to non-negligent driving by government employees," (2) "[a]llegations of a public official driving too fast for the road conditions are grounded in negligence," and (3) "[the] failure to provide seatbelts to prisoners is not a constitutional violation . . ." (Internal quotation marks omitted.) *Id.*, 436–37.

Most other federal courts that have considered the lack of an inmate's seat belt along with certain additional conduct have reached the same conclusion: such conduct does not violate the constitution. See, e.g., *Daily v. CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC) (inmate's allegations that defendant failed to fasten inmate's seat belt, drove ninety

miles per hour, followed other cars too closely, and was distracted by his cell phone did not constitute deliberate indifference); *Uhl v. Wendy*, United States District Court, Docket No. 15 CV 6923 (VB) (S.D.N.Y. December 9, 2016) (inmate’s allegations that defendant “failed to secure a safety belt around [him] and drove in excess of [seventy-five] to [eighty] miles per hour” were “insufficient to state a claim under [§] 1983”); *Byerlein v. Hamilton*, United States District Court, Docket No. 1:09-CV-841 (PLM) (W.D. Mich. October 7, 2009) (allegations that defendant failed to fasten plaintiff’s seat belt, talked on cell phone, and disregarded warning sign about icy conditions did not violate eighth amendment).

In the few instances in which a federal court has found that a constitutional violation occurred during the transportation of an inmate, the plaintiff typically has alleged that (1) he was not seat belted, (2) the defendant purposefully drove in a reckless, fast, and distracted manner, *and* (3) he asked the defendant either to fasten his seat belt or to drive more safely, but the defendant ignored such requests. To demonstrate, in *Brown v. Fortner*, *supra*, 518 F.3d 556, on which Judge Elgo relied in denying the defendant’s motion to dismiss, the plaintiff, an incarcerated inmate, brought a § 1983 deliberate indifference claim against the driver of a prison van after he was injured while being transported to another correctional facility. *Id.* The plaintiff alleged that he was fully shackled, which left him unable to secure his own seat belt without assistance. *Id.* Because of this, the plaintiff asked the defendant to fasten his seat belt but he refused “and instead replied with taunts.” *Id.* “Other inmates [being transported with the plaintiff] also requested seatbelts and were rebuffed.” *Id.* The plaintiff further alleged that the defendant “[drove] in excess of the speed limit, follow[ed] too closely to the lead van, cross[ed] over double-yellow lines, and pass[ed] non-convoy cars when the road

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markings clearly prohibited doing so. Further, [the plaintiff] presented evidence showing that the inmates riding in [the defendant's] van asked him to slow down, and [that the defendant] ignored their requests." *Id.*, 559. The defendant moved for summary judgment, which the United States District Court for the Western District of Missouri denied. *Id.*, 557.

On appeal, the Eighth Circuit affirmed the District Court's denial of the defendant's motion for summary judgment, holding that, on the basis of the uncontested evidence, "a reasonable jury could conclude that there was a substantial risk of harm to [the plaintiff] and that [the defendant] knew of and disregarded the substantial risk [of] harm. As such, [the plaintiff] has presented sufficient evidence that [the defendant's] actions may have violated the [e]ighth [a]mendment prohibition against cruel and unusual punishment." *Id.*, 560.

Other federal courts, when confronted with situations where an inmate either requested to be seat belted or asked that a defendant stop driving recklessly, have reached the same conclusion. See, e.g., *Rogers v. Boatright*, 709 F.3d 403, 408 (5th Cir. 2013) (claim of deliberate indifference could survive sua sponte dismissal and was not frivolous when officer did not provide inmate with seat belt despite being aware of repeated past incidents where unseatbelted inmates were injured);¹⁴ *Brown v. Morgan*, United States Court of Appeals, Docket No. 94-2023, 1994 WL 610993, *1 (8th Cir. 1994) (unpublished decision) (claim of deliberate indifference sufficiently stated when officer refused to let inmate

¹⁴ We note that the United States Court of Appeals for the Fifth Circuit solely decided in this case that the inmate's deliberate indifference claim was not frivolous. *Rogers v. Boatright*, *supra*, 709 F.3d 409. The court did not specifically decide whether the inmate's allegations sufficiently stated a claim of deliberate indifference or whether the inmate's claim could survive a motion for summary judgment. *Id.* ("[w]e . . . express no opinion on the ultimate merits of [the inmate's] claim").

wear seat belt, drove at high rate of speed in bad weather, and laughed at and ignored inmate's request to slow down); *Steele v. Ayotte*, United States District Court, Docket No. 3:17-CV-1370 (CSH) (D. Conn. February 6, 2018) (relying on Judge Elgo's memorandum of decision denying department's motion to dismiss to determine that claim of deliberate indifference was sufficiently stated when officers used cell phones while driving and denied inmate's request to have seat belt fastened, stating, "Why would you need a seatbelt; you don't believe in my driving" (internal quotation marks omitted)); *Williams v. Wisconsin Lock & Load Prisoner Transports, LLC*, United States District Court, Docket No. 15 C 8090 (RWG) (N.D. Ill. August 3, 2016) (claim of deliberate indifference sufficiently stated where "[officer] refused [inmate's request] to properly secure his seat belt, drove too fast for the weather conditions, improperly used his cell phone while driving, and slammed on the van's breaks to avoid a collision caused by his inattention" (footnote omitted)); *Barela v. Romero*, United States District Court, Docket No. CIVIL 06-41 (JBDJS) (D.N.M. May 10, 2007) (eighth amendment violation sufficiently stated when officer transported fully shackled inmate without seat belt, drove erratically at high speeds, and ignored and laughed at inmate's requests to stop).

Given our review of the relevant federal case law and the particular facts of the present case—specifically, that (1) the plaintiff was not seat belted, (2) the defendant refused to acquire a larger vehicle, and (3) the defendant drove erratically and exceeded the speed limit—we conclude that the allegations in the plaintiff's complaint and the record before the court in connection with the defendant's motion for summary judgment do not give rise to a claim for deliberate indifference because

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no federal precedent clearly establishes that the defendant's conduct violates the constitution.¹⁵

First, neither the United States Supreme Court nor the Second Circuit has ever concluded that transporting an inmate without a seat belt, in a car that is too small, and while driving erratically and in excess of the speed limit violates the eighth amendment. Indeed, to the contrary, the Second Circuit explicitly has held that transporting an inmate without a seat belt is not deliberate indifference. See *Jabbar v. Fischer*, supra, 683 F.3d 58–59. Although *Jabbar* implied that conduct in addition to the failure to provide an inmate with a seat belt could give rise to a constitutional violation, such general language cannot be read as creating a clearly established right for inmates to be seat belted and transported in accordance with safety protocols. See *Anderson v. Creighton*, supra, 483 U.S. 640 (1987) (“[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right”). Moreover, and contrary to the court's conclusion when denying the defendant's motion to dismiss, the fact that *Jabbar v. Fischer*, supra, 58, cites to *Brown v. Fortner*, supra, 518 F.3d 559–62, wherein the Eighth Circuit held that the defendant's conduct while transporting the plaintiff gave rise to a constitutional violation, does not clearly establish the constitutional violation alleged in the present case. See *Jermosen v. Smith*, 945 F.2d 547, 551 (2d Cir. 1991) (declining to rely on dicta when determining whether right was clearly established), cert. denied, 503 U.S.

¹⁵ We recognize that for a right to be clearly established, that right must have been clearly established at the time of the challenged conduct. See *Braham v. Newbould*, supra, 160 Conn. App. 302. In the interest of a full analysis, however, we have reviewed cases that were decided both before and after the challenged conduct in the present appeal. Even when considering cases that were decided after the conduct at issue here, we still conclude that the defendant's conduct did not give rise to a clear constitutional violation.

962, 112 S. Ct. 1565, 1181 L. Ed. 2d 211 (1992). As noted previously in this opinion, the facts in *Fortner* were much more egregious than those alleged by the plaintiff in the present case. In particular, in the present case, the plaintiff neither alleged nor presented evidence that he requested to be seat belted or requested that the defendant slow down or drive more cautiously. There is also no evidence that the plaintiff's request that the defendant procure a larger vehicle was made because of a concern for safety instead of comfort. Consequently, the Second Circuit's reference to *Fortner* does not support a conclusion that it would hold that the defendant's conduct in the present case is a clear violation of the plaintiff's eighth amendment rights. Overall, the Second Circuit's precedent regarding the transporting of inmates in vehicles does not clearly establish that the defendant's conduct in the present case violated the plaintiff's constitutional rights.

Second, no other federal courts that have considered factual situations similar to those at issue here have concluded that such facts give rise to a constitutional violation. See *Weber v. Dell*, 804 F.2d 796, 801 n.6, 803–804 (2d Cir. 1986) (relying on decisions from other circuits finding similar conduct unconstitutional, even though Second Circuit had not reached issue), cert. denied sub nom. *Monroe v. Weber*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987). In the present case, the plaintiff alleged that the defendant drove in disregard of the plaintiff's safety by driving thirty miles per hour in excess of the speed limit, making sharp turns, and weaving in and out of traffic, all while the plaintiff was seated in a vehicle that was too small for his stature and was unsecured by a seat belt. Federal courts that have had the opportunity to consider similar facts, however, overwhelmingly have concluded that such conduct does not constitute deliberate indifference. See *Carrasquillo v. New York*, supra, 324 F. Supp.

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2d 433–34 (no deliberate indifference when defendant drove above speed limit in icy conditions with inmate handcuffed and not seat belted); see also, e.g., *Daily v. CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC) (no deliberate indifference when defendant drove ninety miles per hour while “blasting” music and “fumbling with his phone” with inmate handcuffed and not seat belted); *Byerlein v. Hamilton*, supra, United States District Court, Docket No. 1:09-CV-841 (PLM) (no deliberate indifference when defendant drove above speed limit on icy road with inmate handcuffed and not seat belted).

In fact, in many of these cases, the defendant’s conduct was arguably worse than the conduct at issue here, given that the defendants in those cases drove erratically in bad weather or were distracted while driving. See *Daily v. CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC); *Byerlein v. Hamilton*, supra, United States District Court, Docket No. 1:09-CV-841 (PLM); *Carrasquillo v. New York*, supra, 324 F. Supp. 2d 433–34. Despite that worse conduct, though, each court still concluded that such conduct did not constitute deliberate indifference. See *Daily v. CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC); *Byerlein v. Hamilton*, supra, United States District Court, Docket No. 1:09-CV-841 (PLM); *Carrasquillo v. New York*, supra, 433–34. Thus, this persuasive authority also does not clearly establish that the defendant’s conduct in the present case violated the plaintiff’s constitutional rights.

On the other hand, as noted previously in this opinion, the cases on which the plaintiff relies that have reached the contrary conclusion are readily distinguishable from the present case. In those instances in which a federal

court has held that a defendant's conduct while transporting an inmate constituted deliberate indifference, the inmate either asked to be seat belted or asked the officer to slow down or stop, thereby putting the defendant on notice of the danger to which the plaintiff felt exposed, or involved officers who personally knew of recent injuries to inmates that had resulted from the inmates not being seat belted. See, e.g., *Rogers v. Boatright*, supra, 709 F.3d 408 (claim of deliberate indifference could survive dismissal, even when inmate did not request to be seat belted, when officer knew of recent prior injuries to inmates who were not seat belted); *Brown v. Fortner*, supra, 518 F.3d 556 (defendant ignored inmates' requests to have seat belts fastened and to drive more safely); *Brown v. Morgan*, supra, 1994 WL 610993, *1 (defendant ignored inmate's request to be seat belted, ignored inmate's pleas to slow down, and laughed when he saw inmate was scared); *Steele v. Ayotte*, supra, United States District Court, Docket No. 3:17-CV-1370 (CSH) (defendants ignored inmate's request to be seat belted); *Williams v. Wisconsin Lock & Load Prisoner Transports, LLC*, supra, United States District Court, Docket No. 15 C 8090 (RWG) (defendant refused to fasten inmate's seat belt after inmate asked why he was not belted); *Barela v. Romero*, supra, United States District Court, Docket No. CIVIL 06-41 (JBDJS) (defendant, who was speeding and stopping suddenly, ignored inmate's request to stop and laughed at inmate). In the present case, the plaintiff never asked the defendant to fasten his seat belt or commented on his driving. See *Walker v. Schult*, supra, 717 F.3d 125 (official must be actually aware of risk).

Further, as the plaintiff admitted at oral argument before this court, he never alleged a safety concern as to the defendant's conduct. See *id.* There is also no evidence that the plaintiff ever told the defendant that his concern that the assigned vehicle was too small for

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him was related to any safety concern. Accordingly, because the plaintiff never made the defendant aware of any concerns that he had as to his safety, the present case is distinguishable from the federal cases that have found a constitutional violation based on a defendant's conduct while transporting an inmate. Thus, those cases also do not clearly establish that the defendant's conduct in the present case violated a constitutional right.

Consequently, because no federal case has held that facts similar to those alleged in the present case amount to deliberate indifference, we cannot say that the defendant violated a clearly established right when he transported the plaintiff without a seat belt in a vehicle that was too small and drove over the speed limit while making sharp turns and dipping in and out of traffic. See *id.*, 125–26 (in determining whether conduct violates clearly established law, “existing precedent must have placed the . . . constitutional question beyond debate” (internal quotation marks omitted)).

Our conclusion that federal law does not clearly establish the right at issue in the present case, however, does not end our qualified immunity analysis. As the plaintiff notes in his brief, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). In rare cases, a court can conclude that a defendant's conduct rises to the level of a constitutional violation despite the fact that existing precedent has not yet held that the conduct in question is unlawful. See *id.*; see also *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

For example, in *Hope v. Pelzer*, *supra*, 536 U.S. 734–35, the United States Supreme Court concluded that the defendants' conduct, namely, handcuffing an inmate to a hitching post in the hot sun for multiple hours

while denying him water and bathroom breaks and taunting him, was a clear and obvious violation of the eighth amendment, despite the lack of precedent involving similar facts. Similarly, in *Taylor v. Riojas*, U.S. , 141 S. Ct. 52, 53, 208 L. Ed. 2d 164 (2020), an inmate spent six days in two different cells, the first of which was covered “in massive amounts of feces” and the second of which was frigidly cold and overflowing with raw sewage. (Internal quotation marks omitted.) The Supreme Court held that the inmate had an obvious constitutional right to be free from “deplorably unsanitary conditions,” despite the lack of precedent concerning similar facts, because “no reasonable correctional officer could have concluded that . . . it was constitutionally permissible to house [the inmate] in such deplorably unsanitary conditions for such an extended period of time.” *Id.*, 53–54.

The plaintiff thus argues that, despite the lack of any precedent finding a constitutional violation in situations similar to those alleged here, we still can conclude that the defendant’s conduct in the present case constitutes deliberate indifference. We are not persuaded. The facts alleged here—specifically, that the plaintiff was injured in a car accident after the defendant neglected to seat belt the plaintiff, transported him in a vehicle that was too small, and drove in excess of the speed limit while making sharp turns and weaving in and out of traffic—are far less egregious than those alleged in *Hope* and *Taylor*, where inmates were treated in ways that were “antithetical to human dignity.” *Hope v. Pelzer*, *supra*, 536 U.S. 745. Thus, we cannot say that the defendant’s conduct in the present case gave rise to a constitutional violation that should have been readily obvious to the defendant despite the lack of precedent declaring such conduct unlawful.

This is particularly true given that both the United States Supreme Court and the Second Circuit have held

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that conduct far worse than that alleged here was not so obvious as to constitute an eighth amendment violation in the absence of existing precedent. See, e.g., *Taylor v. Barkes*, 575 U.S. 822, 822–23, 826–27, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (defendants who failed to implement suicide prevention protocols, which allegedly led to arrestee’s suicide, were entitled to qualified immunity because “[n]o decision of this [c]ourt establishes a right to the proper implementation of adequate suicide prevention protocols”); *Crawford v. Cuomo*, 721 Fed. Appx. 57, 60 (2d Cir. 2018) (defendant who sexually abused inmates was entitled to qualified immunity, despite “repugnant and intolerable” conduct, because “unconstitutional nature of [the defendant’s] abuse was not clearly established” at time abuse occurred). Therefore, given that the present case involved a car accident with circumstances under which no federal court has found an eighth amendment violation, we decline to conclude, in light of the lack of existing relevant precedent, that the defendant’s conduct was so bad as to constitute an obvious violation of the plaintiff’s eighth amendment rights.

We are also not persuaded by the plaintiff’s contention that, despite the lack of any relevant federal precedent, the defendant had fair notice that his conduct violated the constitution because the plaintiff was unsecured by a seat belt despite the defendant’s knowledge of a department policy which states that “[t]ransportation staff and each inmate in all vehicles . . . shall use seat belts while en route.” Conn. Dept. of Correction, Administrative Directive 6.4 (19) (A) (effective November 13, 2012). As noted previously in this opinion, the failure to seat belt an inmate does not constitute deliberate indifference. This is true even when the law requires the use of seat belts. See also *Carrasquillo v. New York*, supra, 324 F. Supp. 2d 438 (fact that New York law requires seat belts on buses was irrelevant to inmate’s deliberate indifference claim).

Accordingly, because the defendant's conduct did not violate a clearly established constitutional right and because his conduct also was not severe enough to constitute an obvious constitutional violation in the absence of such clearly established law, the plaintiff's factual allegations in the present case do not give rise to a constitutional violation. The plaintiff's claim, instead, sounds in negligence. See, e.g., *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996) (“[a]llegations of a public official driving too fast for the road conditions are grounded in negligence”); *White v. New York*, United States District Court, Docket No. 10 CIV. 8689 (RJH) (S.D.N.Y. November 22, 2011) (“a negligence claim arising from one individual's careless conduct toward another is purely a matter of state tort law”); *Carrasquillo v. New York*, supra, 324 F. Supp. 2d 436 (constitution does not guarantee inmate's right “to non-negligent driving by government employees”). We decline to elevate what is essentially a common-law tort claim to a constitutional violation under § 1983. See *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (declining to adopt reasoning that could allow “any party who is involved in nothing more than an automobile accident with a state official [to] allege a constitutional violation under § 1983”), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

In sum, because no federal case has held that the facts alleged in the present case give rise to a constitutional violation, it is not clearly established that the defendant's conduct violated the plaintiff's eighth amendment right against cruel and unusual punishment. Moreover, the defendant's conduct also is not so egregious as to constitute an obvious constitutional violation in the absence of existing precedent involving similar facts.

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Accordingly, the defendant is entitled to qualified immunity and the court erred in holding otherwise.¹⁶

The judgment is reversed and the case is remanded with direction to grant the defendant's motion for summary judgment and to render judgment thereon for the defendant.

In this opinion the other judges concurred.

JEFFREY A. REINER ET AL. v.
MICHAEL D. REINER ET AL.
(AC 44380)

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

Syllabus

The plaintiff sought, inter alia, a declaratory judgment from the trial court determining the manner in which the plaintiff's buy out of the defendant's interest in certain parcels of real property pursuant to their settlement agreement was to be calculated. The settlement agreement provided that the buyout amount would be based on the fair market value of each property multiplied by the defendant's interest in each property. The parties disagreed as to whether "interest," as used in the settlement agreement, meant equitable interest or a percentage of the fair market value of the property, without taking into account any existing mortgages. This court, in a prior action between the parties, had determined that the settlement agreement was ambiguous with respect to the calculation of the buyout amount. In the present case, the trial court, noting that it was bound by this court's prior decision, determined that the term "interest" meant "equitable interest" and, accordingly, that the calculation of the buyout amount required consideration of the existing mortgages on the properties. On the defendant's appeal to this court, *held* that the trial court properly determined that the buyout amount for the defendant's interests in the properties was to be calculated by multiplying his percentage interest in each property by the difference of its fair market value minus any outstanding mortgage debt: contrary to the defendant's claim, the trial court's reliance on § 201 of the

¹⁶ This conclusion renders it unnecessary for us to consider the defendant's alternative ground for reversal, namely, that the court erred in (1) determining there were material facts in dispute, (2) misstating "the standard for [a] qualified immunity analysis," and (3) defining the plaintiff's alleged constitutional right too broadly.

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Restatement (Second) of Contracts in resolving the underlying action, rather than § 220 of the Restatement (Second) of Contracts, was not improper because § 220 was not applicable, as the word “interest” as used in the settlement agreement had no habitual or customary meaning, § 201 was applicable because the parties attached different meanings to the term “interest,” and there was ample evidence to support the trial court’s determination that the defendant had reason to know that the plaintiff believed that the term, as used in the settlement agreement, meant “equitable interest” because the defendant was aware of the mortgages on the properties and, as an attorney specializing in transactional real estate, he should have known that he did not have legal title to the mortgaged properties and was unable to convey a full legal interest in his share of the fair market value of the properties; moreover, the trial court’s decision not to ascribe any weight to certain e-mails between the defendant, his attorney and the plaintiff’s attorney, in which the plaintiff’s attorney indicated that the buyout amount was to be determined by value, not equity, and which the defendant claimed showed that the plaintiff knew of the defendant’s interpretation of the term “interest,” was not clearly erroneous because the e-mails were sent after the agreement was negotiated, there was evidence that the plaintiff’s attorney was not involved in the negotiations and was unaware of the mortgages encumbering the properties, and there was no evidence that the plaintiff had read the e-mails, discussed them with his attorney, or agreed with his attorney’s interpretation of how the buyout amount should be calculated; furthermore, contrary to the defendant’s claims, the trial court’s conclusion as to the proper interpretation of the term “interest” did not conflict with the plain language of the agreement, which was ambiguous, and the trial court properly considered both the entire language of the agreement and evidence beyond the language of the agreement when making its factual findings regarding the intent of the parties; additionally, the defendant inadequately briefed his claim that equity required that the mortgage encumbering one of the properties not be included in the calculation of the buyout amount for that property because the mortgage was taken out solely to fund security deposits on the property that had not previously been funded due to the alleged mismanagement of the plaintiff, and, even if the claim had been adequately briefed, the issue did not involve a determination of equity but, rather, the interpretation of the contract, and there was no evidence that the parties intended to treat the mortgage on that property differently than the mortgages on the other properties.

Argued April 12—officially released July 26, 2022

Procedural History

Action for, inter alia, a judgment declaring that the calculation of the purchase price required to be paid

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for certain real properties under a settlement agreement take into account outstanding mortgage debt, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Schuman, J.*; judgment for the named plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Gary J. Greene, for the appellant (named defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellee (named plaintiff).

Opinion

BRIGHT, C. J. In this declaratory judgment action, the defendant Michael D. Reiner appeals from the judgment of the trial court rendered in favor of the plaintiff Jeffrey A. Reiner.¹ On appeal, the defendant claims that the court erred in concluding that the term “interest,” as used in the buyout provisions of the parties’ settlement agreement (agreement), meant “equitable interest” and, thus, that the buyout amount for the defendant’s interests in certain parcels of real property is equal to his percentage interest in each property multiplied by the difference of the fair market value of the property minus any outstanding mortgage debt. We disagree and, accordingly, affirm the judgment of the trial court.

This dispute between brothers returns to us after our decision in *Reiner v. Reiner*, 190 Conn. App. 268, 210 A.3d 668 (2019). In *Reiner*, we affirmed, albeit on different grounds, the trial court’s order denying the plaintiff’s motion to enforce the parties’ agreement pursuant

¹ Jeffrey A. Reiner, Trustee, and JAR Partners, LLC, also were named as plaintiffs in this action. For clarity, we refer to Jeffrey A. Reiner as the plaintiff. Additionally, the following defendants were named in this action: Michael D. Reiner, as trustee of the Sheila Reiner Trust; Sheila Reiner, individually; Sheila Reiner, as trustee of the Michael D. Reiner Trust; Sarah L. Reiner; Jacob A. Reiner; Rhino Real Estate Investors, LLC; and Connecticut LLC Irrevocable Trust. Again, for the sake of clarity, we refer to Michael D. Reiner as the defendant.

to *Audubon Parking Associates Ltd. Partnership v. Barclay & Stubbs, Inc.*, 225 Conn. 804, 811–12, 626 A.2d 729 (1993) (*Audubon*),² after concluding that the buyout provisions in the agreement, which stated that the plaintiff would buy out the defendant’s interests in certain properties after the death of the parties’ mother, were not clear and unambiguous.³ See *Reiner v. Reiner*, supra, 283–84. The plaintiff subsequently filed the underlying action in the Superior Court wherein he sought a declaratory judgment determining “the calculation of the purchase price for the [defendant’s] ‘interest[s]’ in [the] properties” In its memorandum of decision dated October 30, 2020, the court determined that, “for the purposes of the buyout provisions of the agreement, ‘interest’ shall mean equitable interest, or [the defendant’s] share of the fair market value of the property minus the outstanding mortgage debt.” This appeal challenges the court’s determination.

Our opinion in *Reiner* sets forth the following relevant facts and procedural history. “The [defendant] and the [plaintiff] are brothers who were two of the three primary beneficiaries of four irrevocable trusts (Reiner Trusts) that were established by their parents, Eleanore Reiner and Leo P. Reiner.⁴ The [plaintiff] was the sole trustee of the Reiner Trusts. The Reiner Trusts owned

² “A hearing pursuant to *Audubon Parking Associates Ltd. Partnership v. Barclay & Stubbs, Inc.*, supra, 225 Conn. 811–12, is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law.” *Ackerman v. Sobol Family Partnership, LLP*, 298 Conn. 495, 499 n.5, 4 A.3d 288 (2010).

³ Our conclusion in *Reiner* was different from the trial court’s conclusion because the trial court denied the plaintiff’s motion to enforce on the basis of the court’s finding that the agreement was clear and unambiguous and that it was the defendant’s interpretation, and not the plaintiff’s, that controlled. *Reiner v. Reiner*, supra, 190 Conn. App. 275–76.

⁴ “Nancy Brooks, the sister of the plaintiff and the defendant, was the third primary beneficiary of the trusts.” *Reiner v. Reiner*, supra, 190 Conn. App. 271 n.6.

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several parcels of real property (Reiner Trusts properties) that had a substantial value; however, a majority of the properties were encumbered by mortgages. Eleanor Reiner also was the sole member of 711 Farmington, LLC, and Canton Gateway, LLC. 711 Farmington, LLC, and Canton Gateway, LLC, each owned a single parcel of real property, both of which were encumbered by a mortgage. After a dispute arose regarding the Reiner Trusts properties, the [defendant], in 2011, commenced the [prior] action and several other parallel actions against the [plaintiff] alleging that he tortiously had mismanaged the Reiner Trusts properties. On July 5, 2012, the [defendant], the [plaintiff], and several other individuals and entities associated with the Reiner Trusts executed a settlement agreement to resolve the [prior] action, the parallel actions, and other disputes. . . . The agreement contained several provisions in which the [plaintiff] agreed to buy out the [defendant's] interests in certain properties after the death of Eleanor Reiner. The following buyout provisions are directly at issue

“Section 1 (a) of the agreement provides: ‘[The plaintiff] shall buyout [the defendant's] interests in the Reiner Trusts and the Reiner Trusts [p]roperties by paying cash to [the defendant] in proportion to his interests therein no later than 280 days following Eleanor Reiner's death. The buy-out amount payable to [the defendant] for his interests in the Reiner Trusts will be based on the fair market value of each of the Reiner Trusts [p]roperties at the time of Eleanor Reiner's death, multiplied by [the defendant's] interests in each [Reiner] Trust[s] [p]roperty with a deduction of ten (10%) percent to compensate for a minority discount and for the fact that there is no real estate brokerage commission.’ Section 1 (b) of the agreement detailed the manner in which the fair market value for each of the Reiner Trusts properties was to be determined. The

parties also agreed that the parties' 'interests' in the Reiner Trusts properties accurately were set forth in the "Trust Property Schedule," which was attached to the agreement. . . .

"Section 2 of the agreement provides in relevant part: 'In connection with the execution and delivery of this [a]greement, Eleanore Reiner will immediately transfer, by [w]arranty [d]eeds (i) her interests (as sole member of 711 Farmington, LLC) in [711 Farmington Avenue, West Hartford (711 Farmington)] as follows: two thirds (2/3) to [the plaintiff] and one-third (1/3) to [the defendant] . . . and (ii) her interests (as sole member of Canton Gateway, LLC) in [50 Albany Turnpike, Canton (Canton Gateway)] as follows: three fourths (3/4) to [the plaintiff] and one-fourth (1/4) to [the defendant] Such transfers are being made upon the following conditions

" '[The plaintiff] shall buy out [the defendant's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the defendant] no later than 280 days following Eleanore Reiner's death. The determination of the fair market value of 711 Farmington and Canton Gateway will be based on the same formula and terms used to determine the fair market value of the Reiner Trust[s] [p]roperties provided for in [§] 1 (a) of this [a]greement above except that the valuation shall be subject only to a four percent (4%) discount, not ten percent (10%). [The plaintiff] will have 280 days from the date of Eleanore Reiner's death, to obtain financing and consummate the buyout.' . . .

"On April 7, 2017,⁵ the [plaintiff] filed the motion to enforce the agreement that [was] the subject of [the]

⁵ In the four and one-half years between the execution of the agreement and the litigation underlying the prior appeal, the parties engaged in extensive litigation concerning property that Eleanore Reiner owned in Florida and other collateral issues stemming from the execution of the agreement. *Reiner v. Reiner*, supra, 190 Conn. App. 273. None of those issues was the subject of the previous appeal, and those issues are not implicated in the present case.

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appeal [in *Reiner*]. Therein, he argued that certain buy-out provisions of the agreement had been triggered as a result of the recent death of Eleanore Reiner, and that a dispute existed between himself and the [defendant] as to the interpretation of those provisions. In particular, Eleanore Reiner's death triggered the [plaintiff's] obligation, under § 2 of the agreement, to buy out the [defendant's] one-third interest in 711 Farmington and his one-quarter interest in Canton Gateway. Her death also triggered the [plaintiff's] obligation, under § 1 of the agreement, to buy out the [defendant's] interest in the Reiner Trusts properties, including 603 Farmington Avenue in Hartford [603 Farmington]. The [defendant] and the [plaintiff] were unable to reach an agreement on how to determine the price that the [plaintiff] was to pay the [defendant] for his interests in the properties. The [plaintiff] claimed that the buyout price of the [defendant's] interests is intended to be calculated as the [defendant's] proportionate interest in the equity in the properties, after deducting the debt secured by any mortgages, less the percentage discounts. The [plaintiff] requested that the court adjudicate the dispute by enforcing the agreement in accordance with his interpretation.

“On April 17, 2017, the [defendant] filed an objection to the [plaintiff's] motion to enforce the agreement. Therein, the [defendant] disagreed with the [plaintiff's] interpretation and advanced his own contrary interpretation of the agreement. The [defendant] maintained that the settlement agreement clearly and unambiguously provides that the buyout amount is to be ‘‘based on the fair market value’’ of each of the properties,’ which amount did not include consideration of the existing mortgages on the properties.

“On August 10, 2017, the [plaintiff] filed a supplemental memorandum in support of his motion to enforce the agreement. In his supplemental memorandum, the

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[plaintiff] argued that the agreement clearly and unambiguously provides that the amount of the buyout must take into consideration the mortgages on the properties. The [plaintiff] argued that a contrary interpretation would be in conflict with Connecticut mortgage jurisprudence, and would result in an absurd result in the form of a substantial unintended windfall for the [defendant].⁶

“On October 23, 2017, following an *Audubon* hearing, the court issued a memorandum of decision in which it denied the [plaintiff’s] motion to enforce the agreement and concluded that the agreement was clear and unambiguous in conformance with the [defendant’s] interpretation [that the buyout amount for the defendant’s interests does not include consideration of the existing mortgages on the properties].” (Footnote added; footnotes in original; footnotes omitted.) *Reiner v. Reiner*, supra, 190 Conn. App. 270–76.

The plaintiff appealed to this court, claiming that “the clear and unambiguous language of the agreement specifies that the buyout amount is the [defendant’s] equitable interest in the properties, namely, the fair market value of the properties less the amount of any mortgage encumbrances.” *Id.*, 270, 279. In response, the defendant argued “that the [trial] court properly determined that the agreement clearly and unambiguously provides that the buyout amount is the fair market value of the properties without regard to any debt associated with the properties.” *Id.*, 279. We disagreed with both parties and instead concluded that, because each party had set forth a reasonable interpretation of the

⁶ “For instance, if the parties equally shared a property that had a fair market value of \$1 million and that was encumbered by \$900,000 of underlying debt, the buyout amount, pursuant to the [defendant’s] construction, would be \$500,000. As a result, the [plaintiff] would be obligated to pay the [defendant] five times the amount of the actual equity in the property.” *Reiner v. Reiner*, supra, 190 Conn. App. 275 n.9.

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buyout provisions, the agreement was “ambiguous with respect to the method of calculation of the buyout amounts” *Id.*, 283. Accordingly, we held that the court had “properly denied the [plaintiff’s] motion to enforce the agreement, [but] it incorrectly determined that the agreement [was] clear and unambiguous” *Id.*, 284.

Thereafter, on June 28, 2019, the plaintiff filed with the trial court in this action a three count complaint alleging (1) breach of the agreement (count one), (2) breach of the implied covenant of good faith and fair dealing (count two), and (3) that “[a] dispute exists between the parties as to the calculation of the purchase price for the [defendant’s] ‘interest(s)’ in said properties which requires judicial determination” (count three). On July 17, 2019, the defendant filed an answer and raised five special defenses: breach of the agreement, collateral estoppel, *res judicata*, waiver, and that the plaintiff sought damages that were not allowed under the agreement. With respect to the plaintiff’s complaint, both the parties and the court construed the third count as seeking a declaratory judgment concerning the meaning of the agreement’s buyout provisions. The parties further agreed that “the court’s determination on the declaratory judgment count would be binding on the remaining counts of the complaint as well as the following related actions: *Rhino Real Estate Investors, LLC v. JAR Partners, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-18-6091460-S [*Rhino Real Estate I*]; *Rhino Real Estate Investors, LLC v. JAR Partners, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-18-6091459-S [*Rhino Real Estate II*];⁷ and *Reiner v. Reiner*, Superior Court, judicial district of Hartford, Docket No. CV-11-6020238-S, which

⁷ The proceedings in *Rhino Real Estate I* and *Rhino Real Estate II* are not at issue in the present appeal.

was the original action that generated the appeal [in *Reiner*].”⁸ (Footnote added.)

A three day trial to the court was held on the plaintiff’s declaratory judgment count on October 1, 2 and 6, 2020. At trial, the plaintiff argued that “interest,” as used in the buyout provisions, meant “equitable interest” and that, accordingly, the buyout amount for the defendant’s interests in 603 Farmington, 711 Farmington, and Canton Gateway required consideration of the existing mortgages on those properties. Conversely, the defendant argued that the parties had not intended to include the existing mortgages in the calculations for the buyout amount.

On October 30, 2020, the court issued a memorandum of decision wherein it adopted the plaintiff’s proposed interpretation, stating: “The court finds that each party had a consistent and sincere belief that the agreement embodied his interpretation of the word ‘interest.’ Abby Reiner Delales, the daughter of [the plaintiff] who negotiated on his behalf, believed in good faith that ‘interest’ meant equitable interest, so that [the plaintiff’s] buyout payment would equal the value of [the defendant’s] equity in the properties. At the same time, [the defendant] earnestly believed that ‘interest’ meant percentage of ownership, so that the buyout payment would equal

⁸ On June 28, 2019, while the plaintiff’s complaint was pending, the defendant filed a motion seeking “an order directing [the plaintiff] to immediately pay the *undisputed* portion of the outstanding amount due and owing to [the defendant] under the parties’ settlement agreement . . . plus attorney’s fees and other money damages” (Emphasis in original.) On July 8, 2019, the plaintiff filed an objection to the defendant’s motion, claiming that the motion was “baseless and violative of the Appellate Court’s decision, which found ambiguity in the settlement [agreement] between the parties. Until such time as a court adjudicates the ambiguity and determines the amount to be paid to [the defendant], [the defendant’s] ‘interests’ cannot be transferred to [the plaintiff], and [the plaintiff] is not obligated to pay until there is a determination.” At the time of the present appeal, the court had not yet ruled on the defendant’s motion for orders.

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his percentage of the properties' fair market value. There is no parol evidence that undermines either party's position. The court places no reliance on the various claimed admissions against interest in the case, as the court views them as improvident or lacking in probative value.

"Under these circumstances, the most logical conclusion is that there was no meeting of the minds. . . . However, the parties have not pleaded that claim and in fact have admitted that a valid contract exists. . . . Accordingly, the court lacks authority to find that there was no meeting of the minds. . . .

"The court must look for the next best solution. The Appellate Court stated that, while it found that each side had a reasonable interpretation of the buyout provisions and, as a result, the language of the contract was ambiguous, it did not 'decide which party has the better interpretation.' . . . The court must therefore look for the better or more reasonable interpretation.

"The court finds some guidance in the Restatement (Second) of Contracts, which our appellate courts have cited in contract cases. . . . Section 201 (2) provides in part as follows: 'Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.' . . .

"In this case, the court finds no basis to say that [the plaintiff] or [Delales] had 'reason to know' that [the defendant] believed that 'interest' meant percentage of fair market value. On the other hand, [the defendant] did have reason to know that [the plaintiff] and [Delales] believed that 'interest' meant equitable interest. At the

time of the agreement, [the defendant] had been an attorney for over twenty-five years specializing in transactional real estate, business, and mortgage cases. Several exhibits and the testimony of [the defendant] establish that [the defendant] knew of the existence of mortgages on all three of the subject properties at the time of the agreement As a real estate attorney, [the defendant] had reason to know that Connecticut follows the title theory of mortgages and that, therefore, he did not have legal title to properties encumbered by mortgages. Thus, he could not convey a full legal interest in his share of the fair market value of the three properties. . . . Further, logically, [the plaintiff] would only want to pay the lesser of the two possible prices for the property. For all these reasons, [the defendant] had reason to know that [the plaintiff] believed that ‘interest’ referred to equitable interest and not to full legal interest.

“Accordingly, the court, following the Restatement, interprets the agreement in accordance with the meaning attached to it by [the plaintiff]. Therefore, for the purposes of the buyout provisions of the agreement, ‘interest’ shall mean equitable interest, or [the defendant’s] share of the fair market value of the property minus the outstanding mortgage debt.” (Citations omitted.) This appeal followed.⁹

On appeal, the defendant claims that the court erred in holding that the term “interest” meant “equitable interest” and, accordingly, that the buyout amount for

⁹ While the present appeal was pending, the plaintiff moved to terminate the appellate stay that arose under Practice Book § 61-11 (a). The trial court denied the motion after finding that “there can be no real proceedings to enforce or carry out the judgment because the court rendered only a declaratory judgment The court did not order anyone to do, or prohibit anyone from doing, anything at all. Because there is no effective automatic stay, the court cannot terminate the automatic stay” The plaintiff did not seek further review from this court of the denial of his motion.

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the defendant's interests in the properties must include consideration of the existing mortgages. The defendant primarily contends that this holding was error because, in reaching this result, the court relied on the wrong section of the Restatement (Second) of Contracts and ignored crucial evidence that supported the defendant's interpretation of the buyout provisions. We are not persuaded.¹⁰

As a preliminary matter, we first address the applicable standard of review. The defendant maintains that, because the agreement "contains definitive contract language . . . the determination [of] what the parties intended by their contractual commitments is a question of law subject to plenary review." Conversely, the

¹⁰ When this appeal was filed on November 13, 2020, the court had rendered judgment only on the third count of the plaintiff's complaint, and counts one and two remained pending. Because counts one and two had yet to be adjudicated, there was a question of law as to whether the defendant had appealed from a final judgment. Accordingly, on March 24, 2021, we ordered the trial court to file an articulation "addressing whether it rendered judgment on the remaining two counts of the complaint and, if not, stating the status of counts one and two of the complaint." Also on March 24, 2021, the plaintiff withdrew the remaining two counts of his complaint. On March 30, 2021, the trial court filed its articulation of decision, wherein it stated: "At the time of the court's October 30, 2020 decision, the court [had] entered judgment only on count three and did not enter judgment on counts one and two. However, on March 24, 2021, the [plaintiff] filed a withdrawal of counts one and two. . . . Therefore, at the present time, the court has entered judgment on all existing counts of the complaint." (Citation omitted.) Thereafter, we ordered the parties to "be prepared to address whether the defendant . . . appealed from a final judgment given that the plaintiff . . . did not withdraw the first and second counts of the complaint until after the defendant filed this appeal." At oral argument before this court, both parties asserted that the defendant's appeal had properly been taken from a final judgment. We agree and conclude that, on the basis of the unique procedural posture of this case, the defendant has appealed from a final judgment. See *Zamstein v. Marvasti*, 240 Conn. 549, 556–57, 692 A.2d 781 (1997) (plaintiff properly appealed from final judgment, even though appeal was originally filed while two counts remained pending before trial court, because pending counts were later withdrawn after appeal was filed). On the basis of the particular circumstances of this case, to conclude otherwise "would unduly elevate form over substance . . ." *Id.*, 557.

plaintiff argues that, because this court determined in *Reiner* that the language at issue is ambiguous, we should apply the clearly erroneous standard of review because a determination as to what the parties intended their agreement to mean is a fact driven inquiry. We agree with the plaintiff.

Although the interpretation of definitive, unambiguous contract language is a question of law subject to plenary review, in *Reiner*, we concluded “that the agreement is ambiguous with respect to the method of calculation of the buyout amounts because the intent of the parties is not clear and certain from the language of the agreement.” *Reiner v. Reiner*, supra, 190 Conn. App. 283. “When the language of a contract is ambiguous, the determination of the parties’ intent is a question of fact, and the trial court’s interpretation is subject to reversal on appeal only if it is clearly erroneous.” (Internal quotation marks omitted.) *David M. Somers & Associates, P.C. v. Busch*, 283 Conn. 396, 403, 927 A.2d 832 (2007); see also *DeLeo v. Equale & Cirone, LLP*, 202 Conn. App. 650, 659, 246 A.3d 988 (“[t]o the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous” (internal quotation marks omitted)), cert. denied, 336 Conn. 927, 247 A.3d 577 (2021). Accordingly, the defendant’s claim is properly reviewed under the clearly erroneous standard of review.¹¹

“A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when

¹¹ To the extent that the defendant claims that plenary review should apply because the court made a legal error when it relied on the wrong section of the Restatement (Second) of Contracts, we note that the Restatement is not the law and is instead simply a tool for interpreting contracts. See *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 885 (Mo. 1985) (“restatements are not law”) (Blackmar, J., concurring). Accordingly, the court’s reliance on the Restatement does not require us to conclude that plenary review is the applicable standard of review.

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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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *David M. Somers & Associates, P.C. v. Busch*, supra, 283 Conn. 403.

We now address the merits of the defendant's appeal. The defendant first claims that the court erred in holding that the buyout provisions require consideration of the existing mortgages because the court incorrectly relied on § 201 of the Restatement (Second) of Contracts when it instead should have relied on § 220 of the Restatement (Second) of Contracts. We are not persuaded.

Section 201 (2) provides in relevant part: "Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party." 2 Restatement (Second), Contracts § 201, p. 83 (1981). Section 220, on the other hand, provides: "(1) An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage. (2) When the meaning attached by one party accorded with a relevant usage and the other knew or had reason

to know of the usage, the other is treated as having known or had reason to know the meaning attached by the first party.” *Id.*, § 220, p. 147.

According to the defendant, the court should have applied § 220 when interpreting the parties’ agreement because what is at issue with regard to the agreement is the parties’ *usage* of the word “interest.” The defendant further contends that had the court applied § 220 in interpreting the parties’ agreement, the court would have concluded that the defendant’s interpretation of the term “interest” (as meaning legal interest, and not equitable interest) controlled. We conclude that § 220 has no application in the present case.

The interpretative guidance provided by § 220 does not broadly apply to any usage of a term. Instead, “usage,” as used in § 220, specifically pertains to “usages” that are a “habitual or customary practice.” 2 Restatement (Second), *supra*, § 219, p. 146. Further, such a “usage” exists only when “few or many people use a word or phrase to convey a standard meaning or several standard meanings and develop a common understanding of the meaning or meanings.” *Id.*, comment (b), p. 146. The defendant cannot claim that his interpretation of the term “interest” was based on a habitual or customary usage of the term or that the term has a standard meaning that is understood by a group of people. The defendant did not present any evidence of such a usage to the court and, instead, his testimony concerning the meaning of “interest” was based solely on his personal understanding of that term as used in the agreement. We further conclude, as we explained in *Reiner*, that the word “interest,” as used in real estate transactions such as the ones at issue in this case, has no habitual or customary meaning that is shared among a group of people. See *Reiner v. Reiner*,

supra, 190 Conn. App. 281–82. Thus, the court was correct in not relying on § 220 to resolve the underlying action.

We further conclude that the court correctly applied § 201 in resolving the underlying action. The interpretative guidance provided by § 201 applies in cases where the parties have attached different meanings to a term or provision of an agreement but one of the parties knew or had reason to know of the meaning attached to that term or provision by the other party. 2 Restatement (Second), supra, § 201, p. 83. In its memorandum of decision, the court found that the defendant had reason to know that the plaintiff believed that the term “interest” meant “equitable interest” and, thus, according to § 201, held that the plaintiff’s interpretation of the buy-out provisions should control. We conclude that the evidence in the record provides ample support for the court’s determination that the defendant had reason to know of the plaintiff’s interpretation of the term “interest.”

First, the evidence establishes that the defendant was aware of the mortgages on each of the three properties. The defendant testified at trial that he knew that 603 Farmington, 711 Farmington, and Canton Gateway all were encumbered by mortgages when the parties executed the agreement. Closing documents and e-mails related to the mortgages for each of those properties further demonstrate that the defendant knew about the mortgages. Second, the evidence also supports the court’s conclusion that the defendant, as an attorney specializing in “transactional real estate, business and mortgage cases” for more than twenty-five years, “had reason to know that Connecticut follows the title theory of mortgages and that, therefore, he did not have legal title to properties encumbered by mortgages.” The

defendant testified that he was an accomplished transactional attorney who had decades of extensive experience and involvement with real estate and mortgage related transactions. Given this background, the trial court had a sufficient evidentiary basis to infer that the defendant knew that “Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property.” (Internal quotation marks omitted.) *Mortgage Electric Registration Systems, Inc. v. White*, 278 Conn. 219, 231, 896 A.2d 797 (2006). Accordingly, it was reasonable for the court to infer that the defendant likely knew that because he, as a mortgagor, had only equitable title to the property, “he could not convey a full legal interest in his share of the fair market value of the three properties.” See *id.*; see also *Reiner v. Reiner*, *supra*, 190 Conn. App. 281. Furthermore, it was reasonable for the court to infer that the plaintiff would want to pay the lesser of the two possible prices for the properties and, hence, the defendant “had reason to know that [the plaintiff] believed that ‘interest’ referred to equitable interest and not to full legal interest.”

The defendant argues that the court’s findings as to each party’s understanding of “interest” were clearly erroneous because the court ignored parol evidence that showed that both parties understood that the value of the defendant’s interests in the properties was to be calculated based on the fair market value of the properties and not on the amount of equity in the properties after considering mortgages. In particular, the defendant relies on exhibits 605 and 606. Exhibit 605 is a series of e-mails, which included a July 6, 2012 e-mail exchange between the defendant and Attorney Samuel Chester, who was assisting the plaintiff with the drafting and execution of the agreement. In that

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e-mail exchange, the defendant wrote that “[m]y biggest concern is mortgaging trust assets before my family is paid.” Chester responded to this concern by writing: “The buyout of the trust properties is determined by **value**, not equity. If [the plaintiff] refinances a trust property, how would that negatively affect your interest?” (Emphasis in original.) The plaintiff and Delales were copied on Chester’s response to the defendant.

Exhibit 606 contains additional e-mails sent later on July 6, 2012, among the defendant, his attorney, Doug Evans, and Chester. In an e-mail to Evans, on which Chester was copied, the defendant wrote: “This is a set up. . . . Now they want no notice which would allow [the plaintiff] to encumber everything and avoid payout.” In response, Chester wrote to the defendant and Evans: “[The defendant’s] buyout is not based upon equity, but upon fair market value of the properties. This is no ‘set up.’” All of the e-mails in exhibits 605 and 606 on which the defendant relies were exchanged one day after the agreement was executed.

The defendant argues that these e-mail exchanges show that the parties, in particular the plaintiff, understood that the buyout amount would be calculated based on the fair market values of the properties and not on the amount of equity in those properties when the buyout occurred. He argues that the court’s conclusion to the contrary was clearly erroneous. We are not persuaded. The record reflects that the court considered exhibits 605 and 606 but chose not to ascribe the weight to them that the defendant contends it should have.

The following additional facts and procedural history inform our analysis. While the present appeal was pending, on April 5, 2021, the defendant filed with this court a motion for permission to file a late motion for articulation with the trial court, which we granted. Thereafter,

on May 14, 2021, the defendant filed with the trial court his motion for articulation, wherein he asked the court to “articulate whether it considered the defendant’s exhibits 605 and 606 in forming its decision” On June 1, 2021, the trial court granted the defendant’s motion for articulation, stating: “The court did consider exhibits 605 and 606. However, the court did not attach any weight to the statements contained in these exhibits.”

It is for the trial court to decide what weight to give the evidence presented to it. See *Vaiuso v. Vaiuso*, 2 Conn. App. 141, 146, 477 A.2d 678 (“[t]he weight given to the evidence before it . . . [is] within the sole province of the trial court”), cert. denied, 194 Conn. 807, 482 A.2d 712 (1984). Furthermore, the court’s decision to give no weight to those two exhibits was reasonable given the other evidence it heard. Delales, who negotiated the agreement on behalf of the plaintiff, testified that the e-mails in exhibits 605 and 606 were sent after the agreement had been negotiated. Delales also testified that Chester had not been involved in any of the negotiations concerning the agreement or in any conversations about what “interest” meant. Further, according to Delales, Chester was not even aware that the properties were encumbered by mortgages when he sent the two e-mails in question. Finally, neither the plaintiff nor Chester was questioned about Chester’s e-mail in exhibit 606 on which the plaintiff was copied. Consequently, there was no evidence that the plaintiff read the e-mail, discussed it with Chester, or agreed with Chester’s statement regarding how the buyout amount would be calculated.¹² On the basis of the totality of the evidence, the court’s conclusion that exhibits

¹² At oral argument before this court, the defendant argued that, because the plaintiff was copied on the e-mails in exhibits 605 and 606 but never corrected Chester’s belief that the buyout amount for the properties was “determined by **value**, not equity,” the plaintiff must have agreed with that interpretation of the term. (Emphasis in original.) We disagree because the trial court did not reach such a conclusion, and for us to so conclude,

605 and 606 did not credibly show that the plaintiff knew or had reason to know of the defendant's interpretation of the term "interest" was not clearly erroneous.

We also are unpersuaded by the defendant's claim that the court's conclusion as to the proper interpretation of "interest" is incorrect because it conflicts with the plain language of the agreement. More specifically, the defendant argues that the lack of any references to equity or mortgages in the agreement's buyout provisions should have been dispositive on the question of whether those provisions included consideration of the existing mortgages. This is essentially the same argument we rejected in *Reiner*. In *Reiner*, this court concluded that the parties' agreement was ambiguous as to whether the buyout amount for the defendant's interests included the mortgages on the properties. *Reiner v. Reiner*, supra, 190 Conn. App. 283–84. That conclusion was binding on the trial court in all subsequent proceedings. See *Marshall v. Marshall*, 200 Conn. App. 688, 707–708, 241 A.3d 189 (2020) (“[i]t is a well-recognized principle of law that the opinion of an appellate court, so far as it is applicable, establishes the law of the case upon a retrial, and is equally obligatory upon the parties to the action and upon the trial court” (internal quotation marks omitted)). Moreover, when a contract is ambiguous, the trial court is required to determine the intent of the parties and is permitted to rely on extrinsic evidence in doing so. See *Hudson City Savings Bank v. Hellman*, 196 Conn. App. 836, 858–59, 231 A.3d 182 (2020). Therefore, the court properly considered evidence beyond the language of the agreement when making its factual findings regarding the intent of the parties.

especially without having heard all of the evidence that the trial court did, would require us to speculate, which we cannot do. See *In re Selena O.*, 104 Conn. App. 635, 644–45, 934 A.2d 860 (2007) (conclusions that rest on speculation are erroneous).

For the same reasons, we reject the defendant's argument that the court erred because it failed to consider the entire language of the agreement. According to the defendant, had the court considered the entirety of the agreement, it would have found additional language that supported the defendant's interpretation of the buyout provisions. This is yet another species of the defendant's argument that the agreement, as a whole, is clear and unambiguous on its face. Again, we reached a contrary conclusion in *Reiner* and did so after considering the entire language of the agreement. See *Reiner v. Reiner*, supra, 190 Conn. App. 282 n.12. The trial court recognized that it was bound by that conclusion and properly turned to parol evidence to determine the parties' intent. This evidence included the testimony of the parties from which the court found that "each party had a consistent and sincere belief that the agreement embodied his interpretation of the word 'interest.'" Given the evidence before it, the court's finding was not clearly erroneous. Furthermore, because we had determined that the language of the agreement is ambiguous, and given the court's finding that the parties had very different yet sincere views as to what they agreed to, the court employed a reasonable and logical approach to resolve their dispute. We find no error in that approach or in the factual findings on which the court relied.

Finally, we reject the defendant's claim that equity requires that the mortgage encumbering 603 Farmington not be included in the calculation of the buyout amount for that property because that mortgage was taken out solely to fund security deposits on the property that had not previously been funded due to mismanagement by the plaintiff.

We first note that this claim is inadequately briefed. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented

to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs.” (Internal quotation marks omitted.) *C. B. v. S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022). The defendant’s argument in support of this claim is both short and conclusory. Further, the defendant provides almost no meaningful analysis in support of the claim and does not provide a single citation to any applicable legal authority. Accordingly, the claim is inadequately briefed. See *id.*, 630–31 (claims were inadequately briefed when party provided “no meaningful analysis,” “almost no citation to applicable legal authorities,” and briefing was conclusory).

Moreover, even assuming that the defendant had properly briefed this claim, we still would conclude that the court did not err in finding that the mortgage on 603 Farmington is included in calculating the buyout amount for that property. As the plaintiff points out, the present case did not involve a determination of equity or any equitable adjustments. Instead, the case solely involved the interpretation of a contract, and there is no evidence that the parties intended to treat the mortgage on 603 Farmington any differently from the mortgages on the other properties. Therefore, the court did not err in treating 603 Farmington the same way as the other properties for the purpose of calculating the buyout amount.

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In sum, for all of the foregoing reasons, we conclude that the court properly determined that the buyout amount for the defendant's interests in the properties is calculated by multiplying his percentage interest in each property by the difference of the property's fair market value minus any outstanding mortgage debt.

The judgment is affirmed.

In this opinion the other judges concurred.

HOSSIEN KAZEMI ET AL. v.
LAURENCE ALLEN ET AL.
(AC 44377)

Prescott, Suarez and Palmer, Js.

Syllabus

The plaintiffs sought to recover damages from the defendants, A and G Co., for, inter alia, vexatious litigation, in connection with a prior quiet title action regarding a disputed area of real property. A acquired a parcel of real property in 1996, and, in 2014, the plaintiffs acquired the adjoining property. Subsequently, the defendants notified the plaintiffs of their claim to a strip of land along the northern boundary of the plaintiffs' property. In October, 2015, the plaintiffs filed on the land records a notice of intent to dispute and prevent the defendants from acquiring the right to possess the disputed area. The plaintiffs then commenced the action to quiet title to their property and to obtain a declaration that the defendants did not have an interest in the area. In response, the defendants asserted a two count counterclaim sounding in adverse possession and trespass, alleging that they had been in possession of the disputed portion of the plaintiffs' property for more than fifteen years prior to the filing of notice on the land records. Following a trial, the trial court found for the plaintiffs. The plaintiffs then filed the underlying action in relation to the defendants' counterclaim, and, following trial, the court found that the plaintiffs successfully had demonstrated that the defendants lacked probable cause to bring the counterclaim and that the defendants had failed to prove their defense of advice of counsel. On the defendants' appeal to this court, *held*:

1. This court determined that the defendants properly appealed from a final judgment in light of the fact that the trial court, although it did not explicitly address the plaintiffs' trespass count in its decision, implicitly disposed of that count; according to the testimony at trial, the plaintiffs incurred expenses to remove structures that had been placed on the

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- property following judgment in the action to quiet title and the court awarded the plaintiffs costs to remove those structures, such that the court implicitly found in favor of the plaintiffs on their count alleging a trespass.
2. The trial court did not err when it determined that the defendants lacked probable cause to bring the adverse possession and trespass counts of their counterclaim, there having been a dearth of evidence to support their claims: the court properly determined, on the basis of the evidence presented at trial, that the defendants did not have a reasonable good faith belief in the existence of facts essential to bring the adverse possession claim with respect to certain encroachments, their use of hedges, a retaining wall and pillar, a mailbox, and a driveway, because, although A testified that the alleged encroachments on which their adverse possession claims were based existed when he purchased the property in 1996, certain surveys and photographs admitted into evidence showed either that no such encroachments existed on various dates following the purchase or that the encroachments were on the defendants' property and not the plaintiffs' property, and the trial court found A's testimony not credible and inconsistent; moreover, because the court did not err in finding that the defendants lacked probable cause to believe that they had acquired the property by adverse possession, the defendants also lacked probable cause to assert their trespass claim with respect to the disputed property over which they had no possessory right.
 3. The trial court properly concluded that the defendants did not establish their advice of counsel defense, as evidence in the record supported the court's findings that the defendants withheld and misrepresented material facts to counsel, limited counsel's preparation, acted to prevent counsel from learning adverse material facts by preventing counsel from independently investigating to corroborate their version of events, and, thus, their reliance on counsel's advice necessarily could not have been made in good faith.
 4. The trial court properly inferred that the defendants acted with malice, that court having properly determined that the defendants lacked probable cause to bring their claims.

Argued January 4—officially released July 26, 2022

Procedural History

Action, inter alia, to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee; judgment for the plaintiffs, from which the defendants appealed to this court. *Affirmed.*

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Thomas B. Noonan, with whom were *Douglas S. Skalka* and, on the brief, *Dennis M. Carnelli*, for the appellants (defendants).

Michael J. Leventhal, for the appellees (plaintiffs).

Opinion

SUAREZ, J. In this vexatious litigation action, the defendants, Lawrence Allen (Allen) and Green Tree Estate Association, Inc. (Green Tree), appeal from the judgment of the trial court in favor of the plaintiffs, Hossien Kazemi and Mahvash Mirzai. On appeal, the defendants claim that the trial court improperly (1) determined that the plaintiffs established that the defendants lacked probable cause to bring the claims for adverse possession and trespass in their counterclaim, (2) denied the defendants' motion for a directed judgment, (3) determined that the defendants failed to establish their advice of counsel defense, and (4) found that the defendants acted with malice. We affirm the judgment of the trial court.

The following facts, as found by the court or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The defendants are the owners of real property known as 43 Maple Avenue (43 Maple) in Greenwich. The property was first acquired by Allen on October 16, 1996, and was later converted into a four unit condominium on December 5, 1998. Allen owns the condominium units, and Green Tree owns the common areas. On March 10, 2014, the plaintiffs acquired real property known as 33 Maple Avenue (33 Maple), the adjoining property situated to the south of 43 Maple. On September 14, 2015, John Tesei, Allen's attorney, sent a letter to the plaintiffs, on behalf of the owners of 43 Maple, in which he notified the plaintiffs of the defendants' claim to a strip of land along the northern boundary of 33 Maple. In the letter, Tesei indicated that the claim was based on the defendants'

adverse use of the disputed area for more than fifteen years by maintenance of shrubs, a curbed driveway, and a stone pillar. In response, on October 20, 2015, the plaintiffs served on the defendants, pursuant to General Statutes § 52-575,¹ a notice of intent to dispute and prevent the defendants from acquiring the right to possess the disputed area. The notice was recorded on the land records on October 22, 2015.

Immediately thereafter, the plaintiffs commenced an action to quiet title to 33 Maple pursuant to General Statutes § 47-31 and to obtain a declaration that the defendants did not have an interest in the disputed area (prior action). In response, the defendants asserted a statute of limitations special defense under § 52-575 (a) and a two count counterclaim sounding in adverse possession of the disputed area and trespass. The defendants alleged that they had been in possession of the disputed portion of 33 Maple for more than fifteen years prior to October 22, 2015, the date on which the notice

¹ General Statutes § 52-575 (a) provides in relevant part: “No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded . . . shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice. The limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate.”

had been recorded. In their answer, the defendants alleged that several acts gave rise to adverse possession of the disputed property, including the defendants' maintenance of a driveway, a chain link fence, a stone pillar, certain shrubs, bushes and plants next to the stone pillar, and a mailbox. The defendants' trespass counterclaim alleged that the plaintiffs' workers had "destroyed the fence and mailbox" The defendants filed an amended counterclaim on May 2, 2017, which alleged the maintenance of a "brick pillar" along with the plants and mailbox. The amended counterclaim also alleged that the chain link fence was just a demarcation of the disputed area and it no longer alleged that the fence was maintained by the defendants. The amended trespass counterclaim alleged that the plaintiffs' agents entered the disputed area to replace the fence and that they "removed, dismantled, and/or otherwise displaced the mailbox"

The prior action was tried before the court, *Hon. David R. Tobin*, judge trial referee, on April 18 and 20, 2018. The court issued a memorandum of decision dated June 13, 2018, in which it quieted title to 33 Maple in favor of the plaintiffs and rejected the defendants' special defense and counterclaim of adverse possession. The court, after examining the evidence adduced at trial, concluded that the only evidence supporting the adverse possession counterclaim was Allen's uncorroborated testimony, which was insufficient to sustain the defendants' burden of proof. The court did not address the defendants' trespass counterclaim in its memorandum of decision because that claim was withdrawn by the defendants at trial in the prior action after they had rested their case.

Thereafter, on September 12, 2018, the plaintiffs filed the action underlying the present appeal. The complaint

alleged causes of action against the defendants sounding in slander of title,² vexatious litigation, vexatious litigation with malicious intent, and trespass. The vexatious litigation claims³ against the defendants related to their counterclaim alleging adverse possession and trespass that they had raised in the prior action. In their defense against the vexatious litigation claims, the defendants attempted to demonstrate that they had brought their counterclaim in good faith and on the advice of counsel.

Following a trial to the court, *Hon. Edward T. Krumreich II*, judge trial referee, the court found that the plaintiffs successfully had demonstrated that the defendants lacked probable cause to bring the counterclaim alleging adverse possession and trespass and that the defendants had failed to prove their advice of counsel

² On December 27, 2019, the court granted the defendants' motion to dismiss the slander of title count after finding that the defendants were entitled to the absolute litigation privilege. There are no claims on appeal related to this issue.

³ In the counts of the complaint alleging vexatious litigation, the plaintiffs do not specifically indicate whether the claims are statutory claims, brought under General Statutes § 52-568, or common-law claims. In the prayer for relief, however, the plaintiffs requested, for the second count, "[d]ouble damages pursuant to . . . § 52-568 (1)" and for the third count, "[t]reble damages pursuant to . . . § 52-568 (2)" Despite the plaintiffs' lack of precision in the counts of the complaint, the court, in its memorandum of decision, asserted that the "plaintiffs claim that in . . . prosecuting the counterclaims in the prior action [the] *defendants committed vexatious litigation under . . . § 52-568 and at common law.*" (Emphasis added.) After finding that the defendants lacked probable cause to bring the claims and that they acted with malice, the court ultimately awarded the plaintiffs' treble damages under § 52-568 (2). We note that, regardless of whether the plaintiffs' claims in the present case were brought under § 52-568 or the common law, our analysis in this opinion with respect to probable cause is the same. See *Ferri v. Powell-Ferri*, 200 Conn. App. 63, 68, 239 A.3d 1216 (noting that "[a] statutory action for vexatious litigation under . . . § 52-568 . . . 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" (footnote omitted; internal quotation marks omitted)), cert. denied, 335 Conn. 970, 240 A.3d 285 (2020).

defense. In its memorandum of decision, the court found the following facts: “[The] defendants have demonstrated that they consulted with impartial counsel who advised them they had viable claims. . . . The credible evidence established there was not full and fair disclosure of material facts to counsel. Allen withheld and misrepresented material facts to counsel, limited counsel’s preparation and acted to prevent counsel from learning adverse material facts by preventing counsel from independently investigating the defense and claims to corroborate his version of events. Allen did not rely on counsel’s advice but, rather, manipulated counsel to accept his false version of events and acted in bad faith in prosecuting the limitations defense and [both counts of] the [counterclaim].

“The court finds Allen’s testimony lacked credibility in many respects. Allen testified that the alleged encroachments existed when he purchased 43 Maple . . . in 1996. The 1998 survey belies that claim because it shows no encroachments and, indeed, shows neither the pillar and wall nor the mailbox shed. The 2006 survey also omits the mail shed but does show a new encroaching stone wall without a pillar where the 1998 survey showed a nonencroaching u-shaped structure. Allen was disingenuous when he testified in this case he was not familiar with surveys yet claimed the 1998 survey was inaccurate, as he did in the trial before Judge Tobin. The court rejects Allen’s interpretation of the 1998 survey that the u-shaped structure shown is the encroaching wall depicted on the 2006 survey. The absence of a pillar is also striking because the 1998 survey calls out a pillar at another location. Allen’s assertion that the surveys are not accurate rings hollow and is contradicted by other evidence that corroborates the wall and pillar and the mail shed were constructed after the 1998 survey.

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“The amended counterclaim’s change of allegations from a stone to a brick pillar was significant. Allen testified that the pillar was brick when he purchased the property in 1996 and was subsequently clad in fieldstone as part of the condominium renovations. No brick was shown in the video of the pillar’s demolition and the demolition contractor testified the workers found no brick when the fieldstone pillar was demolished in 2019, along with the encroaching fieldstone, rubble, and mortar wall to which it was attached. The court finds that the encroaching wall and pillar were constructed sometime after 1996 and that Allen’s testimony to the contrary in both trials was false. The court also finds that the stone pillar was added later and the testimony by Allen that there was originally a brick pillar in 1996 was fabricated to explain evidence that the pillar was formed of stone when the wall was extended and became an encroachment sometime after the 1998 survey.

“Hedges are shown on both the 1998 and 2006 surveys on 43 Maple . . . at the location Allen testified there were shrubs and other plantings in 1996 that encroached on 33 Maple . . . which were maintained by [the] defendants’ landscapers. The only photograph of the hedges shows tall landscaped hedges that appear to be on [the] defendants’ side of the property line with low ground cover beneath, possibly pachysandra or ivy also depicted nearby. No shrubs or other plantings are shown in the photograph. Although the court credits that [the] defendants’ landscapers maintained the hedge and ground cover beneath, there is no proof of any encroachment by the hedge and ground cover on 33 Maple . . . that existed in 1996, as Allen testified.⁴

⁴ “Because [the] defendants never engaged a surveyor to map out the claim to have adversely possessed a portion of 33 Maple . . . or to stake the line, there is a paucity of evidence as to the location of any alleged encroachments other than a portion of the wall where the pillar and wall were located on the 2006 survey.”

“The mailbox shed was added sometime after the condominium conversion in December, 1998, presumably as part of the condominium construction project. The credible evidence is that the shed was originally placed on a concrete pad located on 43 Maple . . . and moved to a new location for the convenience of the postal service. The photograph of the mail shed and the concrete pad appear to show both to be on 43 Maple. [In the prior action] Judge Tobin could not find the shed encroached on 33 Maple for the requisite period.

“Allen went to great lengths to keep his counsel in the dark about material facts and surveys that contradicted his version of events and stymied their efforts to investigate his narrative. All three counsel involved relied on information supplied by Allen as to the alleged encroachments and their duration when advising him as to the merits of his defense and claims. The only source of information to counsel about the encroachments and their duration came from Allen, who kept [Attorney David W.] Rubin, and especially [Attorney Michael] Powers, on a tight leash ostensibly to keep them from overcharging him but also to prevent them from learning about Allen’s deception. Allen would not allow Rubin to interview witnesses he wanted to interview and accused both his trial counsel of trying to run up their fees when they recommended doing more than the minimum Allen authorized to prepare and defend the case. Attorney Rubin twice moved to withdraw as counsel, in part, because he disagreed with Allen’s efforts to prevent him from investigating the case to corroborate what Allen had told him and because Allen did not take counsel’s advice as to how the case should be prepared, defended and prosecuted. Allen’s interrogatory responses to the first set of interrogatories, prepared by Rubin’s associate and certified as true by Allen, stated that the stone pillar was located on the property when he purchased [it] in 1996. In his responses to the

second set of interrogatories, after amendment of the answer, Allen swore there was a ‘brick’ pillar there when he purchased the property in 1996. Neither is supported by the objective evidence adduced at trial, notably the 1998 and 2006 surveys and the evidence related to demolition of the pillar in 2019. Allen did not supply counsel with the 1998 and 2006 surveys done by his surveyor, which turned out to be pivotal evidence at trial in the prior action. The 2006 survey was the only objective evidence that there was any encroachment at all and forced counsel to rely on Allen’s anecdotal evidence that the encroachments existed for the requisite period.

“Rubin wanted to interview and/or depose Nakolin-kova Bliznakova in San Francisco but Allen would not permit him to do so, citing the expense. At trial in the prior action her testimony as a rebuttal witness was devastating to [the] defendants. She testified she was the granddaughter of the owners of 33 Maple . . . and grantor on the deed to [the] plaintiffs. She testified the hedge was planted by her grandfather and was maintained by her family. She testified the chain link fence was erected by her grandfather to keep his dogs from leaving the property. Judge Tobin found the fence was never intended to demarcate the boundary between 43 Maple and 33 Maple and the hedge was located ‘entirely, or in large measure,’ north of both the fence and the property line.

“[Powers] replaced Rubin as defense counsel on July 27, 2017, and he tried the case in the prior action. When he was retained, he assured Allen he would not need to conduct an extensive investigation or interview and/or depose fact witnesses but would rely on the testimony of Allen, his wife Michelle Allen, and one of their landscapers. Little or no activity occurred in the case as reflected in the court’s file until the trial date approached and then there was a flurry of activity that

[appears] calculated to delay trial and encourage settlement.

“On April 18, 2018, the first day of trial before Judge Tobin, [the] plaintiffs rested after brief testimony by Kazemi. Allen testified the remainder of the day to conclusion. An e-mail from Allen to . . . Powers on Monday, April 16, 2018, two days before trial, listed three witnesses, [Allen, Michelle Allen] and a landscaper. Those were the only witnesses [the] defendants intended to call at trial. Apparently, by the evening of the first trial day, Allen became concerned [the] defendants had not met their burden of proof to the satisfaction of Judge Tobin. That same day, on Wednesday, April 18, 2018, at 6:44 p.m., Allen sent Powers an e-mail stating that ‘I have the general contractor and architect willing to sign attestation letters’ as to construction of the mailbox and fieldstone cladding of the existing retaining wall. At 8:41 p.m. later that same day, Allen sent Powers an attestation letter he had drafted. At 9:30 a.m., the next day, April 19, 2018, the day before the second and final day of trial, Allen sent Powers proposed attestation letters he had drafted for signature by Michael Blanc . . . the architect, and Mark Mantione . . . the general contractor on the condominium conversion project and Joann P. Erb, a realtor involved in marketing Allen’s properties. The attestation letters drafted by Allen and later signed by the contractor, architect, and realtor were addressed to Judge Tobin and attested to certain facts relating to the mailbox, wall, and pillar and landscaping at issue. These unsworn letters were never admitted into evidence and the signatories were never witnesses at trial of the prior action. Their significance to the claims in this action is as evidence that Allen knew the identity of the architect, contractor, and realtor and knew they had material information about the subject property that was kept from his counsel, who in the ordinary course at least would have interviewed

them and reviewed their files in preparation of the case. Allen had claimed at his deposition on May 9, 2017, he could not recall the name of the contractor who had worked on the pillar. If that was true initially, which is doubtful, it clearly was not true later as the case proceeded toward trial.

“Some of the information in the attestation letters is not helpful to [the] defendants in this case. For example, Mantione attested his crew poured the slab and built the mail shed in November, 1998, and then, ‘[i]n or about January, 1999, my crew moved the mailbox approximately 3 [to] 5 feet to the left of the cement slab inside the hedges, at the request of the Greenwich Post Office.’ That is the position shown in the photograph of the mail shed and concrete pad, which appear to be on 43 Maple, not 33 Maple, north of the hedge the surveys place on [the] defendants’ property. Mantione’s letter also attests that in or about March, 1999, his crew ‘extended the height at the beginning of the retaining wall to form a small pillar.’ If true, the pillar did not exist in 1996, when Allen testified it existed. Mantione backtracked when he testified in this action that he clad an existing pillar with fieldstone, presumably to bolster Allen’s testimony about an existing brick pillar, but that testimony is not credible and is contradicted by the surveys, the credible testimony of the demolition contractor and the pillar demolition video. The encroaching pillar was constructed of fieldstone when the section of the stone and rubble wall was extended and then encroached on 33 Maple . . . as shown on the 2006 survey.

“Blanc, the architect, signed an attestation letter dated April 17, 2018, the day before the trial started, which contradicted Mantione by stating the ‘mailbox stand . . . was not constructed by one of the contractors or by the present owners of 43 Maple’ Blanc

corroborated Mantione's letter, and contradicted Mantione's testimony at trial in this case and the prior case, by attesting that, in or about March, 1999, the renovation work '[e]xtended height at the beginning of the retaining wall to form a small pillar.' This contradicts Allen's testimony in both trials that the pillar existed in 1996. The 1998 survey does not show an existing retaining wall at that location, while the 2006 survey shows an encroaching wall there, which is proof the wall was not merely heightened, as Blanc and Mantione attested, but rather it was constructed sometime between December 4, 1998, and August 18, 2006, the respective survey dates. Allen's testimony that there had been no improvements since 1998 was false.

"Neither Rubin nor Powers had the benefit of interviewing Blanc or Mantione or reviewing their files. Neither counsel was provided with their names until Powers was presented with the attestation letters during trial. The attestation letters were not admissible; the realtor letter was offered but not admitted as hearsay by Judge Tobin. [The] defendants did not offer the architect and contractor attestation letters. Powers was not informed of the contractor, architect, and realtor as potential witnesses until shortly before the second day of trial. Rubin never knew their identity. Allen knew who they were, knew that the architect and contractor and their files would be a likely source of material information and yet he withheld their identity from his counsel.

"Also on April 19, 2018, at 10:29 p.m., Allen informed Powers that his wife found new evidence, including a 1997 survey that showed the wall and overhead photos of 43 Maple . . . in 1997, 2003 and 2006. By e-mail of same date at 10:51 p.m., Allen sent Powers the certified attestation letters and a 1997 survey by S.E. Minor and stated he would bring a 2005 survey by Ahneman to court the next day. The 2005 survey showed an

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encroaching ‘retaining wall’ as of March, 2005, according to Judge Tobin’s findings. Neither counsel had benefit of these late produced documents when they advised Allen of the viability of the defense and claims.

“The significance of the late provided evidence and the attestation letters was that information which should have been available to counsel was not provided to them by Allen so any advice counsel gave was not informed by what counsel would have learned from the missing evidence and lost opportunities to investigate. The court does not believe Allen’s testimony that he wanted Mantione, Blanc and [Erb] to testify at [the] trial of the prior action but Powers decided not to call them because he had missed the deadline for listing them as witnesses or because they had not been deposed. Instead, the court credits Powers’ testimony Allen did not want them to testify. Allen’s apparent strategy for preparing the attestation letters was to avoid live testimony and use written statements to control the information to be given to Judge Tobin and to avoid cross-examination that would contradict his version of events.

“Allen’s strategy was to defend the prior action based on the false narrative that there were encroachments on 33 Maple . . . that existed in 1996 when Allen purchased 43 Maple He compounded this by fabricating a trespass claim that was bereft of evidence and was withdrawn at trial of the prior action after [the] defendants had rested their case. Allen believed that Kazemi was a real estate developer who planned to build a new house and flip the property. The Tesei letter and later the special defense and [counterclaim] were designed to give him leverage for concessions as to the disputed strip and to keep any encroaching wall and pillar, hedge and plantings. His approach to the litigation was to forestall [the] plaintiffs’ efforts to enforce

their title to 33 Maple . . . while keeping [the] defendants' expenses low with the expectation of settlement. When trial loomed, he had his attorney file frivolous motions with the hope of bringing [the] plaintiffs to the bargaining table and avoiding trial.⁵ When he could not avoid trial, and indeed was in the midst of trial, Allen manufactured evidence that he sprung on his attorney at the last minute. He presented testimony by two of these witnesses, Mantione and [Erb], at trial in this case. Mantione's testimony was not credible as it related to the wall and pillar, which, he testified, was existing and in need of repair and his crew merely repaired and clad in fieldstone. It is clear from the surveys that the portion of the wall that encroached on 33 Maple . . . was constructed after December 4, 1998, but before August 18, 2006. Thus, the encroaching wall and pillar were either new when Mantione came onto the project, having been constructed by his predecessor contractor, or, more likely, Mantione constructed the wall or pillar, which is more consistent with his attestation letter that states his crew formed the pillar. Either way, these facts contradict Allen's testimony that the pillar and wall existed when he bought the property in 1996. The court credits [Erb's] testimony that [the] defendants maintained the hedge and ground cover shown in the photograph, but she started representing [the] defendants in

⁵ "Two egregious examples of frivolous and dilatory motions filed by [the] defendants were the motion to dismiss filed on February 22, 2018, less than two months before trial was scheduled, and the application for ex parte temporary injunction filed the week before on February 16, 2018. In the motion to dismiss [the] defendants denied they were owners of 43 Maple . . . and referred to various conveyances to Allen's entities. The motion to dismiss was denied after a hearing. In fact, [the] defendants were the owners of 43 Maple In the application for ex parte temporary injunction [the] defendants falsely represented: '[The] plaintiffs are in the process of removing stone walls, shrubbery, and other physical structures that exist on the disputed portions of real property for which are the corpus of this case.' The court vacated the ex parte injunction that had been issued on February 23, 2018 There was no evidence that the events sworn to by Allen ever occurred and it appears Allen's affidavit was either based on

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2002 and could not attest to the more than fifteen year duration of maintenance claimed by [the] defendants. In any event, neither Manton nor [Erb] testified in the trial before Judge Tobin, nor did the architect Blanc, all of whom were known to and could have been called by Allen. Powers testified Allen did not want them to come to court and would not pay for subpoenas.

“Allen’s false and deceptive misconduct in the prior action provides graphic evidence of his lack of probable cause, bad faith and malice. . . . Allen’s false testimony in this case, and in the prior action, confirms his willingness to dissemble if he believes perjury and false pleading would advance what he perceives to be his interests. [The] defendants’ defense and [counterclaim] in the prior action were grounded in the fiction that there were encroachments on 33 Maple . . . that existed when Allen purchased 43 Maple . . . in 1996. The trespass claim was based on an alleged event that did not happen and fictional possessory rights. Allen did not have probable cause to assert the defense and [both counts of the counterclaim] and did so maliciously to obtain leverage over [the] plaintiffs, who he believed planned to flip the property for sale and would be amenable to settlement on Allen’s terms.” (Citations omitted; footnotes in original; footnotes omitted.)

After finding that the plaintiffs had “proven their vexatious litigation claim by a fair preponderance of the evidence,” the court awarded them compensatory damages, which included “demolition costs of \$304.69,” “surveying costs of \$505,” and “attorney’s fees in the prior action of \$58,680.50” Because the court found both a lack of probable cause and that the defendants acted with malice, the court awarded the plaintiffs treble damages under General Statutes § 52-568, for a

pure hearsay from his wife that turned out not to be true or was simply made up.”

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total damages award of \$178,470.57. This appeal followed. Additional facts will be set forth as necessary.

I

As a preliminary matter, we address whether the defendants appealed from a final judgment in light of the fact that the court, in its decision, did not explicitly address the plaintiffs' trespass count. "[E]ven where the appellee fails to bring to our attention the lack of a final judgment, either by motion to dismiss or in its brief, or at oral argument, we must, nonetheless, act *sua sponte*." (Internal quotation marks omitted.) *Mase v. Riverview Realty Associates, LLC*, 208 Conn. App. 719, 726, 265 A.3d 944 (2021). As a result of our final judgment concerns, we notified the parties that "[a]t oral argument, counsel of record . . . [should] be prepared to address whether the defendants appealed from a final judgment given that the trial court's October 26, 2020 memorandum of decision does not expressly dispose of the fourth count of the plaintiffs' complaint alleging a cause of action for trespass."

The right of appeal is purely statutory, and General Statutes § 52-263⁶ provides that parties may appeal to this court from the final judgment of the trial court. See *In re Teagan K.-O.*, 335 Conn. 745, 754, 242 A.3d 59 (2020) ("a final judgment . . . is a statutory prerequisite to appellate jurisdiction" (citations omitted)). "[L]ack of a final judgment is a jurisdictional defect that mandates dismissal." (Internal quotation marks omitted.) *RAL Management, Inc. v. Valley View Associates*, 278 Conn. 672, 686, 899 A.2d 586 (2006).

"When judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment. . . . As a general rule, however, a judgment that

⁶ General Statutes § 52-263 provides in relevant part: "[I]f either party is aggrieved by the decision of the court . . . upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction from the final judgment of the court . . ." (Emphasis added.)

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disposes of only a part of a complaint is not final, unless it disposes of all of the causes of action against the appellant.” (Citation omitted; internal quotation marks omitted.) *Meribear Productions, Inc. v. Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018). “In assessing whether a judgment disposes of all of the causes of action against a party, this court has recognized that the trial court’s failure to expressly dispose of all of the counts in the judgment itself will not necessarily render the judgment not final. Rather, the reviewing court looks to the complaint and the memorandum of decision to determine whether the trial court explicitly or implicitly disposed of each count.” (Emphasis omitted.) *Id.*, 718.

In the present case, the court’s October 26, 2020 memorandum of decision clearly disposed of the plaintiffs’ vexatious litigation claims. The court explicitly found that the defendants lacked probable cause to bring both counts of their counterclaim for adverse possession and trespass and, as a result, the plaintiffs had proven their vexatious litigation claims. The court also found that the defendants had acted with malice. The court did not, however, expressly analyze or render judgment with respect to the plaintiffs’ count alleging trespass, which raises the issue of whether the court rendered a final judgment. We conclude, nevertheless, that the court implicitly disposed of the plaintiffs’ trespass count and, thus, it rendered a final judgment.

The plaintiffs’ claims against the defendants included vexatious litigation, vexatious litigation with malicious intent, and trespass. In their complaint, the plaintiffs sought as relief, inter alia, “[d]amages in the amount required to restore and repair 33 Maple after the defendants’ trespass.” Generally, “[w]hen injury to property resulting from a trespass is remedial by restoration or repair . . . the measure o[f] damages is the cost of

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restoration and repair.” (Internal quotation marks omitted.) *Argentinis v. Fortuna*, 134 Conn. App. 538, 556, 39 A.3d 1207 (2012). In contrast, “[t]he purpose of [an] action [for vexatious litigation] is to compensate a wronged individual for damage to his reputation and to reimburse him for the expense of defending against the unwarranted action.” (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC v. Dunican*, 286 Conn. 548, 554, 944 A.2d 329 (2008).

According to the testimony at trial, the plaintiffs, after prevailing in the prior action, “incur[red] expenses to remove structures that had been placed on [the] property,” including \$505 to have “surveyors . . . come and stake out the property correctly” and \$304.69 “for demolition of the wall” Although the court did not explicitly address the trespass cause of action in its memorandum of decision, the court awarded the plaintiffs “demolition costs of \$304.69” and “surveying costs of \$505” Taking into consideration the complaint, the memorandum of decision, and the award of expenses incurred to restore and replace the property, we conclude that the court implicitly found in favor of the plaintiffs on their count alleging a trespass. Because we have determined that the court implicitly disposed of the plaintiffs’ count alleging a trespass, it follows that the court disposed of all of the counts in the plaintiffs’ complaint, and, therefore, we conclude that the court rendered a final judgment.

II

On appeal, the defendants first claim that the court erred in concluding that the plaintiffs established, for purposes of the vexatious litigation claims,⁷ a lack of

⁷ As we noted previously in this opinion, in their complaint, the plaintiffs alleged two separate counts of vexatious litigation against the defendants, both of which were based on the defendants’ underlying claims of adverse possession *and* trespass. One of the counts was labeled “vexatious suit” and the other count was labeled “malicious vexatious suit.”

probable cause related to the defendants' counterclaim in the prior action alleging claims for adverse possession and trespass. Specifically, the defendants argue that they "alleged facts and presented a viable claim for adverse possession in the [prior] action with respect to the [use of the] disputed property due to [the] defendants' having, for a period of not less than fifteen years, maintained the hedges and grounds up to the chain-link fence, erected the retaining wall and pillar, erected and placed the mailbox shed, and placed the Belgian block along the driveway." (Footnote omitted.) The defendants, therefore, argue that there was probable cause to bring the claim of adverse possession.⁸ The defendants also argue that they had probable cause to bring the counterclaim of trespass because "[t]he evidence . . . demonstrates that [the] defendants had a possessory right to [the disputed area] based on adverse possession and that [the] plaintiffs entered this area and moved the mailbox without permission and constructed a fence in the disputed [area]."⁹

⁸ "The essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner." (Internal quotation marks omitted.) *Anderson v. Poirier*, 121 Conn. App. 748, 752, 997 A.2d 604, cert. denied, 298 Conn. 904, 3 A.3d 68 (2010).

⁹ In their brief, the defendants also argue, albeit in a conclusory manner, that the court conflated its analysis of probable cause with its analysis of the advice of counsel defense, specifically with respect to its findings that Allen had lied to his counsel. In the introductory section of the defendants' brief, the defendants assert that "the court purported to consider and determine an essential element of [the] plaintiffs' claim—lack of probable cause—through the lens of [the] defendants' advice of counsel defense, thereby commingling the parties' burdens to a point where factual evidence of probable cause clearly was not considered."

We observe that the defendants did not adequately brief this aspect of their claim with reference to any authority or an analysis of the court's written decision. As this court has explained previously, "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial

We begin by setting forth the legal principles relevant to our resolution of this claim. “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.” (Citation omitted; internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC v. Dunican*, supra, 286 Conn. 554. “For purposes of a vexatious suit action, [t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable

court on the basis of challenges to its rulings that have not been adequately briefed.” (Internal quotation marks omitted.) *Starboard Fairfield Development, LLC v. Grempe*, 195 Conn. App. 21, 31, 223 A.3d 75 (2019). When, during oral argument, a member of this panel asked counsel for the defendants about this aspect of their claim, counsel did not seem to remember having made this argument at all and did not pursue it.

Even if the argument is properly before us, we note that the court’s memorandum of decision reflects that, in a single sentence, the court stated that “Allen’s false and deceptive misconduct in the prior action provides graphic evidence of his lack of probable cause, bad faith, and malice.” Despite this isolated reference linking its analysis of “probable cause” with its finding concerning Allen’s “deceptive misconduct,” our review of the decision as a whole reflects that the court did not conflate probable cause with its findings that Allen had lied to counsel. The court’s analysis of probable cause was supported by reference to appropriate legal principles and it does not appear to have been intertwined with its analysis of the advice of counsel defense raised by the defendants. “It is well settled that [we] do not presume error; the trial court’s ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary.” (Internal quotation marks omitted.) *Ellen S. v. Katlyn F.*, 175 Conn. App. 559, 565, 167 A.3d 1182 (2017).

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cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted.” (Citations omitted; internal quotation marks omitted.) *DeLaurentis v. New Haven*, 220 Conn. 225, 256, 597 A.2d 807 (1991).

“We are mindful that [p]robable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in [vexatious litigation] must separately show lack of probable cause. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win Were we to conclude . . . that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories.” (Internal quotation marks omitted.) *Tatoian v. Tyler*, 194 Conn. App. 1, 59, 220 A.3d 802 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020).

“A statutory action for vexatious litigation under . . . § 52-568 . . . 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 either type of action, however, [t]he existence of probable cause is an absolute protection against an action for malicious prosecution” (Footnote omitted; internal quotation marks omitted.) *Ferri v. Powell-Ferri*, 200 Conn. App. 63, 68, 239 A.3d 1216, cert. denied, 335 Conn. 970, 240 A.3d 285 (2020).

We next set forth the standard of review for this claim. “[W]hat facts, and whether particular facts, constitute probable cause is always a question of law. . . .

Accordingly, our review is plenary.” (Internal quotation marks omitted.) *Id.* When our review is plenary, “we must decide whether [the court’s] conclusions are legally and logically correct and find support in the facts that appear in the record.” (Internal quotation marks omitted.) *Barber v. Barber*, 193 Conn. App. 190, 196, 219 A.3d 378 (2019).

We first address the defendants’ challenge to the factual findings on which the court relied when it determined that the defendants lacked probable cause to bring the adverse possession claim. When an appellant challenges the factual findings on which the court’s finding of a lack of probable cause is based, we apply the clearly erroneous standard of review. “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.) *Casiraghi v. Casiraghi*, 200 Conn. App. 771, 788, 241 A.3d 717 (2020). “Because factual findings and credibility determinations are squarely within the trial court’s purview, we afford them great deference. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court’s ruling.” (Citation omitted; internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc. v. Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017).

In the present case, the defendants argue that the court erred in finding that the hedges do not encroach onto 33 Maple. The defendants assert that the court’s finding that the hedges did not encroach on 33 Maple “contradicts the testimony of the only witnesses who had personal knowledge of the hedges.” They further

argue that the court's finding was based on the 1998 and 2006 surveys, "which the court purported to interpret in the absence of requisite expert testimony." They contend that the court's finding is clearly erroneous because "the court appears to have found that there was no evidence that the hedges encroached onto 33 Maple because it disbelieved Allen, not because there is evidence in the record permitting a reasonable inference that the hedges did not encroach onto 33 Maple." We are not persuaded.

At trial, Allen testified that there were shrubs and other plantings that encroached on 33 Maple, which were maintained by the defendants' landscapers. There was also testimony from Mantione that the hedges extended to the pillar and retaining wall that he built in 1998 and from Erb that the defendants maintained the hedges and ground cover shown in a photograph that was entered into evidence at trial. As we recited previously in this opinion, however, the court, in its memorandum of decision, found that "Allen's testimony lacked credibility in many respects." There was also evidence in addition to Allen's testimony, by way of the 1998 and 2006 surveys,¹⁰ that depicted the hedges at the

¹⁰ Both the 1998 and 2006 surveys were entered into evidence as full exhibits without objection at trial. The defendants never claimed at trial that an expert was necessary to interpret the surveys. To the extent that the defendants argue that the court was unable to rely on the surveys in the manner that it did, they appear to raise a claim related to the admissibility of the surveys. We decline to entertain an unpreserved evidentiary claim in the context of this claim. "Whenever evidence is admitted without objection, the trier of fact can rely on its contents for whatever they are worth on their face. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *Lambert v. Donahue*, 78 Conn. App. 493, 501, 827 A.2d 729 (2003). Because these surveys were admitted into evidence without limitation, the court properly drew whatever inferences from the surveys that it deemed to be reasonable.

location that Allen described. This evidence, however, shows that the hedges are located on 43 Maple, not 33 Maple. Additionally, contrary to Allen's testimony, the only photograph of the hedges that was entered into evidence shows tall landscaped hedges that appear to be on the defendants' side of the property line, and the photograph does not depict any shrubs or other plantings. Consequently, the court's finding that the hedges did not encroach onto 33 Maple was not clearly erroneous because there is evidence in the record, namely the surveys and photographs, to support this finding, and the court specifically found Allen's testimony not credible.

We now turn to whether, on the basis of the facts found by the court, the defendants had probable cause to bring the adverse possession and trespass claims. The defendants argue that the court erred in determining that the plaintiffs established a lack of probable cause for the adverse possession claim with respect to the defendants' use of the hedges, the retaining wall and pillar, the mailbox, and the driveway. Allen testified that the alleged encroachments onto 33 Maple on which the adverse possession claims are based existed when he purchased 43 Maple in 1996. The defendants argue, therefore, that they had probable cause to assert the adverse possession claim having met the requirements of adverse possession for the statutory period of fifteen years. The 1998 survey, however, shows no such encroachments. Moreover, as previously mentioned, the court did not credit Allen's testimony with respect to the encroachments and concluded that "Allen's strategy was to defend the prior action based on the false narrative that there were encroachments on 33 Maple . . . that existed in 1996 when Allen purchased 43 Maple" The court therefore determined that the defendants lacked probable cause to bring the adverse possession claim. We agree and affirm the judgment of the court.

We begin by examining the defendants' adverse possession claim as it pertained to the defendants' use of the property—specifically, with respect to the hedges. As previously mentioned, Allen testified that there were shrubs and other plantings that encroached onto 33 Maple and that they were maintained by the defendants' landscapers. Both the 1998 and 2006 surveys depict hedges at the location that Allen described; however, the surveys depict these hedges to be on 43 Maple, not 33 Maple. Additionally, the only photograph of the hedges entered into evidence depicts them to be on the defendants' side of the property line, which also indicates that the hedges did not encroach on 33 Maple.

Although Allen testified that shrubs and bushes encroached onto 33 Maple, there were no shrubs or other plantings depicted in the photograph, and the court did not find Allen's testimony credible. Further, when asked about the depiction of the hedges in the survey, Allen admitted that the survey showed the hedges to be located entirely on the property of 43 Maple. The court found, contrary to Allen's testimony, that there was no proof of any encroachment by the hedges or other plantings onto 33 Maple that existed in 1996. The court further noted that the defendants never engaged a surveyor to specifically map out the area that they claimed to adversely possess or to stake the property line, and, as a result, there was a lack of evidence as to the location of any encroachments. We conclude that the court properly determined, on the basis of the evidence presented at trial, that the defendants did not have a reasonable good faith belief in the existence of facts essential to bring the claim and thus lacked probable cause to bring the adverse possession claim as it pertained to the defendants' use of the property—specifically, with respect to the hedges.

Allen also testified that the retaining wall and pillar existed in 1996. The 1998 survey, however, does not

show an existing retaining wall or pillar. The 2006 survey does show a retaining wall, which indicates that the portion of the wall that encroached onto 33 Maple was constructed sometime between December 4, 1998, and August 18, 2006, the dates on which the respective surveys were completed. Because the 2006 survey also depicts the pillar, the surveys further indicate that the encroaching pillar was constructed when the section of the retaining wall was extended, which then caused it to encroach on 33 Maple. Both surveys contradict Allen's testimony that the pillar and wall existed when he bought the property in 1996.

Further, Allen's testimony at trial about the interrogatories that he answered in the prior action reveals that his answers to the first and second sets of interrogatories are internally inconsistent. Additionally, Mantione's attestation letter in the prior action, which was drafted by Allen, is also inconsistent with Allen's testimony at trial in the present case. On the basis of these inconsistencies, the court found that "Allen's apparent strategy for preparing the attestation letters was to avoid live testimony and use written statements to control the information to be given to Judge Tobin and to avoid cross-examination that would contradict his version of events." In Allen's first set of interrogatories in the prior action, Allen stated that there was a stone pillar located on the property when he purchased it in 1996. In the second set of interrogatories, however, he stated that there was a brick pillar on the property when he purchased it in 1996. Allen testified at trial that the pillar was brick when he purchased the property in 1996 and subsequently was clad in fieldstone as part of the condominium renovations. Contrary to Allen's testimony, there was no brick shown in the video of the pillar's demolition, and the demolition contractor testified that the workers found no brick when the pillar was demolished in 2019.

Additionally, Mantione's attestation letter, which was drafted by Allen, stated that Mantione and his crew extended the height at the beginning of the retaining wall to form a small pillar during their work on the property in 1999. If the statement in the letter is true, it would indicate that the pillar did not exist in 1996 as Allen testified. When Mantione testified in the present matter, however, he asserted that he did not form a new pillar in 1999; rather, he clad an existing pillar with fieldstone. Mantione's testimony is contradicted by the surveys and the testimony about the demolition of the pillar, and the court ultimately found it to be not credible. Instead, the court found this change in testimony to be an effort to bolster Allen's testimony about the existing brick pillar. On the basis of the surveys and the significant inconsistencies in the testimony of both Allen and Mantione, we agree with the court that the defendants did not have a reasonable, good faith belief in the existence of the facts essential to bring the adverse possession claim, and, therefore, they lacked probable cause to bring the claim as it pertained to the defendants' use of the property—specifically, with respect to the retaining wall and pillar.

Allen also claimed that the mailbox existed when he purchased the property in 1996 and that it encroached onto 33 Maple. In spite of this claim, Allen himself testified that the 1998 and 2006 surveys did not show an encroaching mailbox on 33 Maple. Moreover, a photograph introduced as an exhibit at trial also showed the mailbox to be on 43 Maple, rather than on 33 Maple. The evidence in the record does not support a reasonable, good faith belief in the existence of a claim for adverse possession as it pertained to the defendants' use of the property—specifically, with respect to the mailbox.

Finally, with respect to the driveway, Allen claimed that the driveway was in existence in 1996 when he

purchased the property and that it was located on the property of 33 Maple. When Allen testified, however, he admitted that neither the 1998 or 2006 surveys depicted any driveway encroaching onto 33 Maple. Further, during Rubin's testimony, Rubin indicated that, in an interrogatory answered by Allen in the prior action, Allen asserted that he did not have knowledge of when the portion of the curbed driveway that is located on the common property line came into existence. Allen also indicated in that interrogatory that he did not know whether that portion of the driveway was located on the common property line or on 33 Maple. On the basis of these inconsistencies in Allen's statements and the facts in the record, we determine that the court did not err in finding that the defendants did not have probable cause to bring the adverse possession claim as it pertained to the defendants' use of the property—specifically, with respect to the driveway.

The defendants further argue that the court erred in determining that the plaintiffs established a lack of probable cause to bring the trespass counterclaim. The defendants argue that they had probable cause for a trespass claim based on the plaintiffs' modifications to the disputed portion of 33 Maple because the defendants had acquired it by adverse possession. Because we determine that the court did not err in finding that the defendants lacked probable cause to believe that they had acquired the property by adverse possession, they also lacked probable cause to assert the trespass claim with respect to the disputed property over which they had no possessory right.

Specifically, with respect to this claim, the court found that Allen "fabricat[ed] a trespass claim that was bereft of evidence and was withdrawn at trial of the prior action after [the] defendants had rested their case." The court noted that Powers testified that the

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defendants withdrew the trespass claim because there was insufficient evidence.

We agree with the court that the dearth of evidence to support the defendants' claims evidences the defendants' lack of probable cause to bring the adverse possession and trespass counts of the counterclaim. The court's conclusion that the defendants lacked probable cause to bring the adverse possession and trespass claims is legally and logically correct and has support from the facts that appear in the record. Accordingly, we conclude that the court did not err when it determined that the defendants lacked probable cause to bring both counts of the counterclaim.

III

The defendants next claim that the court improperly denied their motion for a directed verdict. The defendants argue that, "[e]ven if the trial court fully discredits Allen's testimony in finding lack of probable cause, the balance of the evidence unequivocally and completely supports [the] defendants' good faith, reasonable, and bona fide belief that they had a viable claim for adverse possession in the quiet title action." They claim that the court could not conclude the opposite simply because it disbelieved Allen. In support thereof, they cite *Essex Ins. Co. v. William Kramer & Associates, LLC*, 331 Conn. 493, 205 A.3d 534 (2019), without any analysis whatsoever.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be

abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs.” (Citation omitted; internal quotation marks omitted.) *Burton v. Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021). Because the defendants’ brief did not provide any analysis of their claim that the court improperly denied their motion for a directed verdict, we conclude that the claim was inadequately briefed. We, therefore, decline to review it on appeal.

IV

The defendants further claim that the court improperly determined that they failed to establish their advice of counsel defense. We disagree.

We begin by setting forth the legal principles related to this claim. “[T]he defense [of advice of counsel] has five essential elements. First, the defendant must actually have consulted with legal counsel about his decision to institute a civil action Second, the consultation with legal counsel must be based on a full and fair disclosure by the defendant of all facts he knew or was charged with knowing concerning the basis for his contemplated . . . action Third, the lawyer to whom the defendant turns for advice must be one from whom the defendant can reasonably expect to receive an accurate, impartial opinion as to the viability of his claim The fourth element . . . is, of course, that the defendant, having sought such advice, actually did rely upon it Fifth and finally, if all other elements of the defense are satisfactorily established, the defendant must show that his reliance on counsel’s advice was made in good faith.” (Internal quotation marks omitted.) *Rieffel v. Johnston-Foote*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-13-6019381-S (February 19, 2015) (reprinted at

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165 Conn. App. 391, 406–407, 139 A.3d 729), aff'd, 165 Conn. App. 391, 139 A.3d 729, cert. denied, 322 Conn. 904, 138 A.3d 289 (2016).

“Advice of counsel is a complete defense to an action of . . . [vexatious litigation] when it is shown that the [client] . . . instituted his [or her] civil action relying in good faith on such advice, given after a full and fair statement of all facts within his [or her] knowledge, or which he [or she] was charged with knowing. . . .

“In determining whether a [client] gave a full and fair statement of the facts within his or her knowledge to counsel, reliance on whether the omitted information would have had any impact on counsel’s decision to bring the allegedly vexatious action . . . is irrelevant . . . because, as a matter of law, showing an impact on an attorney’s ultimate course of action is not an element of the defense of reliance on counsel. . . . In other words, a client should not be permitted to rely upon the defense of advice of counsel if the client did not disclose all of the material facts related to a potential claim, because the lawyer cannot render full and accurate legal advice regarding whether there is a good faith basis to bring the claim in the absence of knowledge of all material facts. In such instances, a client’s reliance on the advice of counsel is unreasonable regardless of whether the material facts would have altered counsel’s assessment of the validity of the claim.” (Internal quotation marks omitted.) *Rozbicki v. Sconyers*, 198 Conn. App. 767, 783–84, 234 A.3d 1061 (2020).

“Whether there was a full and fair disclosure of material facts as required by the advice of counsel defense is a question of fact” (Citation omitted; internal quotation marks omitted.) *Verspyck v. Franco*, 274 Conn. 105, 112–13, 874 A.2d 249 (2005). As previously noted, “[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. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached.” (Citation omitted; internal quotation marks omitted.) *Id.*, 113.

In its memorandum of decision, the court rejected the defendants’ reliance on the advice of counsel defense. Specifically, the court determined that the defendants failed to establish both that they had made a full and fair disclosure to their attorneys of all facts they knew or were charged with knowing and that their reliance on counsel’s advice was made in good faith.

With respect to the second element of the advice of counsel defense, the defendants argue that “[a]n objective review of the evidence presented at trial reveals that Allen provided both of his counsel with all of the material facts within his knowledge.” We disagree and conclude that there is evidence in the record to support the court’s finding, and, thus, the court’s finding is not clearly erroneous.

As we stated previously in this opinion, the court ultimately found that “Allen withheld and misrepresented material facts to counsel, limited counsel’s preparation, and acted to prevent counsel from learning adverse material facts by preventing counsel from independently investigating the defense and claims to corroborate his version of events.” The court further found that all of the information related to encroachments on 33 Maple came from Allen, who kept his counsel, Rubin, and subsequently, Powers, “on a tight leash . . . to prevent them from learning about Allen’s deception.” Moreover, the court found that, at the trial in the prior action, Allen withheld from his counsel the 1998 and

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2006 surveys done by his surveyor, which were pivotal evidence against his position.

Following the first day of trial in the prior action, on the evening of April 18, 2018, Allen notified Powers that the general contractor and architect on the condominium conversion project as well as a realtor involved in marketing Allen's properties were willing to sign attestation letters with respect to facts in issue including the construction of the mailbox, the pillar, and landscaping. The attestation letters, which were drafted by Allen and later signed by the contractor, architect, and realtor, were never admitted into evidence, however, and the signatories did not appear as witnesses at the trial. In the present action, the court noted that no evidence was presented to indicate that Rubin was aware of the facts recited in the attestation letters or the identity of the signatories prior to Allen's preparation of the letters after the first day of trial. Additionally, Rubin testified in the present action that, while he was representing Allen, he had asked Allen for the names of the contractors who worked on the property, but Allen had failed to identify them. On the basis of these facts, the court inferred that "Allen knew the identity of the architect, contractor, and realtor and knew they had material information about the subject property that was kept from his counsel, who in the ordinary course at least would have interviewed them and reviewed their files in preparation of the case."

Further, as the court found, Rubin advised Allen of the need to corroborate Allen's testimony about the encroachments, but Allen did not do so despite the fact that he obtained two separate surveys of the property that depicted the disputed area. Allen did not produce any documentation of the condominium project, including the 1998 and 2006 surveys, both of which were prepared at the defendants' request. Rubin saw the surveys for the first time on May 9, 2017, when they were

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produced by the plaintiffs' counsel as deposition exhibits at Allen's deposition. The surveys were critical, material evidence at trial because they depicted the disputed area and the existence or nonexistence of each of the claimed encroachments at two different periods in time. On the basis of the foregoing facts, we conclude that there is evidence in the record to support the court's finding that the defendants had not made a full and fair disclosure to counsel of the material facts within their knowledge. On the basis of the evidence in the record, the court reasonably could have found that Allen omitted information that he was charged with knowing based on the events surrounding the attestation letters and his failure to provide his counsel with the 1998 and 2006 surveys. Accordingly, the court's finding that the defendants did not make a full and fair disclosure to counsel of the material facts within their knowledge is not clearly erroneous.

With respect to the fifth element of the defense, the defendants argue that "[t]he court's finding that [the] defendants did not rely on their counsel's advice in good faith is clearly erroneous based on the evidence corroborating [the] defendants' claims and the . . . court's improper focus on [the] defendants' right to supervise and direct the litigation, including discovery." We disagree. Because we conclude that the defendants knowingly did not make a full and fair disclosure to counsel, their reliance on counsel's advice necessarily could not have been made in good faith. We, therefore, uphold the court's conclusion that the defendants did not establish their advice of counsel defense.

V

Last, the defendants claim, summarily, that the court improperly found that they acted with malice. Specifically, the defendants argue that, because there was probable cause to bring the prior action, the court could

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not “properly infer malice from a lack of probable cause.” Additionally, the defendants seem to argue that the court’s finding of their “improper motives” is not supported by the record but, rather, it is based on the court’s disbelief of Allen, “which constitutes clear error.”

“In a vexatious suit action, the defendant is said to have acted with malice if he acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based” (Citation omitted; internal quotation marks omitted.) *DeLaurentis v. New Haven*, supra, 220 Conn. 256 n.16. “Malice may be inferred from lack of probable cause.” (Internal quotation marks omitted.) *Tatoian v. Tyler*, supra, 194 Conn. App. 57.

Because we have concluded in this opinion that the court properly determined that the defendants lacked probable cause to bring their claims, it was proper for the court to infer that the defendants acted with malice. See *id.*

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT v. STEPHEN GUILD
(AC 43868)

Moll, Clark and DiPentima, Js.

Syllabus

The defendant acquittee, who previously had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the trial court’s denial of his motion to dismiss the state’s petition, filed pursuant to statute (§ 17a-593), to extend his commitment to the jurisdiction of the Psychiatric Security Review Board. On appeal, the acquittee claimed that this court had subject matter jurisdiction over his appeal because the trial court’s order denying his motion satisfied

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at least one prong of the finality test set forth in *State v. Curcio* (191 Conn. 27). *Held* that the trial court's order denying the acquittee's motion to dismiss the state's petition did not satisfy either prong of *Curcio* and was not a final judgment for purposes of appeal: the order did not terminate a separate and distinct proceeding for purposes of the first prong of *Curcio* as the order involved a constitutional challenge that was inextricably intertwined with the adjudication of the petition and, as a result, the proceedings concerning that order were not wholly severable from the merits of the state's petition; moreover, the order did not result in the irreparable loss of a claimed right if immediate appellate review was not afforded, required to satisfy the second prong of *Curcio*, as the petition remained pending before the trial court, the acquittee's claimed right to discharge from the board's jurisdiction on the basis of his right to equal protection pursuant to the United States constitution was still intact and further proceedings could still affect the acquittee's claimed right; accordingly, this court lacked subject matter jurisdiction over the appeal.

Argued December 7, 2021—officially released July 26, 2022

Procedural History

Petition for an order extending the defendant's commitment to the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of Middlesex, where the court, *Keegan, J.*, denied the defendant's motion to dismiss the petition, and the defendant appealed to this court. *Appeal dismissed.*

Richard E. Condon, Jr., senior assistant public defender, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Russell C. Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Stephen Guild (acquittee),¹ appeals from the judgment of the trial court denying

¹ Because the defendant was found not guilty by reason of mental disease or defect pursuant to General Statutes § 53a-13 in the underlying criminal proceedings, he is an "[a]cquittee," as that term is defined in General Statutes § 17a-580 (1).

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his motion to dismiss the state's petition, filed pursuant to General Statutes § 17a-593 (c),² to continue his commitment to the jurisdiction of the Psychiatric Security Review Board (board) beyond his maximum term of commitment. On appeal, as a threshold matter, the acquittee claims that this court has subject matter jurisdiction over this appeal because the trial court's denial of his motion to dismiss satisfies at least one prong of the finality test set forth in *State v. Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). We conclude that the trial court's denial of the acquittee's motion to dismiss is not a final judgment for appeal purposes under either prong of *Curcio* and, accordingly, dismiss the acquittee's appeal for lack of subject matter jurisdiction.³

The following facts, as recited by the trial court, and procedural history are relevant to our resolution of this appeal. On October 9, 1997, the acquittee, who was

² General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee."

³ The acquittee claims on the merits that, in denying his motion to dismiss, the court improperly rejected his claim that § 17a-593, as applied to him, violates his rights under the equal protection clause of the fourteenth amendment to the United States constitution. The acquittee's equal protection claim is twofold. First, he argues that the continued commitment procedures set forth in § 17a-593 (c), as interpreted in *State v. Metz*, 230 Conn. 400, 645 A.2d 965 (1994), and related statutes and regulations, do not afford him the substantive rights and due process protections otherwise provided by the civil commitment procedures contained in General Statutes § 17a-495 et seq. and General Statutes § 17a-508, consistent with the requirements of equal protection. In outlining this distinction, the acquittee contends that the state should have to prove that *Metz* acquittees are more dangerous than the similarly situated class of civilly committed inmates. Second, he argues that his continued commitment under the jurisdiction of the board beyond his maximum term of commitment subjects him to legal processes, criminal penalties, and other restrictions on his liberty interests inconsistent with the requirements of equal protection. In light of our conclusion that we lack subject matter jurisdiction to entertain this appeal, we do not address this claim.

angry because he believed that his father had sexually abused him, attacked his father with a folding knife and a sword, causing critical physical injuries. The acquittee was subsequently charged with attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a and assault in the first degree in violation of General Statutes § 53a-59 (a) (1).⁴ He was acquitted of these charges as a result of mental disease or defect and, on March 5, 1999, was committed to the jurisdiction of the board for a period not to exceed twenty years, i.e., March 5, 2019. Notably, the acquittee was granted conditional release on June 17, 2016, and subsequently discharged from Connecticut Valley Hospital on conditional release on September 13, 2016.

On November 23, 2018, the state petitioned the court for an order of continued commitment pursuant to § 17a-593 (c) (petition) on the ground that the acquittee remains a person with psychiatric disabilities to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others.⁵ On November 29, 2018, the court, *Keegan, J.*, ordered that the petition be forwarded to the board for a report to be filed with the court in accordance with § 17a-593 (d).⁶ On or about February

⁴ In its corrected revised memorandum of decision, the court explained that the acquittee was “acquitted due to mental disease or defect of the charges of attempted murder pursuant to General Statutes §§ 53a-48 and 53a-54a, and assault in the second degree, pursuant to General Statutes § 53a-60.” It is not clear why the court referenced §§ 53a-48 and 53a-60. The trial court file, as well as the parties’ briefs, reflect that the acquittee was charged with attempt to commit murder in violation of §§ 53a-49 and 53a-54a and assault in the first degree in violation of § 53a-59 (a) (1).

⁵ While the petition was pending, the acquittee filed several motions to extend the acquittee’s commitment to the board’s jurisdiction, by agreement, pending the completion and eventual adjudication of his motion to dismiss, and the court granted those requests. Most recently, on September 28, 2021, by agreement of the parties, the court again extended the acquittee’s commitment for a period of time not to exceed March 20, 2023.

⁶ General Statutes § 17a-593 (d) provides: “The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within

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14, 2019, the board submitted its report on the petition, recommending that the court grant the petition for a period not to exceed three years.

On March 5, 2019, the acquittee filed a motion to dismiss the petition and a memorandum of law in support of that motion on the basis that his continued commitment to the board pursuant to § 17a-593 (c), as applied to him, violates his rights under the equal protection clause of the fourteenth amendment to the United States constitution. See footnote 3 of this opinion. On June 20, 2019, the court heard oral argument on the acquittee's motion to dismiss. Thereafter, both parties filed posthearing briefs.

On December 2, 2019, the court issued a corrected revised memorandum of decision, dated November 26, 2019, denying the acquittee's motion to dismiss.⁷ In its decision, the court concluded that § 17a-593, as applied to the acquittee, did not violate his right to equal protection under the fourteenth amendment to the United States constitution. This appeal followed.⁸

ninety days of its receipt of the application or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report."

⁷ On October 18, 2019, the court issued its original memorandum of decision in which it denied the acquittee's motion to dismiss and also granted the petition, ordering the acquittee's continued commitment not to exceed three years. On October 31, 2019, the acquittee filed a motion to correct the original memorandum of decision, requesting that the court issue a memorandum of decision addressed solely to the merits of the motion to dismiss. Ultimately, on December 2, 2019, the court issued a corrected revised memorandum of decision denying the acquittee's motion to dismiss.

⁸ On May 12, 2021, while this appeal was pending, the state filed a revised petition for an order of continued commitment pursuant to § 17a-593 (c) (revised petition), and the acquittee filed a motion to dismiss the revised petition. On September 28, 2021, the court granted a motion filed by the acquittee and joined by the state, requesting that the court "take no action" on the revised petition and the filings related to the revised petition, with both parties reserving "their right to pursue said [filings] if and when appropriate." Both the revised petition and the acquittee's motion to dismiss the revised petition remain pending.

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On appeal, as a threshold matter, the acquittee claims that we have subject matter jurisdiction over this appeal because the court's denial of his motion to dismiss satisfies at least one prong of the finality test set forth in *State v. Curcio*, supra, 191 Conn. 31. The state argues that neither prong of *Curcio* is satisfied, and, therefore, we lack subject matter jurisdiction over this appeal. We agree with the state.

We begin by setting forth the relevant standard of review and principles of law. “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 [over which we exercise plenary review].” (Internal quotation marks omitted.) *Brown & Brown, Inc. v. Blumenthal*, 288 Conn. 646, 651–52, 954 A.2d 816 (2008).

“[T]here is no constitutional right to an appeal.” *Palmer v. Friendly Ice Cream Corp.*, 285 Conn. 462, 466, 940 A.2d 742 (2008). “The legislature has enacted General Statutes § 52-263,⁹ which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided 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.” (Footnote in original; internal quotation marks omitted.) *Id.*, 466–67; see also *State v. Bemmer*, 339 Conn. 528, 536–37, 262 A.3d 1 (2021)

⁹ “General Statutes § 52-263 provides in relevant part: ‘Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge’” *Palmer v. Friendly Ice Cream Corp.*, supra, 285 Conn. 466 n.5.

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("[B]ecause 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 It is well established that [t]he principal statutory prerequisite to invoking our jurisdiction is that the ruling from which an appeal is sought must constitute a final judgment." (Internal quotation marks omitted.)).

As a general matter, "the denial of a motion to dismiss is an interlocutory ruling and, therefore, is not a final judgment for purposes of appeal." (Internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 645 n.5, 974 A.2d 669 (2009). In *State v. Curcio*, supra, 191 Conn. 27, our Supreme Court articulated the following rule: "In both criminal and civil cases . . . we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." *Id.*, 31. "Unless the appeal is authorized under the *Curcio* criteria, absence of a final judgment is a jurisdictional defect that [necessarily] results in a dismissal of the appeal." (Internal quotation marks omitted.) *State v. Fielding*, 296 Conn. 26, 38, 994 A.2d 96 (2010). We address the applicability of each *Curcio* prong in turn.

I

The acquittee argues that the court's denial of his motion to dismiss is immediately appealable under *Curcio*'s first prong because, "[i]ndisputably, the proceedings on [his] motion to dismiss, predicated upon his equal protection as applied claim to § 17a-593 (c), [are]

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separate and distinct, in form and substance, from a continued commitment proceeding on the merits.” This argument fails.

“The first prong of the *Curcio* test . . . requires that the order being appealed from be severable from the central cause of action so that the main action can proceed independent of the ancillary proceeding. . . . If the interlocutory ruling is merely a step along the road to final judgment then it does not satisfy the first prong of *Curcio*. . . . Obviously a ruling affecting the merits of the controversy would not pass the first part of the *Curcio* test. The fact, however, that the interlocutory ruling does not implicate the merits of the principal issue at the trial . . . does not necessarily render that ruling appealable. It must appear that the interlocutory ruling will not impact directly on any aspect of the [action].” (Internal quotation marks omitted.) *Abreu v. Leone*, 291 Conn. 332, 339, 968 A.2d 385 (2009); see also *State v. Bemer*, supra, 339 Conn. 537. “The question to be asked is whether the main action could proceed independent of the ancillary proceeding.” *State v. Parker*, 194 Conn. 650, 654, 485 A.2d 139 (1984).

Here, it is evident that the order at issue did not, under *Curcio*’s first prong, terminate a proceeding separate and distinct from the continued commitment proceedings in that such order involves a constitutional challenge that is inextricably intertwined with the adjudication of the state’s petition. As a result, the proceedings concerning that order were not wholly severable from the proceedings relating to the merits of the state’s petition, as evidenced by the fact that those proceedings could not advance and have not advanced during this appeal. See *State v. Bemer*, supra, 339 Conn. 537–38; *Abreu v. Leone*, supra, 291 Conn. 339; *State v. Parker*, supra, 194 Conn. 654. Because the order denying the acquittee’s motion to dismiss was “merely a step along the road to final judgment”; (internal quotation marks

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omitted) *Abreu v. Leone*, supra, 339; it does not constitute a final judgment for appeal purposes under the first *Curcio* prong and is not the proper subject of this appeal. See *State v. Parker*, supra, 653 (“[o]bviously a ruling affecting the merits of the controversy would not pass the first part of the *Curcio* test”).

In sum, on the basis of the foregoing, we conclude that the court’s order denying the acquittee’s motion to dismiss the petition did not terminate a separate and distinct proceeding for purposes of the first prong of *Curcio*.

II

The acquittee also argues that the court’s denial of his motion to dismiss is immediately appealable under *Curcio*’s second prong, i.e., the order results in the irreparable loss of a claimed right if immediate appellate review is not afforded. See *State v. Curcio*, supra, 191 Conn. 31. In support of this argument, the acquittee contends that he has “raised a colorable claim that continued commitment under § 17a-593 (c) is unconstitutional as applied to his circumstances. . . . As a matter of state law, [he] is entitled to immediate discharge at the expiration of his maximum term of commitment, absent continued commitment under § 17a-593 (c).” (Citation omitted.) We conclude that the second *Curcio* prong does not apply.

“The second prong of the *Curcio* test . . . permits an appeal if the decision so concludes the rights of the parties that further proceedings cannot affect them. . . . That prong focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court’s order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . One must make at least a colorable claim

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that some recognized statutory or constitutional right is at risk. . . . In other words, the [appellant] must do more than show that the trial court’s decision threatens him with irreparable harm. The [appellant] must show that that decision threatens to abrogate a right that he or she then holds. . . . The right itself must exist independently of the order from which the appeal is taken. . . .

“The key to appellate jurisdiction under the second prong of *Curcio* is not so much that the right is already secured to the party; indeed, what is at issue in an appeal is the effect of the challenged order on the scope of the claimed right at issue. Rather, the second prong of *Curcio* boils down to whether, as a practical and policy matter, not allowing an immediate appeal will create irreparable harm insofar as allowing the litigation to proceed before the trial court will—in and of itself—function to deprive a party of that right.” (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Halladay v. Commissioner of Correction*, 340 Conn. 52, 62–63, 262 A.3d 823 (2021).

We are mindful that our Supreme Court “previously has determined that, under the second prong of [*Curcio*], a colorable claim to a right to be free from an action is protected from the immediate and irrevocable loss that would be occasioned by having to defend an action through the availability of an immediate interlocutory appeal from the denial of a motion to dismiss. . . . The rationale for immediate appellate review is that the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation. . . . The second prong of *Curcio* has been deemed satisfied under this rationale for actions that are claimed to violate: sovereign immunity . . . immunity for statements made in judicial and quasi-judicial proceedings . . . statutory immunity . . . the prohibition against double jeopardy . . . and

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res judicata.” (Citations omitted; internal quotation marks omitted.) *Blakely v. Danbury Hospital*, 323 Conn. 741, 746–47, 150 A.3d 1109 (2016). None of those grounds is implicated in the present case.

Here, for purposes of *Curcio*’s second prong, the acquittee’s claimed right is the right to discharge from the board’s jurisdiction based on his equal protection claim described in footnote 3 of this opinion. We cannot conclude, notwithstanding the acquittee’s arguments to the contrary, that such claimed right includes the right to avoid a continued commitment proceeding pursuant to § 17a-593 (c). Rather, the claim raises arguments as to why the petition should be denied on the merits. Unlike, for example, a sovereign’s right to be immune from suit or a criminal defendant’s right against double jeopardy, the claimed right at issue here will not be “irretrievably lost” if interlocutory appellate review of the court’s order on the acquittee’s motion to dismiss is denied. *State v. Coleman*, 202 Conn. 86, 92, 519 A.2d 1201 (1987). The petition remains pending before the court,¹⁰ and, as the state correctly points out in its appellate brief, “the trial court may yet deny the state’s pending petition for continued commitment. If the court denies the petition, the acquittee would be discharged from the [board’s] jurisdiction.” See also *State v. Coleman*, supra, 86, 91. The acquittee’s claimed right is “still intact and may be enforced on trial or on appeal from a final judgment.” *Id.*, 91. Accordingly, further proceedings still can affect the acquittee’s claimed right and, therefore, the second *Curcio* prong is not satisfied. See *id.*, 91–92 (denial of motion to dismiss based on statute of limitations affirmative defense did not satisfy *Curcio*’s second prong); see also *State v. Ahern*, 42 Conn. App. 144, 146–47, 678 A.2d 975 (1996) (denial of motion to dismiss based on right to speedy trial and due process of law did not satisfy *Curcio*’s second prong).

¹⁰ See footnote 7 of this opinion.

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In sum, because the court's denial of the acquittee's motion to dismiss the petition does not satisfy either prong of *Curcio*, it is not a final judgment for purposes of appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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RULES OF APPELLATE PROCEDURE

NOTICE

Notice is hereby given that the following amendments to the Rules of Appellate Procedure were adopted to take effect January 1, 2023. The amendments were approved by the Supreme Court on July 19, 2022, and by the Appellate Court on June 29, 2022.

Attest:

Carl D. Cicchetti
Chief Clerk Appellate

INTRODUCTION

Contained herein are amendments to the Rules of Appellate Procedure. These amendments are indicated by brackets for deletions and underlined text for added language. The designation “NEW” is printed with the title of each new rule. This material should be used as a supplement to the Connecticut Practice Book until the 2023 edition of the Practice Book becomes available.

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CHAPTER 60
GENERAL PROVISIONS RELATING TO APPELLATE RULES
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Sec. 60-4. Definitions

“Administrative appeal” shall mean an appeal from a judgment of the Superior Court concerning the appeal to that court from a decision of any officer, board, commission or agency of the state or of any political subdivision of the state.

“Appellant” shall mean the party, or parties if an appeal is jointly filed, taking the appeal.

“Appellee” shall mean all other parties in the trial court at the time of judgment, unless after judgment the matter was withdrawn as to them or unless a motion for permission not to participate in the appeal has been granted by the court.

“Certificate of interested entities or individuals” is a certificate filed in any civil appellate matter, excluding habeas corpus matters, by counsel of record for a party that is an entity as defined in this rule. The certificate shall list for that party: (1) any parent entities and (2) all entities or individuals owning or controlling an interest of 10 percent or more of that party. If there are no other interested entities or individuals, a certificate indicating that information is required. The certificate shall also state whether the party knows of any direct or indirect ownership, controlling or legal interest for that party that counsel of record thinks could reasonably require a judge to disqualify himself or herself under Rule 2.11 of the Code of Judicial Conduct.

“Counsel of record” shall include all attorneys and self-represented parties appearing in the trial court at the time of the initial appellate filing, unless an exception pursuant to Section 62-8 applies, all attorneys and self-represented parties who filed the appellate matter, and all attorneys and self-represented parties who file an appearance in the appellate matter.

“Entity” means any corporation, limited liability company, partnership, limited liability partnership, firm or any association that is not a governmental entity or its agencies.

“Filed” shall mean the receipt by the appellate clerk of a paper or document by electronic submission pursuant to Section 60-7. If an exemption to electronic filing has been granted or if the electronic filing requirements do not apply, filed shall mean receipt of the paper or document by hand delivery, by first class mail or by express mail delivered by the United States Postal Service or an equivalent commercial service. If a document must be filed by a certain date under these rules or under any statutory provision, the document must be received by the appellate clerk by the close of business on that date; it is not sufficient that a document be mailed by that date to the appellate clerk unless a rule or statutory provision expressly so computes the time.

“Issues” shall include claims of error, certified questions and questions reserved.

“Motion” shall include applications and petitions, other than petitions for certification. A preappeal motion is one that is filed prior to or independent of an appeal.

“Paper” and “Document” shall include an electronic submission that complies with the procedures and standards established by the

chief clerk of the appellate system under the direction of the administrative judge of the appellate system and a paper or document created in or converted to a digital format by the Judicial Branch.

“Petition” does not include petitions for certification unless the context clearly requires.

“Record” shall include the case file, any decisions, documents, transcripts, recordings and exhibits from the proceedings below, and, in appeals from administrative agencies, the record returned to the trial court by the administrative agency.

“Requests” shall include correspondence and notices as permitted by these rules.

“Signature” shall be made upon entry of an attorney’s individual juris number or a self-represented party’s user identification number during the filing transaction, unless an exemption from the requirements of Section 60-7 (d) has been granted or applies.

“Submission” shall mean a “paper” or a “document” and shall include an electronic submission that complies with the procedures and standards established by the chief clerk of the appellate system under the direction of the administrative judge of the appellate system.

(For additional definitions, see Secs. 62-2 and 76-6.)

COMMENTARY: These amendments add definitions for “certificate of interested entities or individuals” and “entity” in accordance with a new filing intended to provide the Supreme and Appellate Courts with information regarding individuals or entities that own or have certain controlling or ownership interests in the business entities appearing before those courts.

CHAPTER 61
REMEDY BY APPEAL

**Sec. 61-9. Decisions Subsequent to Filing of Appeal;
Amended Appeals**

Should the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision as provided for in Section 63-1.

The amended appeal shall be filed [in the same manner as an original appeal pursuant to Section 63-3] in the pending appeal using form JD-SC-033, along with a certification pursuant to Section 62-7. No additional fee is required to be paid upon the filing of an amended appeal.

Within ten days of filing the amended appeal, the appellant shall file with the appellate clerk either a certificate stating that there are no changes to the Section 63-4 papers filed with the original appeal or any amendments to those papers. Any other party may file responsive Section 63-4 papers within twenty days of the filing of the certificate or the amendments.

If the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed.

After disposition of an appeal where no amended appeals related to that appeal are pending, a subsequent appeal shall be filed as a new appeal.

If an amended appeal is filed after the filing of the appellant's brief but before the filing of the appellee's brief, the appellant may move

for leave to file a supplemental brief. If an amended appeal is filed after the filing of the appellee's brief, either party may move for such leave. In any event, the court may order that an amended appeal be briefed or heard separately from the original appeal.

If the appellant files a subsequent appeal from a trial court decision in a case where there is a pending appeal, the subsequent appeal may be treated as an amended appeal, and, if it is treated as an amended appeal, there will be no refund of the fees paid.

COMMENTARY: The purpose of this amendment is to more closely conform the text of the rule to e-filing practice.

CHAPTER 62

CHIEF JUDGE, APPELLATE CLERK AND DOCKET: GENERAL ADMINISTRATIVE MATTERS

Sec. 62-5. Changes in Parties

Any change in the parties to an action pending an appeal shall be made in the court in which the appeal is pending. The appellate clerk shall notify the clerk of the trial court of any change.

If any party to a civil action is an entity as defined in Section 60-4, counsel of record shall include a certificate of interested entities or individuals with any motion seeking a change in the parties filed with the appellate clerk.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

CHAPTER 63

FILING THE APPEAL; WITHDRAWALS

Sec. 63-3. Filing of Appeal

All appeals shall be filed and all fees paid in accordance with the provisions of Section 60-7 or 60-8. The appeal will be docketed upon

filing but may be returned or rejected for noncompliance with the Rules of Appellate Procedure.

The appellant must certify that a copy of the appeal form generated at the time of electronic filing and bearing the assigned docket number and electronic signature of the filer will immediately be delivered pursuant to Section 62-7 (c) to all counsel of record and, in criminal and habeas corpus matters, to the Office of the Chief State's Attorney, Appellate Bureau. The appellate clerk, upon receipt of the foregoing, shall deliver a copy of the appeal form to the clerk of the [original] trial court[, to the clerk of any trial courts to which the matter was transferred, and to each party to the appeal]. In criminal and habeas corpus matters, the appellate clerk shall deliver a copy of the appeal form to the Office of the Chief State's Attorney, Appellate Bureau, or to the attorney general, as appropriate.

COMMENTARY: These amendments conform the rule to e-filing practice and available technological capabilities. Notices from the appellate clerk will replace the delivery of the copy of the appeal form as required under the present rule.

Sec. 63-4. Additional Papers To Be Filed by Appellant and Appellee Subsequent to the Filing of the Appeal

(Applicable to appeals filed on or after October 1, 2021.)

(a) Within ten days of filing an appeal, the appellant shall also file with the appellate clerk the following:

(1) A preliminary statement of the issues intended for presentation on appeal. If any appellee wishes to: (A) present for review alternative grounds upon which the judgment may be affirmed; (B) present for

review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial; or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on the appeal, that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues.

Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue.

(2) A designation of the proposed contents of the clerk appendix that is to be prepared by the appellate clerk under Section 68-2A listing the specific documents docketed in the case file that the appellant deems are necessary to include in the clerk appendix for purposes of presenting the issues on appeal, including their dates of filing in the proceedings below, and, if applicable, their number as listed on the docket sheet. The appellant shall limit the designation to the documents referenced in Section 68-3A for inclusion in the clerk appendix. If any other party disagrees with the inclusion of any documents designated by the appellant, or deems it necessary to include other documents docketed in the case file in the clerk appendix, that party may, within seven days from the filing of the appellant's designation of the proposed contents of the clerk appendix, file its own designation of the proposed contents of the clerk appendix.

(3) A certificate stating that no transcript is deemed necessary or a transcript order confirmation from the official court reporter pursuant to Section 63-8. If the appellant is to rely on any transcript delivered prior to the filing of the appeal, the transcript order confirmation shall

indicate that an electronic version of a previously delivered transcript has been ordered.

If any other party deems any other parts of the transcript necessary that were not ordered by the appellant, that party shall, within twenty days of the filing of the appellant's transcript papers, file a transcript order confirmation for an order placed in compliance with Section 63-8. If the order is for any transcript delivered prior to the filing of the appeal, the transcript order confirmation shall indicate that an electronic version of a previously delivered transcript has been ordered.

(4) A docketing statement containing the following information to the extent known or reasonably ascertainable by the appellant: (A) the names and addresses of all parties to the appeal, and the names, addresses, and e-mail addresses of trial and appellate counsel of record[, and the names and addresses of all persons having a legal interest in the cause on appeal sufficient to raise a substantial question whether a judge should be disqualified from participating in the decision on the case by virtue of that judge's personal or financial interest in any such persons]; (B) the case names and docket numbers of all pending appeals to the Supreme Court or Appellate Court which arise from substantially the same controversy as the cause on appeal, or involve issues closely related to those presented by the appeal; (C) whether a criminal protective order, civil protective order, or civil restraining order was requested or issued during any of the underlying proceedings; [(D) whether there were exhibits in the trial court and, if so, whether the exhibits were physical, electronic or a combination thereof;] and ([E]D) in criminal and habeas cases, the defendant's or petitioner's conviction(s) and sentence(s) that are the subject of the

direct criminal or habeas appeal and whether the defendant or petitioner is incarcerated. If additional information is or becomes known to, or is reasonably ascertainable by the appellee, the appellee shall file a docketing statement supplementing the information required to be provided by the appellant.

When an appellant or an appellee is aware that one or more appellees have no interest in participating in the appeal, the appellant and any other appellees may be relieved of the requirement of certifying copies of filings to those appellees by designating the nonparticipating appellee(s) in a section of the docketing statement named “Nonparticipating Appellee(s).” This designation shall indicate that if no docketing statement in disagreement is filed, subsequent filings will not be certified to those appellees.

If an appellee disagrees with the nonparticipating designation, that appellee shall file a docketing statement indicating such disagreement within twenty days of the filing of that designation. All documents filed on or before the expiration of the time for an appellee to file a docketing statement in disagreement as stated above shall be delivered pursuant to Section 62-7 (b) to all counsel of record. If no docketing statement in disagreement is filed, subsequent filings need not be certified to nonparticipating appellees.

(5) In all noncriminal matters, except for matters exempt from a preargument conference pursuant to Section 63-10, a preargument conference statement.

(6) A constitutionality notice, in all noncriminal cases where the constitutionality of a statute has been challenged. Said notice shall identify the statute, the name and address of the party challenging it,

and whether the statute's constitutionality was upheld by the trial court. The appellate clerk shall deliver a copy of such notice to the attorney general. This section does not apply to habeas corpus matters based on criminal convictions, or to any case in which the attorney general is a party, has appeared on behalf of a party, or has filed an amicus brief in proceedings prior to the appeal.

(7) In matters in which documents are under seal, conditionally or otherwise, or limited as to disclosure, a notice identifying the time, date, scope and duration of the sealing order with a copy of the order. (See Section 77-2.)

(8) If an entity as defined in Section 60-4 is an appellant, counsel of record for that entity shall file a certificate of interested entities or individuals as defined in Section 60-4 in any civil appeal to assist the appellate jurists in making an informed decision regarding possible disqualification from the appeal. If an entity in a civil appeal is an appellee, counsel of record for the entity shall file a certificate of interested entities or individuals within twenty days of the filing of the appellant's preliminary statement of the issues. Counsel of record has a continuing duty to amend the certificate of interested entities or individuals during the pendency of the appeal if any changes occur.

(b) Except as otherwise provided, a party may as of right file amendments to the preliminary statement of issues at any time until that party's brief is filed. Amendments to the docketing statement may be filed at any time. Amendments to the transcript statement may be made only with leave of the court. If leave to file such an amendment is granted, the adverse party shall have the right to move for permission to file a supplemental brief and for an extension of time. Amendments

to the preargument conference statement shall not be presented in writing but may be presented orally at the preargument conference, if one is held.

(c) Failure to comply with this rule shall be deemed as sufficient reason to schedule a case for sanctions under Section 85-3 or for dismissal under Section 85-1.

COMMENTARY: The purpose of these amendments is to remove subsection (a) (4) (D) in light of changes to how the appellate clerk receives exhibits from the trial court and to describe when a certificate of interested entities or individuals is required to be filed.

Sec. 63-10. Preargument Conferences

The chief justice or the chief judge or a designee may, in cases deemed appropriate, direct that conferences of the parties be scheduled in advance of oral argument. All civil cases are eligible for preargument conferences except habeas corpus appeals, appeals involving juvenile matters, including child protection appeals as defined in Section 79a-1, summary process appeals, foreclosure appeals, and appeals from the suspension of a motor vehicle license due to operating under the influence of liquor or drugs.

In any exempt case, all parties appearing and participating in the appeal may file a joint request for a preargument conference. In a foreclosure case, the request for a preargument conference is sufficient if jointly submitted by the owner of the equity and the foreclosing party. In any exempt case, however, the chief justice or the chief judge or a designee may, if deemed appropriate, order a preargument conference.

The chief justice may designate a judge of the Superior Court, a senior judge or a judge trial referee to preside at a preargument

conference. The scheduling of or attendance at a preargument conference shall not affect the duty of the parties to adhere to the times set for the filing of briefs. Failure of counsel of record to attend a preargument conference may result in the imposition of sanctions under Section 85-2. Unless other arrangements have been approved in advance by the [conference] presiding judge, parties shall be present at the preargument conference site and available for consultation. When a party against whom a claim is made is insured, an insurance adjuster for such insurance company shall be available by telephone at the time of such preargument conference unless the [conference] presiding judge, in his or her discretion, requires the attendance of the adjuster at the preargument conference. The preargument conference proceedings shall not be brought to the attention of the court by the presiding [officer] judge or any of the parties unless the preargument conference results in a final disposition of the appeal.

The following matters may be considered:

- (1) Possibility of settlement;
- (2) Simplification of issues;
- (3) Amendments to the preliminary statement of issues;
- (4) Transfer to the Supreme Court;
- (5) Timetable for the filing of briefs;
- (6) En banc review; and
- (7) Such other matters as the [conference] presiding judge shall consider appropriate.

All matters scheduled for a preargument conference before a judge trial referee are referred to that official by the chief court administrator

pursuant to General Statutes § 52-434a, which vests judge trial referees with the same powers and jurisdiction as Superior Court judges and senior judges, including the power to implement settlements by opening and modifying judgments.

COMMENTARY: These amendments make technical changes to the rule to refer to the presiding judge at the preargument conference in a consistent manner.

CHAPTER 65

TRANSFER OF [CASES] MATTERS

COMMENTARY: This amendment was made for consistency.

Sec. 65-1. Transfer of [Cases] Matter by Supreme Court

[When, p]Pursuant to General Statutes § 51-199 (c), the Supreme Court may [(1)] transfer[s to itself] a [cause in] matter to itself from the Appellate Court[,] or [(2) transfers a cause or a class of causes] from itself to the Appellate Court[,], the appellate clerk shall notify all parties and the clerk of the trial court that the appeal has been transferred. A case so transferred shall be entered upon the docket of the court to which it has been transferred. There shall be no fee on such transfer. The appellate clerk may require the parties to take such steps as may be necessary to make the appeal conform to the rules of the court to which it has been transferred, for example, supply the court with additional copies of the briefs and party appendices, if any.]

COMMENTARY: These amendments clarify existing appellate practice.

(NEW) Sec. 65-1A. Transfer of Matter on Recommendation of Appellate Court

If, at any time before the final determination of a matter, the Appellate Court is of the opinion that the matter is appropriate for Supreme Court

review, the Appellate Court may notify the Supreme Court of the reasons why transfer is appropriate. The Supreme Court will then determine if the matter will be transferred.

COMMENTARY: This new section clarifies existing appellate practice.

Sec. 65-2. [Motion for] Party Motion to Transfer [from Appellate Court to Supreme Court] Appeal, Writ of Error or Reservation

After the filing of an appeal, writ of error or reservation in the Appellate Court, but in no event after [the case] it has been assigned for hearing, any party may move for transfer to the Supreme Court. The motion, addressed to the Supreme Court, shall specify, in accordance with provisions of Section 66-2, the reasons why the party believes that the Supreme Court should hear the [appeal] matter directly. A copy of the memorandum of decision of the trial court, if any, shall be attached to the motion. The filing of a motion for transfer shall not stay proceedings in the Appellate Court.

[If, at any time before the final determination of an appeal, the Appellate Court is of the opinion that the appeal is appropriate for Supreme Court review, the Appellate Court may notify the Supreme Court of the reasons why transfer is appropriate. If the Supreme Court transfers the case to itself, the appellate clerk shall promptly notify the parties. The appellate clerk may require the parties to take such steps as may be necessary to make the appeal conform to the rules of the court to which it has been transferred.]

COMMENTARY: These amendments clarify existing appellate practice.

Sec. 65-3. Transfer of Petition[s] for Review of Bail Order[s] from Appellate Court to Supreme Court

Whenever a petition for review of an order of the Superior Court concerning release is filed in the Appellate Court pursuant to General Statutes § 54-63g in any case on appeal to the Supreme Court or where the defendant could appeal to the Supreme Court if convicted, such petition shall be transferred to the Supreme Court pursuant to the exercise of the Supreme Court's transfer jurisdiction under General Statutes § 51-199 (c) for review of such order.

COMMENTARY: These amendments were made for consistency.

Sec. 65-4. Transfer of Matter[s] Brought to Wrong Court

Any [appeal or cause] matter brought to the Supreme Court or the Appellate Court which is not properly within the jurisdiction of the court to which it is brought shall not be dismissed for the reason that it was brought to the wrong court but shall be transferred by the appellate clerk to the court with jurisdiction and entered on its docket. Any timely filed [appeal or cause] matter that is transferred shall be considered timely filed in the appropriate court. [The appellate clerk shall notify all parties and the clerk of the trial court that the appeal or cause has been transferred. In the event that an appeal or cause is so transferred, no additional fees will be due.]

COMMENTARY: These amendments clarify existing appellate practice.

(NEW) Sec. 65-5. Proceedings after Transfer

The appellate clerk shall notify all parties and the clerk of the trial court that a matter has been transferred. The transferred matter shall

be entered upon the docket of the court to which it was transferred. There shall be no fee on such transfer. The appellate clerk may require the parties to take such steps as may be necessary to make the matter conform to the rules of the court to which it has been transferred, for example, supply the court with additional copies of briefs and party appendices, if any.

COMMENTARY: This new section clarifies existing appellate practice and consolidates information previously contained in multiple rules.

CHAPTER 66

MOTIONS AND OTHER PROCEDURES

Sec. 66-1. Extension of Time

(a) Motions to extend the time limit for filing an appeal shall be filed with the clerk of the trial court. Except as otherwise provided in these rules, the judge who tried the case may, for good cause shown, extend the time limit provided for filing the appeal, except that such extension shall be of no effect if the time within which the appeal must be filed is set by statute and is a time limit that the legislature intended as a limit on the subject matter jurisdiction of the court in which the appeal is filed. In no event shall the trial judge extend the time for filing the appeal to a date which is more than twenty days from the expiration date of the appeal period. Where a motion for extension of the period of time within which to appeal has been filed at least ten days before expiration of the time limit sought to be extended, the party seeking to appeal shall have no less than ten days from issuance of notice of denial of the motion to file the appeal.

(b) Motions to extend the time limit for filing any appellate document, other than the appeal or a motion for review of a ruling concerning a

stay of execution pursuant to Section 61-14, shall be filed with the appellate clerk. The motion shall set forth the reason for the requested extension and shall be accompanied by a certification that complies with Section 62-7. An attorney filing such a motion on a client's behalf shall also indicate that a copy of the motion has been delivered to each of his or her clients who are parties to the appeal. The moving party shall also include a statement as to whether the other parties consent or object to the motion. A motion for extension of time to file a brief must specify the current status of the brief or preparations therefor, indicate the estimated date of completion, and, in criminal cases, state whether the defendant is incarcerated as a result of the proceeding in which the appeal has been filed.

(c) The appellate clerk is authorized to grant or to deny motions for extension of time promptly upon their filing. Motions for extension of time to complete any step necessary to prosecute or to defend the appeal, to move for or to oppose a motion for reconsideration, or to petition for or to oppose a petition for certification will not be granted except for good cause. Claims of good cause shall be raised promptly after the cause arises.

(d) An opposing party who objects to a motion for extension of time filed pursuant to subsection (b) of this section shall file an objection with reasons in support thereof with the appellate clerk within five days from the filing of the motion. Parties that are exempt from electronic filing pursuant to Section 60-8 shall file the objection within ten days from the filing of the motion.

(e) [A motion for extension of time shall be filed at least ten days before the expiration of the time limit sought to be extended or, if the

cause for such extension arises during the ten day period, as soon as reasonably possible after such cause has arisen.] No motion under this rule shall be granted unless it is filed before the time limit sought to be extended by such motion has expired.

(f) Any action by the trial judge pursuant to subsection (a) of this section or the appellate clerk pursuant to subsection (c) of this section is reviewable pursuant to Section 66-6.

COMMENTARY: The purpose of the amendment to subsection (d) is to give parties who are exempt from e-filing, which includes incarcerated self-represented litigants, an additional five days to object to a motion for an extension of time. The amendment to subsection (e) conforms the rule to what has been treated as mandatory as a matter of practice.

Sec. 66-3. Motion Procedures and Filing

All motions, petitions, applications, memoranda of law, stipulations, and oppositions shall be filed with the appellate clerk in accordance with the provisions of Sections 60-7 and 60-8 and docketed upon filing. The submission may be returned or rejected for noncompliance with the Rules of Appellate Procedure. All papers shall contain a certification that a copy has been delivered to each other counsel of record in accordance with the provisions of Section 62-7.

No paper mentioned above shall be filed after expiration of the time for its filing unless the filer demonstrates good cause for its untimeliness in a separate section captioned “good cause for late filing.” No motion directed to the trial court that is required to be filed with the appellate clerk shall be filed after expiration of the time for its filing, except on separate written motion accompanied by the proposed trial court motion and by consent of the Supreme or Appellate

Court. No amendment to any of the above mentioned papers shall be filed except on written motion and by consent of the court.

Motions shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two fonts, of 12 point or larger size, are approved for use in motions: Arial and Univers. Each page of a motion, petition, application, memorandum of law, stipulation and opposition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2inch; and bottom, 1 inch.

Any preappeal motion, petition, application or opposition filed by an entity as defined in Section 60-4 in a civil matter shall be accompanied by a certificate of interested entities or individuals filed by counsel of record.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

Sec. 66-5. Motion for Rectification; Motion for Articulation

A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk. Any other party may oppose the motion by filing an opposition with the appellate clerk within ten days of the filing of the motion for rectification or articulation. The trial court may, in its discretion, require assistance from the parties in providing an articulation. Such assistance may include, but is not limited to, provision of copies of transcripts and exhibits.

The appellate clerk shall forward the motion for rectification or articulation and the opposition, if any, to the trial judge who decided, or presided over, the subject matter of the motion for rectification or articulation for a decision on the motion. If any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved. The trial court may make such corrections or additions as are necessary for the proper presentation of the issues. The clerk of the trial court shall list the decision on the trial court docket and shall send notice of the court's decision on the motion to the appellate clerk, and the appellate clerk shall issue notice of the decision to all counsel of record.

Nothing herein is intended to affect the existing practice with respect to opening and correcting judgments and the records on which they are based. The trial court shall file any such order changing the judgment or the record with the appellate clerk.

Corrections or articulations made before the clerk appendix is prepared shall be included in the clerk appendix. Corrections or articulations made after the clerk appendix is prepared but before the appellant's brief [and appendix are]is prepared shall be included in the appellant's party appendix. Corrections or articulations made after the appellant's brief [and appendix have]has been filed, but before the appellee's brief [and appendix have]has been filed, shall be included in the appellee's party appendix. [When corrections or articulations are made after both parties' briefs and appendices have been filed, the appellant shall file the corrections or articulations as an addendum to its appendix. Any addendum shall be filed within ten days after

issuance of notice of the trial court's order correcting the record or articulating the decision.]

The sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on the motion filed pursuant to this section or any other correction or addition ordered by the trial court during the pendency of the appeal shall be by motion for review under Section 66-7.

Upon the filing of a timely motion pursuant to Section 66-1, the appellate clerk may extend the time for filing briefs until after the trial court has ruled on a motion made pursuant to this section or until a motion for review under Section 66-7 is decided.

Any motion for rectification or articulation [shall be filed within thirty-five days after the delivery of the last portion of the transcripts or, if none, after the filing of the appeal, or, if no memorandum of decision was filed before the filing of the appeal, after the filing of the memorandum of decision. If the court, sua sponte, sets a different deadline from that provided in Section 67-3 for filing the appellant's brief, a motion for rectification or articulation] shall be filed at least ten days prior to the deadline for filing the appellant's brief, unless otherwise ordered by the court. [The filing deadline may be extended for good cause.] If a final order has been issued for the appellant's brief, no motion for rectification or articulation shall be filed without permission of the court. No motion for rectification or articulation shall be filed after the filing of the appellant's brief except for good cause shown.

A motion for further articulation may be filed by any party within twenty days after issuance of notice of the filing of an articulation by the trial judge. A motion for extension of time to file a motion for articulation shall be filed in accordance with Section 66-1.

COMMENTARY: These amendments make the rule consistent with the recently enacted amendments regarding the preparation of the clerk appendix and to reflect the current practice that, if a final order has been issued for the appellant's brief, the appellant must obtain permission of the court before filing a motion for rectification or articulation.

CHAPTER 67

BRIEFS

Sec. 67-4. The Appellant's Brief; Contents and Organization

The appellant's brief shall contain the following:

(a) A table of contents.

(b) A concise statement setting forth, in separately numbered paragraphs, without detail or discussion, the principal issue or issues involved in the appeal, with appropriate references to the page or pages of the brief where the issue is discussed, pursuant to subsection (e) hereof. Such statement shall be deemed in replacement of and shall supersede the preliminary statement of issues.

(c) A table of authorities cited in the brief, with references to the page or pages of the brief where the citations to those authorities appear. Citations shall be in the form provided in Section 67-11.

(d) A statement of the nature of the proceedings and of the facts of the case bearing on the issues raised. The statement of facts shall be in narrative form, shall be supported by appropriate references to the page or pages of the transcript or to the document upon which the party relies and shall not be unnecessarily detailed or voluminous.

(e) The argument, divided under appropriate headings into as many parts as there are points to be presented, with appropriate references

to the statement of facts or to the page or pages of the transcript or to the relevant document. The argument on each point shall include a separate, brief statement of the standard of review the appellant believes should be applied.

(1) When error is claimed in the trial court's refusal to charge the jury as requested, the party claiming such error shall include in the brief of that party or the appendix thereto a verbatim statement of the relevant portions of the charge as requested and as given by the court and any relevant exceptions to the charge as given and shall recite in narrative form any evidence which it is claimed would entitle that party to the charge as requested, with appropriate references to the page or pages of the transcript.

(2) When error is claimed in the charge to the jury, the brief or appendix shall include a verbatim statement of all relevant portions of the charge and all relevant exceptions to the charge. Unless essential to review of a claimed error, a verbatim statement of the entire charge to the jury should not be included in the brief or appendix. Evidence relevant to the claimed error shall be recited in narrative form with appropriate references to the page or pages of the transcript.

(3) When error is claimed in any evidentiary ruling in a court or jury case, the brief or appendix shall include a verbatim statement of the following: the question or offer of exhibit; the objection and the ground on which it was based; the ground on which the evidence was claimed to be admissible; the answer, if any; and the ruling.

(4) When error is claimed in any other ruling in a court or jury case, the brief or appendix shall include the pertinent motion or pleading as well as any other pertinent documents which are a part of the record of the proceedings below.

(5) When the basis of an evidentiary or other ruling referred to in subsection (e) (3) or (e) (4) cannot be understood without knowledge of the evidence or proceeding which preceded or followed the ruling, a brief narrative or verbatim statement of the evidence or proceeding should be made. A verbatim excerpt from the transcript should not be used if a narrative statement will suffice. When the same ruling is repeated, the brief should contain only a single ruling unless the other rulings are further illustrative of the rule which determined the action of the trial court or establish the materiality or harmfulness of the error claimed. The statement of rulings in the brief shall include appropriate references to the page or pages of the transcript.

(f) A short conclusion stating the precise relief sought.

(g) The text of the pertinent portions of any constitutional provision, statute, ordinance or regulation at issue or on which the appellant relies. Such text need not be included in the brief if it is included in the appendix to the appellant's brief.

(h) In appeals filed pursuant to Section 81-4, a statement identifying the version of the land use regulations filed with the appellate clerk.

(i) In civil appeals filed by an entity as defined in Section 60-4, counsel of record shall include a current certificate of interested entities or individuals in the appellant's brief.

([i] j) The appellant's brief shall be organized in the following order: if the appeal is in a civil matter and the appeal was filed by an entity, a current certificate of interested entities or individuals as defined in Section 60-4; table of contents; statement of issues; table of authorities; if the appeal was filed pursuant to Section 81-4, statement identifying version of land use regulations filed with the appellate clerk; statement

of facts; argument; conclusion and statement of relief requested; signature; and certification pursuant to Section 62-7.

COMMENTARY: These amendments describe when a certificate of interested entities or individuals is required to be filed and dictate the order in which such certificate is to appear in the appellant's brief.

Sec. 67-5. The Appellee's Brief; Contents and Organization

The brief of the appellee shall contain, in a form corresponding to that stated in Section 67-4, the following:

(a) A table of contents.

(b) A counterstatement of any issue involved as to which the appellee disagrees with the statement of the appellant or a statement of any other grounds which were properly raised by an appellee under Section 63-4. Such statement shall be deemed in replacement of and shall supersede the preliminary statement of the issues.

(c) A table of authorities cited in the brief, with references to the page or pages of the brief where the citations to those authorities appear. Citations shall be in the form provided in Section 67-11.

(d) A counter statement of any fact as to which the appellee disagrees with the statement of the appellant. The counter statement of facts shall be in narrative form and shall be supported by appropriate references to the page or pages of the transcript or to the relevant document upon which the appellee relies. An appellee may not rely on any fact unless it is set forth in the appellee's counter statement of facts or in the appellant's statement of facts or is incorporated in any brief of the parties in accordance with Section 67-4 (e) or with subsection (e) hereof.

(e) The argument of the appellee, divided as provided in Section 67-4 (e). The argument on each point shall include a separate, brief

statement of the standard of review the appellee believes should be applied. The argument may augment or take exception to the appellant's presentation of rulings or the charge by reference to any relevant part of the court's charge or any other evidence in narrative or verbatim form which is relevant to such question, with appropriate references to the statements of facts or to the page or pages of the transcript or to the relevant document.

(f) Claims, if any, directed to any rulings or decisions of the trial court adverse to the appellee. These shall be made in the manner provided in Section 67-4 (e).

(g) A short conclusion stating the precise relief sought.

(h) The text of the pertinent portions of any constitutional provision, statute, ordinance or regulation at issue or on which the appellee relies. Such text need not be included in the brief if it is included in the appellant's brief or appendix or in the appendix to the appellee's brief.

(i) In appeals filed pursuant to Section 81-4, a statement as to whether the appellee disputes the applicability of the version of the land use regulations filed with the appellate clerk. If the appellee disputes the applicability of such regulations, it shall set forth its basis for maintaining that such regulations do not apply.

(j) If the appellee is an entity as defined in Section 60-4, counsel of record shall include a current certificate of interested entities or individuals in the appellee's brief.

~~(l)~~ k) The appellee's brief shall be organized in the following order: a current certificate of interested entities or individuals as defined in Section 60-4; table of contents; statement of issues; table of authorities; statement of facts; argument; conclusion and statement of relief requested; signature; and certification pursuant to Section 62-7.

([k]) When the appellee is also the cross appellant, the issues on the cross appeal shall be briefed in accordance with Section 67-4. In such a case, the briefs shall clearly label which sections of the brief refer to the appeal and which refer to the cross appeal.

COMMENTARY: These amendments describe when a certificate of interested entities or individuals is required to be filed and dictate the order in which such certificate is to appear in the appellee's brief.

Sec. 67-7. The Amicus Curiae Brief

(Applicable to appeals filed before October 1, 2021.)

(a) A brief of an amicus curiae in cases before the court on the merits may be filed only with the permission of the court. An application for permission to appear as amicus curiae and to file a brief shall be filed within twenty days after the filing of the brief of the party, if any, whom the applicant intends to support, and if there is no such party, then the application shall be filed no later than twenty days after the filing of the appellee's brief.

(b) The application shall state concisely the nature of the applicant's interest and the reasons why a brief of an amicus curiae should be allowed. If the applicant in a civil appeal is an entity as defined in Section 60-4, a certificate of interested entities or individuals shall be attached to the application. The length of the brief shall not exceed ten pages unless a specific request is made for a brief of more than that length. The application shall conform to the requirements set forth in Sections 66-2 and 66-3. The amicus application should specifically set forth reasons to justify the filing of a brief in excess of ten pages. A party in receipt of an application may, within ten days after the filing of the application, file an objection concisely stating the reasons therefor.

(c) All briefs filed under this section shall comply with the applicable provisions of this chapter and shall set forth the interest of the amicus curiae. If the appeal is in a civil matter and the amicus curiae is an entity as defined in Section 60-4, a certificate of interested entities or individuals shall be included in the brief.

(d) An amicus curiae may argue orally only when a specific request for such permission is granted by the court in which the appeal is pending.

(e) With the exception of briefs filed by the attorney general as provided by this rule, all briefs shall indicate whether counsel for a party wrote the brief in whole or in part and whether such counsel or a party contributed to the cost of the preparation or submission of the brief and shall identify those persons, other than the amicus curiae, its members or its counsel, who made such monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(f) Except for habeas corpus matters based on criminal convictions, if an appeal in a noncriminal matter involves an attack on the constitutionality of a state statute, the attorney general may appear and file a brief amicus curiae as of right. Any such appearance by the attorney general shall be filed no later than the date on which the brief of the party that the attorney general supports is filed, and the attorney general's brief will be due twenty days after the filing of the brief of the party that the attorney general supports.

COMMENTARY: These amendments describe when a certificate of interested entities or individuals is required to be filed and the requirement that such a certificate shall be included in an amicus brief filed in a civil matter.

Sec. 67-7A. The Amicus Curiae Electronic Brief

(Applicable to appeals filed on or after October 1, 2021.)

(a) A brief of an amicus curiae in cases before the court on the merits may be filed only with the permission of the court unless Section 67-7A (f) applies. An application for permission to appear as amicus curiae and to file a brief shall be filed within twenty days after the filing of the brief of the party, if any, whom the applicant intends to support, and if there is no such party, then the application shall be filed no later than twenty days after the filing of the appellee's brief.

(b) The application shall state concisely the nature of the applicant's interest and the reasons why a brief of an amicus curiae should be allowed. If the applicant in a civil appeal is an entity as defined in Section 60-4, a certificate of interested entities or individuals shall be attached to the application. The length of the brief shall not exceed 4000 words unless a specific request is made for a brief of more than that length. The application shall conform to the requirements set forth in Sections 66-2 and 66-3. The amicus application should specifically set forth reasons to justify the filing of a brief in excess of 4000 words. A party in receipt of an application may, within ten days after the filing of the application, file an objection concisely stating the reasons therefor.

(c) All briefs filed under this section shall comply with the applicable provisions of this chapter and shall set forth the interest of the amicus curiae. If the appeal is in a civil matter and the amicus curiae is an entity as defined in Section 60-4, a certificate of interested entities or individuals shall be included in the brief.

(d) An amicus curiae may argue orally only when a specific request for such permission is granted by the court in which the appeal is pending.

(e) With the exception of briefs filed by the attorney general as provided by this rule, all briefs shall indicate whether counsel for a party wrote the brief in whole or in part and whether such counsel or a party contributed to the cost of the preparation or submission of the brief and shall identify those persons, other than the amicus curiae, its members or its counsel, who made such monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(f) Except for habeas corpus matters based on criminal convictions, if an appeal in a noncriminal matter involves an attack on the constitutionality of a state statute, the attorney general may appear and file a brief amicus curiae as of right. Any such appearance by the attorney general shall be filed no later than the date on which the brief of the party that the attorney general supports is filed, and the attorney general's brief will be due twenty days after the filing of the brief of the party that the attorney general supports.

COMMENTARY: These amendments describe when a certificate of interested entities or individuals is required to be filed and the requirement that such a certificate shall be included in an amicus brief filed in a civil matter.

CHAPTER 70

ARGUMENTS AND MEDIA COVERAGE OF COURT PROCEEDINGS

Sec. 70-1. Oral Argument; Videoconferencing of Oral Argument in Certain Cases

(a) Oral argument will be allowed as of right in all appeals except as provided in subsection (b) of this rule.

(b) In civil cases where: (1) the dispositive issue or set of issues has been recently authoritatively decided; or (2) the facts and legal

arguments are adequately presented in the briefs and the decisional process would not be significantly aided by oral argument, notice will be sent to counsel of record that the case will be decided on the briefs and record only. This notice will be issued after all briefs and appendices, if any, have been filed. Any party may file a request for argument stating briefly the reasons why oral argument is appropriate and shall do so within ten [seven] days of the issuance of the court's notice. After receipt and consideration of such a request, the court will either assign the case for oral argument or assign the case for disposition without oral argument, as it deems appropriate.

(c) In matters involving incarcerated self-represented parties, oral argument may be conducted by videoconference upon direction of the court in its discretion.

COMMENTARY: The purpose of this amendment is to increase the time from seven to ten days to file a request for oral argument following the issuance of notice from the court that the case will be decided on briefs and the record only.

Sec. 70-4. Time Allowed for Oral Argument; Who May Argue

Unless the court grants a request for additional time made before oral argument begins, argument of any case shall not exceed [one-half hour] thirty minutes on each side in the Supreme Court and twenty minutes on each side in the Appellate Court. The time allowed may be apportioned among counsel on the same side of a case as they may choose. The court may terminate the argument whenever in its judgment further argument is unnecessary.

Prior to the date assigned for hearing, counsel of record may file a request with the appellate clerk to allow more than one counsel to present oral argument for one party to the appeal.

In cases in which there is a firm appearance, or in which there are multiple appearances for the same party, if an attorney from the appearing firm or who already has an appearance wishes to argue the appeal but is not identified as the arguing attorney on the brief, the attorney who will be arguing the appeal shall file a letter notifying the court of the change as soon as possible prior to argument.

No argument shall be allowed any party who has not filed a brief or who has not joined in the brief of another party.

COMMENTARY: The intent of these amendments is to clearly state in the rules the different practices of the Supreme and Appellate Courts with respect to the time allotted for oral arguments.

Sec. 70-9. Coverage of Court Proceedings by Cameras and Electronic Media

(a) The broadcasting, televising, recording or photographing of proceedings in the Supreme or Appellate Court by the media as defined in Section 1-10A should be allowed unless the panel of jurists partially or totally excludes coverage in the interests of the administration of justice. [Except for those matters enumerated in subsection (c) of this rule, all judicial courtroom proceedings in the Supreme and Appellate Courts are presumed to be subject to coverage by cameras and electronic media.]

(b) Unless good cause is shown, any media or pool representative who has been approved as media pursuant to Section 1-10A and wishes to broadcast, televise, record or photograph a Supreme or Appellate Court proceeding shall send an e-mail request for electronic coverage to a person designated by the chief court administrator to receive such requests at least three business days prior to the commencement of the proceeding. Said designee shall promptly transmit

any such request to the panel of jurists assigned to hear the matter.

[(1) All such proceedings may be broadcast, televised, videotaped, audio recorded or photographed unless: (A) the panel of jurists grants a motion by a party or a victim in a case requesting the limitation or preclusion of such coverage, or (B) the panel of jurists, on its own motion, limits or precludes such coverage. The right to permit or to exclude coverage, whether partially or totally, at any time in the interests of the administration of justice shall remain with the panel of jurists.

(2) Any party or victim who desires to file a motion to limit or preclude coverage shall do so not later than one week before the start of the term for which the case is subject to being assigned, as indicated on a docket pursuant to Section 69-1. The party or victim shall deliver a copy of such motion to each counsel of record and to any other victim in the case. The party or victim shall give notice to any such victim by notifying the state's attorney in a criminal case, the attorney or guardian ad litem for a minor child in cases involving a minor victim or child represented by an attorney or guardian ad litem, and to any other victim or child by notifying the office of the victim advocate. Endorsed on the motion shall be certification of such delivery. The appellate clerk shall refer any such motion to the panel of jurists for review as soon as the panel is determined. The panel of jurists may consider a late motion to limit or preclude coverage. Prior to acting on such motion, the panel of jurists shall provide any media outlet expected to cover the proceeding an opportunity to respond in writing to the motion.

(3) In acting on such motion or on its own motion, the panel of jurists will apply the presumption that all judicial courtroom proceedings in the Supreme and Appellate Courts are subject to coverage by cameras

and electronic media. In addition, it will be guided by the principles that such coverage should be limited only if there is good cause to do so, there are no reasonable alternatives to such limitations, and the limitation is no broader than necessary to protect the competing interests at issue.

(4) In acting on such motion or its own motion, the panel of jurists will conclude that the presumption in favor of coverage by cameras and electronic media has been overcome only if it is satisfied that good cause exists for a limitation or preclusion on coverage. If the panel of jurists orders a limitation or preclusion on coverage, it will provide a statement of its reasons. A statement may be written or stated on the record in open court.]

(c) The right to permit or to exclude coverage, whether partially or totally, shall remain with the panel of jurists, consistent with subsection (a).

[(c) (1)] (d) In any case involving: [The presumption in favor of coverage shall not apply to cases involving:] [(A)] (1) sexual assault; [(B)] (2) risk of injury to, or impairing the morals of, a child; [(C)] (3) abuse or neglect of a child; [(D)] (4) termination of parental rights; and [(E)] (5) contested questions of child custody or visitation, counsel of record shall not disclose any information that would likely publicly reveal the identity or location of the protected parties during the proceeding.

[(2) In cases to which the presumption in favor of coverage does not apply, any person may request such coverage by filing a motion not later than one week before the start of the term for which the case is subject to being assigned, as indicated on the docket pursuant to Section 69-1. The applicant shall deliver a copy of such written request to each counsel of record and to any victim or child in the case. The

applicant shall give notice to any such victim by notifying the state's attorney in a criminal case, the attorney or guardian ad litem for a minor child in cases involving a minor victim or child represented by an attorney or guardian ad litem, and to any other victim or child by notifying the office of the victim advocate. Endorsed on the motion shall be a certification of such delivery. The appellate clerk shall refer any such motion to the panel of jurists for review as soon as the panel is determined. The panel of jurists may consider a late motion requesting coverage. Prior to acting on such motion, the panel of jurists shall provide the parties, any such minor children and any victims of the offense an opportunity to respond in writing to the motion. The panel of jurists shall grant the motion only if it is satisfied that the need for such coverage outweighs the privacy interests involved in the case.

(d) The Supreme and Appellate Courts shall establish appropriate protocols governing the number, location and use of all forms of coverage consistent with these rules.]

(e) If there are multiple requests to broadcast, televise, record or photograph the same proceeding, the media representatives making such requests must make pooling arrangements among themselves, unless otherwise determined by the panel of jurists. The panel of jurists shall not mediate any disputes among the media regarding pooling arrangements.

[(e)] (f) As used in this rule, "panel of jurists" means the justices or judges assigned to hear a particular case.

COMMENTARY: The purpose of these amendments is to conform the rule to the current practice before the Supreme Court, and to

instruct counsel of record not to disclose in certain cases the identity or location of protected parties.

CHAPTER 72

WRITS OF ERROR

Sec. 72-1. Writs of Error; In General

(a) Writs of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the Appellate Court in the following cases: (1) a decision binding on an aggrieved nonparty; (2) a summary decision of criminal contempt; (3) a denial of transfer of a small claims action to the regular docket; and (4) as otherwise necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

(b) No writ of error may be brought in any civil or criminal proceeding for the correction of any error where (1) the error might have been reviewed by process of appeal, or by way of certification, or (2) the parties, by failure timely to seek a transfer or otherwise, have consented to have the case determined by a court or tribunal from whose judgment there is no right of appeal or opportunity for certification.

(c) If an entity as defined in Section 60-4 is a plaintiff in error or a defendant in error, counsel for that entity shall file a certificate of interested entities or individuals.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

Sec. 72-3. Applicable Procedure

(a) The writ of error, if in proper form, shall be allowed and signed by a judge or clerk of the court in which the judgment or decree was rendered. The writ of error shall be presented for signature within twenty days of the date notice of the judgment or decision complained

of is given but shall be signed by the judge or clerk even if not presented in a timely manner. Failure without cause to present the writ of error in a timely manner maybe a ground for dismissal of the writ of error by the court having appellate jurisdiction.

(b) The writ of error shall be served and returned as other civil process, except that the writ of error shall be served at least ten days before the return day and shall be returned to the appellate clerk at least one day before the return day. The return days are any Tuesday not less than twelve nor more than thirty days after the writ of error is signed by a judge or clerk of the court.

(c) The writ of error shall be deemed filed the day it is properly returned to the appellate clerk. The plaintiff in error shall return the writ of error to the appellate clerk by (1) complying with Section 60-7 or 60-8 by paying the required fee, submitting a signed application for waiver of fees and the order of the trial court granting the fee waiver, or certifying that no fees are required; (2) submitting the matter in accordance with the provisions of Section 63-3; and (3) submitting the allowed and signed writ of error and the signed marshal's return to the appellate clerk.

(d) An electronically filed writ of error will be docketed upon the submission of the matter in accordance with Section 63-3 but will be rejected upon review by the appellate clerk if the plaintiff in error fails to comply with Section 60-7 or to submit an allowed and signed writ of error and the signed marshal's return on the same business day the matter is submitted in accordance with the provisions of Section 63-3. The writ of error may also be returned upon review by the appellate clerk for noncompliance with the Rules of Appellate Procedure. The appellate clerk shall forthwith give notice to all parties of the filing of the writ of error.

(e) If the writ of error is brought against a judge of the Superior Court to contest a summary decision of criminal contempt by that judge, the defendant in error shall be the Superior Court. In all other writs of error, the writ of error shall bear the caption of the underlying action in which the judgment or decision was rendered. All parties to the underlying action shall be served in accordance with chapter 8 of these rules.

(f) Within ten [twenty] days of [after] filing a [the] writ of error, the plaintiff in error shall file with the appellate clerk

(1) a certificate stating that no transcript is deemed necessary or a transcript order confirmation from the official court reporter in compliance with Section 63-4 (a). If any other party deems any other parts of the transcript necessary that were not ordered by the plaintiff in error, that party shall, within twenty days of the filing of the plaintiff in error's transcript papers, file a transcript order confirmation for an order placed in compliance with Section 63-8 or 63-8A.

(2) A docketing statement in compliance with Section 63-4 (a). If additional information is or becomes known to, or is reasonably ascertainable by the defendant in error, the defendant in error shall file a docketing statement supplementing the information required to be provided by the plaintiff in error.

(g) Within twenty days of filing a writ of error, the plaintiff in error shall file with the appellate clerk such documents as are necessary to present the claims of error made in the writ of error, including pertinent pleadings, memoranda of decision and judgment file, accompanied by a certification that a copy thereof has been served on each counsel of record in accordance with Section 62-7.

[(g) In the event a transcript is necessary, the plaintiff in error shall follow the procedure set forth in Sections 63-8 and 63-8A.]

(h) Within ten days of the filing by the plaintiff in error of the documents referred to in subsection[s (f) and] (g) of this rule, the defendant in error may file such additional documents as are necessary to defend the action, accompanied by a certification that a copy thereof has been served on each counsel of record in accordance with Section 62-7.

(i) Answers or other pleas shall not be filed in response to any writ of error.

(j) Briefing is in accordance with Section 67-1 et seq. in which the rules applicable to appellants shall apply to plaintiffs in error, and the rules applicable to appellees shall apply to defendants in error.

COMMENTARY: The purpose of these amendments is to require a plaintiff in error to file a certificate regarding transcripts and a docketing statement within ten days of filing a writ of error for consistency with Section 63-4 (a) and to clarify that briefing is to be in accordance with the rules applicable to appeals.

CHAPTER 73 RESERVATIONS

Sec. 73-1. Reservation of Questions from the Superior Court to the Supreme Court or Appellate Court; Contents of Reservation Request

(a) Counsel may jointly file with the Superior Court a request to reserve questions of law for consideration by the Supreme Court or Appellate Court. A reservation request shall set forth: (1) a stipulation of the essential undisputed facts and a clear and full statement of the question or questions upon which advice is desired; (2) a statement of reasons why the resolution of the question by the appellate court

having jurisdiction would serve the interest of simplicity, directness and judicial economy; and (3) whether the answers to the questions will determine, or are reasonably certain to enter into the final determination of the case. All questions presented for advice shall be specific and shall be phrased so as to require a Yes or No answer.

(b) Reservation requests may be brought only in those cases in which an appeal could have been filed directly to the Supreme Court, or to the Appellate Court, respectively, had judgment been rendered. Reservations in cases where the proper court for the appeal cannot be determined prior to judgment shall be filed directly to the Supreme Court.

(c) If one of the parties to the reservation request in a civil matter is an entity as defined in Section 60-4, the reservation request must also include a certificate of interested entities or individuals filed by counsel of record for that entity.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

CHAPTER 77

PROCEDURES CONCERNING COURT CLOSURE AND SEALING ORDERS OR ORDERS LIMITING THE DISCLOSURE OF FILES, AFFIDAVITS, DOCUMENTS OR OTHER MATERIAL

Sec. 77-2. Sealing Orders; Treatment of Lodged Records

(a) When, by order of the trial court or by operation of statute, a trial court file is sealed or is subject to limited disclosure, all filings with the appellate clerk in that matter shall be treated similarly unless otherwise ordered by the court having appellate jurisdiction. Any sealing or limitation on disclosure ordered by the trial court or required by operation of statute as to any affidavit, document or other material filed in the trial court shall continue throughout the appellate process.

(b) If a party includes material in a brief or appendix that is sealed or subject to limited disclosure, that party shall file a redacted brief and appendix, if any, to be made available to the public, and an unredacted brief and appendix, if any, to be made available to only the parties and the court. Both the redacted and unredacted brief and appendix shall be filed in accordance with the applicable provisions of Section 67-2 or Section 67-2A, except that only one paper copy of the redacted brief and appendix is required. Prior to filing, counsel of record shall file a letter notifying the court that the briefs and appendices will be filed pursuant to this subsection. This subsection shall not apply to briefs or appendices filed in child protection matters pursuant to Section 79a-6, or where the only redacted material are names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

~~(b)~~ c) If a claim is raised on appeal challenging the denial of a motion to seal or limit disclosure pursuant to Section 7-4B (d), a lodged record shall remain conditionally under seal in the court having appellate jurisdiction and shall be treated as an exhibit pursuant to the provisions of Section 68-1.

COMMENTARY: The purpose of the new subsection (b) is to facilitate the process by which a party can file an unredacted appellate brief when that party wishes to discuss matters that are subject to a sealing order.

(NEW) CHAPTER 78b

REVIEW OF ORDERS DENYING APPLICATION FOR WAIVER OF FEES TO COMMENCE A CIVIL ACTION OR A WRIT OF HABEAS CORPUS

COMMENTARY: This new chapter would implement review by the Appellate Court of an order denying an application for a fee waiver

for the commencement of a civil action or the filing of a petition for a writ of habeas corpus, contingent on the General Assembly's passing of proposed legislation authorizing such review.

(NEW) Sec. 78b-1. Petition for Review of Order Denying Application for Waiver of Fees to Commence a Civil Action or a Writ of Habeas Corpus

Any person aggrieved by an order of the Superior Court denying an application for waiver of the payment of a fee for filing an action or the cost of service of process to commence a civil action or a writ of habeas corpus in the Superior Court may petition the Appellate Court for review of such an order after a hearing pursuant to the provisions of Section 8-2 (d) and a decision thereon.

Petitions for review of the denial of an application for waiver of the payment of a fee for filing an action or the cost of service of process to commence a civil action or writ of habeas corpus must conform to the requirements for motions for review set forth in Section 66-6 and are subject to transfer to the Supreme Court pursuant to Section 65-3.

COMMENTARY: This new section would implement review by the Appellate Court of an order denying an application for a fee waiver for the commencement of a civil action or the filing of a petition for a writ of habeas corpus, contingent on the General Assembly's passing of proposed legislation authorizing such review.

CHAPTER 79a

APPEALS IN CHILD PROTECTION MATTERS

Sec. 79a-3. Filing of the Appeal

(a) General provisions

Appeals in child protection matters shall be filed in accordance with the provisions of Section 63-3 and all required fees shall be paid in accordance with Sections 60-7 and 60-8.

(b) Appeal by indigent party

If a trial attorney who has provided representation to an indigent party through the Division of Public Defender Services declines to pursue an appeal, that attorney shall ascertain that the indigent party expressly wishes to appeal and obtain the indigent party's current address, e-mail address and telephone number. The trial attorney shall explain to the indigent party the appellate review process set forth in this section. The trial attorney shall within twenty days of the decision or judgment simultaneously file with the court before which the matter was heard a motion for an additional twenty or forty day extension of time to appeal pursuant to Section 79a-2 (a) and (e), a sworn application signed by the indigent party for appointment of appellate counsel and a waiver of fees, costs and expenses, including the cost of an expedited transcript. If the court finds the indigent party still to be indigent, the court shall not grant the application for appointment of appellate counsel but shall first appoint an appellate review attorney for the sole purpose of determining whether there is any nonfrivolous ground on which to appeal. The trial attorney shall immediately request an expedited transcript from an official court reporter or court recording monitor in accordance with Section 79a-5, the cost of which shall be paid for by the Division of Public Defender Services.

Any party who is indigent who wishes to appeal and was not provided with representation by the Division of Public Defender Services during the proceeding which resulted in the decision or judgment from which an appeal is being sought shall, within twenty days of the decision or judgment, simultaneously file with the court before which the matter was heard a motion for an additional twenty or forty day extension of

time to appeal pursuant to Section 79a-2 (a) and (e), a sworn application signed by the indigent party for appointment of appellate counsel and a waiver of fees, costs, and expenses, including the cost of an expedited transcript. If the court finds the party to be indigent, the court shall not grant the application for appointment of appellate counsel but shall first appoint an appellate review attorney for the sole purpose of determining whether there is any nonfrivolous ground on which to appeal. The indigent party shall immediately request an expedited transcript from the official court reporter or court recording monitor in accordance with Section 79a-5, the cost of which shall be paid for by the Division of Public Defender Services.

(c) Review by the Division of Public Defender Services

(1) An appellate review attorney determining whether there is a nonfrivolous ground for appeal shall file a limited “in addition to” appearance with the trial court for the purpose of that determination. If the appellate review attorney determines that there is a nonfrivolous ground on which to appeal, that attorney shall notify the court, and the application for appellate counsel shall be granted by the court. The appellate counsel so appointed shall file a limited “in addition to” appearance with the trial court for the purpose of prosecuting the appeal and shall file the appeal in accordance with Section 63-3.

(2) In a child protection proceeding that has not resulted in the termination of parental rights, if the appellate review attorney determines that there is no nonfrivolous ground on which to appeal, that attorney shall promptly make this determination known to the indigent party, the judicial authority and the Division of Public Defender Services. The reviewing attorney shall inform the indigent party, by letter, of his or her determination and of the balance of the time remaining

to file an appeal as a self-represented party or to secure counsel, who may file an appearance to represent the indigent party on appeal at the indigent party's own expense. A copy of the letter shall be filed with the clerk for juvenile matters forthwith.

(3) In a termination of parental rights proceeding, if the appellate review attorney determines that there is no nonfrivolous ground on which to appeal, that attorney immediately shall file, under seal, a motion for in-court review, which shall indicate that the appellate review attorney has thoroughly reviewed the record for potential errors and set forth the least meritorious grounds that might arguably support an appeal and the factual and legal bases for the conclusion that an appeal would be frivolous. Simultaneous with the filing of the motion for in-court review, the appellate review attorney shall provide a copy of such motion to the indigent party seeking to appeal and shall serve counsel of record and the Division of Public Defender Services with a written notice that a motion for an in-court review by the appellate review attorney has been filed, but shall not serve counsel of record or the Division of Public Defender Services with a copy of the motion or any supporting documentation. The clerk for juvenile matters shall schedule a hearing on the motion for in-court review with the presiding judge or other judge designated to hear the motion within ten days of the date of its filing.

(4) Unless the presiding judge was also the trial judge or is unavailable, the presiding judge shall conduct a nonevidentiary hearing to fully examine the motion for an in-court review and any argument or response by the indigent party, together with any relevant portions of the record. The presiding judge shall afford the indigent party an adequate opportunity to bring to the court's attention what he or she

believes are appealable issues. In his or her discretion, such judge may require briefing. The hearing shall be closed except that the appellate review attorney and the indigent party shall attend. If the indigent party cannot attend the hearing for good cause shown, he or she may file, under seal, a written response to the motion for an in-court review prior to the date of the hearing. Absent compelling circumstances, the hearing shall not be continued if the indigent party does not appear.

(A) If, after the in-court review, the presiding judge independently concludes that any appeal would be frivolous, such judge, within fourteen days of the date of the hearing, shall issue a decision, either written or oral, denying the indigent party's application for appellate counsel and setting forth the basis for his or her finding that an appeal would be frivolous. Any written or transcribed oral decision of the presiding judge shall be filed under seal. The presiding judge also shall order the appellate review attorney to inform the indigent party, by letter, of the decision and to provide a copy of the decision to the indigent party. The appellate review attorney shall also advise the indigent party of the balance of the time remaining to file a motion for review and/or an appeal as a self-represented party or to secure counsel who may file an appearance to represent the indigent party for purposes of filing a motion for review and/or an appeal at the indigent party's own expense. A copy of the letter shall be filed with the clerk for juvenile matters forthwith. An indigent party may seek review of a denial of an application for appointment of appellate counsel on the basis of a finding by the presiding judge that any appeal would be frivolous solely by filing, under seal, a motion for review pursuant to Section 79a-2 (d). The Appellate Court shall expeditiously consider any such motion for review.

(B) If, after the in-court review, the presiding judge concludes that the indigent party's appeal is not frivolous, such judge shall grant the application for appointment of appellate counsel.

(5) Any presiding judge who also was the trial judge or is unavailable shall refer a motion for in-court review filed by an appellate review attorney to the chief administrative judge for juvenile matters for assignment to another judicial authority. If such presiding judge is also the chief administrative judge for juvenile matters, then the motion for in-court review shall be referred by the presiding judge to the administrative judge in the judicial district where the juvenile court hearing the motion for in-court review is located for assignment to another judicial authority.

(d) Duties of clerk for juvenile matters for cases on appeal

The appellate clerk shall send notice to the clerk for juvenile matters and to the clerk of any trial court to which the matter was transferred that an appeal has been filed. Upon receipt of such notice, the clerk for juvenile matters shall send a copy of the appeal form and the case information form to the Commissioner of Children and Families, to the petitioner upon whose application the proceedings in the Superior Court were instituted, unless such party is the appellant, to any person or agency having custody of any child who is a subject of the proceeding, to the Division of Public Defender Services, and to all other interested persons; and if the addresses of any such persons do not appear of record, the clerk for juvenile matters shall call the matter to the attention of a judge of the Superior Court, who shall make such an order of notice as such judge deems advisable.

COMMENTARY: This amendment is in response to *In re Taijha H.B.*, 333 Conn. 297 (2019), in which the court indicated that an indigent party who did not have appointed counsel at trial and who

applies for the appointment of appellate counsel is entitled to an appellate review attorney for the purpose of determining whether there is a nonfrivolous ground on which to appeal.

Sec. 79a-9. Oral Argument

(a) Oral argument will be allowed as of right except as provided in subsection (b) of this rule.

(b) In child protection appeals as defined by Section 79a-1 where (1) the dispositive issue or set of issues has been recently authoritatively decided, or (2) the facts and legal arguments are adequately presented in the briefs and the decisional process would not be significantly aided by oral argument, notice will be sent to counsel of record that the case will be decided on the briefs and record only. This notice will be issued after all briefs and appendices have been filed. Any party may file a request for argument stating briefly the reasons why oral argument is appropriate and shall do so within ten [seven] days of the issuance of the court's notice. After receipt and consideration of such a request, the court will either assign the case for oral argument or assign the case for disposition without oral argument, as it deems appropriate.

(c) In matters involving incarcerated self-represented parties, oral argument may be conducted by videoconference upon direction of the court in its discretion.

COMMENTARY: The purpose of this amendment is to increase the time from seven to ten days to file a request for oral argument following the issuance of notice from the court that the case will be decided on briefs and the record only.

CHAPTER 81**APPEALS TO APPELLATE COURT BY CERTIFICATION FOR
REVIEW IN ACCORDANCE WITH GENERAL STATUTES
CHAPTERS 124 AND 440****Sec. 81-2. Form of Petition**

(a) A petition for certification shall contain the following sections in the order indicated here:

(1) A statement of the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail.

(2) A statement of the basis for certification identifying the specific reasons why the Appellate Court should allow the extraordinary relief of certification. These reasons may include but are not limited to the following:

(A) The court below has decided a question of substance not theretofore determined by the Supreme Court or the Appellate Court or has decided it in a way probably not in accord with applicable decisions of the Supreme Court or the Appellate Court.

(B) The decision under review is in conflict with other decisions of the court below.

(C) The court below has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by any other court, as to call for an exercise of the Appellate Court's supervision.

(D) A question of great public importance is involved.

(3) A summary of the case containing the facts material to the consideration of the questions presented, reciting the disposition of the matter in the trial court, and describing specifically how the trial court decided the questions presented for review in the petition.

(4) A concise argument amplifying the reasons relied upon to support the petition. No separate memorandum of law in support of the petition will be accepted by the appellate clerk.

(5) An appendix containing a table of contents, the operative complaint, all briefs filed by all parties, the opinion or order of the trial court sought to be reviewed, a copy of the order on any motion, other than a motion for extension of time, which would stay or extend the time period for filing the petition, and a list of all parties to the appeal in the trial court with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris numbers of their counsel. If a petitioner in a civil matter is an entity as defined in Section 60-4, counsel of record must also provide a certificate of interested entities or individuals in the appendix. The appendix shall be paginated separately from the petition with consecutively numbered pages preceded by the letter "A."

(b) The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the appellate clerk. The petition shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two fonts, of 12 point or larger size, are approved for use in petitions: Arial and Univers. Each page of a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch.

COMMENTARY: The amendments to this section clarify that, insofar as orders are not issued in connection with motions for extensions of time, those motions are exempt from the rule, and also describe when a certificate of interested entities or individuals is required to be filed.

Sec. 81-3. Statement in Opposition to Petition

(a) Within ten days of the filing of the petition, any party may file a statement in opposition with the appellate clerk stating the reasons why certification should not be granted. The statement shall be presented in a manner which is responsive, in form and content, to the petition it opposes. The statement in opposition shall not exceed ten pages in length, except with special permission of the appellate clerk. The statement in opposition shall be typewritten and fully double spaced and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two fonts, of 12 point or larger size, are approved for use in the statement in opposition: Arial and Univers. Each page of a statement in opposition to a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch.

No separate memorandum of law in support of the statement in opposition will be accepted by the appellate clerk.

(b) The statement in opposition shall be delivered in the manner set forth in Section 62-7.

(c) No motion to dismiss a petition for certification will be accepted by the appellate clerk. Any objection to the jurisdiction of the court to entertain the petition shall be included in the statement in opposition.

(d) If the party in a civil matter filing the opposition is an entity as defined in Section 60-4, a certificate of interested entities or individuals shall be attached to the opposition.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

CHAPTER 82
CERTIFIED QUESTIONS TO OR FROM COURTS OF
OTHER JURISDICTIONS

Sec. 82-3. Contents of Certification Request

A certification request shall set forth: (1) The questions of law to be answered; (2) a finding or stipulation approved by the court setting forth all facts relevant to answering the questions certified and showing fully the nature of the controversy in which the questions arose; (3) that the receiving court may reformulate the questions; and (4) the names and addresses of counsel of record.

The questions presented should be such as will be determinative of the case, and it must appear that their present determination would be in the interest of simplicity, directness and economy of judicial action.

All questions presented shall be specific and shall be phrased so as to require a Yes or No answer, wherever possible.

If one of the parties to the certification request in a civil matter is an entity as defined in Section 60-4, the certification request must also include a certificate of interested entities or individuals filed by counsel of record for that entity.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

CHAPTER 83
CERTIFICATION PURSUANT TO GENERAL STATUTES § 52-265a
IN CASES OF SUBSTANTIAL PUBLIC INTEREST

Sec. 83-1. Application; In General

Within two weeks of the issuance of an order or decision of the Superior Court involving a matter of substantial public interest pursuant

to General Statutes § 52-265a, any party may file an application for certification by the chief justice. The application for certification shall contain: (1) the question of law on which the appeal is to be based; (2) a description of the substantial public interest that is alleged to be involved; (3) an explanation as to why delay may work a substantial injustice; and (4) an appendix with: (A) the decision or order of the Superior Court sought to be appealed and (B) a list of all parties to the case in the Superior Court with the names, addresses, telephone numbers, e-mail addresses and, if applicable, the juris numbers of their counsel. If the party in a civil matter is an entity as defined in Section 60-4, counsel of record must also provide a certificate of interested entities or individuals in the appendix.

Using an expeditious delivery method such as overnight mail or facsimile or other electronic medium, in addition to the certification requirements of Section 62-7, the party submitting the application shall also notify the trial judge and the clerk of the trial court that rendered the decision sought to be appealed.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

CHAPTER 84

APPEALS TO SUPREME COURT BY CERTIFICATION FOR REVIEW

Sec. 84-5. Form of Petition

(a) A petition for certification shall contain the following sections in the order indicated here:

(1) A brief introduction providing context for the statement of the questions presented for review.

(2) A statement of the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The Supreme Court will ordinarily consider only those questions squarely raised, subject to any limitation in the order granting certification.

(3) A brief history of the case containing the facts material to the consideration of the questions presented, including the disposition of the matter in the Appellate Court, and if applicable, a specific description of how the Appellate Court decided the questions presented for review in the petition.

(4) A concise argument expanding on the bases for certification, as presented in Section 84-2, and explaining why the Supreme Court should allow the extraordinary relief of certification. No separate memorandum of law in support of the petition will be accepted by the appellate clerk.

(5) An appendix, which shall be paginated separately from the petition with consecutively numbered pages preceded by the letter “A,” containing:

(A) a table of contents,

(B) the opinion, preferably as published in the Connecticut Law Journal, or order of the Appellate Court sought to be reviewed,

(C) if the opinion or order of the Appellate Court was per curiam or a summary affirmance or dismissal, a copy of the trial court’s memorandum of decision that was entered in connection with the claim raised by the petitioner before the Appellate Court, or, if no memorandum was filed, a copy of the trial court’s ruling on the matter,

(D) a copy of the order on any motion, other than a motion for extension of time, which would stay or extend the time period for filing the petition,

(E) a list of all parties to the appeal in the Appellate Court with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris numbers of their trial and appellate counsel. If one of the parties in a civil action is an entity as defined in Section 60-4, counsel of record must also provide a certificate of interested entities or individuals.

(b) The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the appellate clerk. The petition shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two fonts, of 12 point or larger size, are approved for use in petitions: Arial and Univers. Each page of a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inches; right, 1/2 inch; and bottom, 1 inch.

COMMENTARY: The amendments to this section express the preference of the justices of the Supreme Court for the version of the Appellate Court opinion published in the Connecticut Law Journal, clarify that, insofar as orders are not issued in connection with motions for extensions of time, those motions are exempt from the rule, and describe when a certificate of interested entities or individuals is required to be filed.

Sec. 84-6. Statement in Opposition to Petition

(a) Within ten days of the filing of the petition, any party may file a statement in opposition to the petition with the appellate clerk. The statement in opposition shall disclose any reasons why certification should not be granted by the Supreme Court and shall be presented in a manner which is responsive, in form and content, to the petition

it opposes. The statement in opposition shall not exceed ten pages in length except with special permission of the appellate clerk.

The statement in opposition shall be typewritten and fully double spaced and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two fonts, of 12 point or larger size, are approved for use in the statement in opposition: Arial and Univers. Each page of a statement in opposition to a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch. No separate memorandum of law in support of the statement in opposition will be accepted by the appellate clerk.

(b) The statement in opposition shall be delivered in the manner set forth in Section 62-7.

(c) No motion to dismiss a petition for certification will be accepted by the appellate clerk. Any objection to the jurisdiction of the court to entertain the petition shall be included in the statement in opposition.

(d) If the party filing the opposition in a civil action is an entity as defined in Section 60-4, a certificate of interested entities or individuals shall be attached to the opposition.

COMMENTARY: This amendment describes when a certificate of interested entities or individuals is required to be filed.

(NEW) Sec. 84-10A. Record

Those portions of the record for the appeal to the Appellate Court relevant to the issue certified by the Supreme Court shall be included in the clerk appendix, which shall be prepared and distributed in accordance with Section 68-2 et seq. In addition, the clerk appendix shall include the order granting certification, the opinion or order of the

Appellate Court under review and, to the extent the appellate clerk deems appropriate, any papers subsequently filed pursuant to Section 84-11.

COMMENTARY: This new section details what constitutes the record in an appeal to the Supreme Court following the granting of a petition for certification to appeal.

Sec. 84-11. Papers To Be Filed by Appellant and Appellee in an Appeal After Certification

(a) Within ten days of filing the appeal, the appellant shall also file a docketing statement pursuant to Section 63-4 (a) (4) and a designation of the proposed contents of the clerk appendix pursuant to Section 63-4 (a) (2). The parties shall not file other Section 63-4 papers on a certified appeal without permission of the Supreme Court.

([a]b) [Upon the granting of certification,] Within ten days of the filing of the appeal, the appellee may [present for review] file a statement of alternative grounds for affirmance or adverse rulings or decisions to be considered in the event of a new trial, [upon which the judgment may be affirmed provided those grounds were raised and briefed in the Appellate Court. Any party to the appeal may also present for review adverse rulings or decisions which should be considered on the appeal in the event of a new trial,] provided that such party has raised such claims in the Appellate Court. If such alternative grounds for [affirmation] affirmance or adverse rulings or decisions to be considered in the event of a new trial were not raised in the Appellate Court, the party seeking to raise them in the Supreme Court must move for special permission to do so prior to the filing of that party's brief. Such permission will be granted only in exceptional cases where the interests of justice so require.

([b]c) Any party may also present for review any claim that the relief afforded by the Appellate Court in its judgment should be modified, provided such claim was raised in the Appellate Court either in such party's brief or upon a motion for reconsideration.

[(c) Any party desiring to present alternative grounds for affirmance, adverse rulings or decisions in the event of a new trial or a claim concerning the relief ordered by the Appellate Court shall file a statement thereof within fourteen days from the date the certified appeal is filed in accordance with Section 84-9.

(d) Except for a docketing statement, parties shall not file other Section 63-4 papers on a certified appeal without permission of the Supreme Court.]

COMMENTARY: These amendments clarify the papers to be filed upon the granting of a petition for certification to appeal by the Supreme Court.

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

NOTICE OF INTENT TO RENEW AND AMEND THE HOME AND COMMUNITY SUPPORTS WAIVER FOR PERSONS WITH AUTISM (“AUTISM WAIVER”)

In accordance with the provisions of section 17b-8(c) of the Connecticut General Statutes, notice is hereby given that the Commissioner of Social Services intends to submit a renewal of the Home and Community Supports Waiver for Persons with Autism (commonly referred to as the “Autism Waiver”) to the Centers for Medicare and Medicaid Services (“CMS”), to be effective January 1, 2023.

The Department of Social Services is proposing the following changes upon renewal:

- Adding Nutrition as a service. The service includes the clinical assessment and development of special diets; positioning techniques for eating; recommendations for adaptive equipment for eating and counseling for dietary needs related to medical diagnosis for participants; and training for paid support staff to ensure compliance with the participant’s dietary needs. These services are not covered in the Medicaid State Plan.
- Adjusting the maximum total number of participants. The waiver was expanded legislatively to add 50 slots beginning July 1, 2021, and an additional 150 slots beginning July 1, 2022.
- Amending the service definitions of social skills groups, life skills coach and clinical behavioral support services to permit these services to be provided by alternate means beyond face-to-face, including virtually. The alternate means of service delivery is currently permitted for life skills coaching services on a temporary basis pursuant to an Appendix K Emergency Preparedness and Response Amendment, however such authority will expire six months after the end of the COVID-19 public health emergency.
- Amending the qualifications for individual and agency providers of life skills coaching. The amendment removes the requirements that providers must have a bachelor’s degree and pass competency tests for Autism Program Orientation Training Level I and II within three months of working with an individual. The qualifications have been updated to include the requirement that providers have a high school diploma or equivalent and have experience with those on the autism spectrum.
- Technical updates.

A copy of the complete text of the waiver is available, at no cost, upon request to: Department of Social Services, Community Options Unit, 55 Farmington Ave, Hartford, CT 06105, Attention: Jennifer Cavallaro, Director; or via email to Jennifer.Cavallaro@ct.gov. It is also available on the Department of Social Services’ website, www.ct.gov/dss, under “News and Press,” as well as the following direct link: <http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications>.

All written comments regarding this renewal application must be submitted by August 25, 2022, to: Department of Social Services, Community Options Unit, 55 Farmington Ave, Hartford, CT 06105, Attention: Jennifer Cavallaro, Director; or via email to Jennifer.Cavallaro@ct.gov.

NOTICES

Notice of Certification as Authorized House Counsel

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

Certified as of June 2, 2022:

Stephanie Platzman-Diamant Cavalry Portfolio Services, LLC

Certified as of June 30, 2022:

Kelly S. Larkin Booking Holdings, Inc.

Certified as of July 2, 2022:

Monica S. DeNeale Granicus, LLC

Certified as of July 6, 2022:

Raymond Y. Lin Mohegan Tribal Gaming Authority

Hon. Patrick L. Carroll III
Chief Court Administrator

CONNECTICUT BAR EXAMINING COMMITTEE

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

Kathleen B. Harrington
Deputy Director, Attorney Services

Anand, Sapana Chandra of Burr Ridge, IL
Bayraktar, Esra Nur of Sudbury, MA
Chouinard, Alicia Marie of Natick, MA
D'Urso III, Joseph Anthony of Hillsdale, NJ
DeBarba, Joshua Daniel of Woodbridge, CT
Johnson, Shannon Nicole of Middletown, CT
Mahon, Tara E. of Garden City, NY
Nanni Jr., Anthony P. of Barkhamsted, CT
Nash, Karen Elise Priscilla of Lebanon, ME
Salomone, Jr., Mark E. of Weston, MA
Stone, Kacey Amber of Farmington, CT

CONNECTICUT BAR EXAMINING COMMITTEE

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

Kathleen B. Harrington
Deputy Director, Attorney Services

Araujo, Todd Joseph of Uncasville, CT
Berlandi, Brian of White Plains, NY
Bonitatibus, Kara Marie of Norwalk, CT
Carver, Robert of Brooklyn, NY
Covitt, Adam Steven of Garden City, NY
Mallol, Michelle Collins of Riverside, CT
Manhart, Christopher Michael of Valparaiso, IN
Mantyla, Kristen S. of Holbrook, NY
Moody, Justin Andrew of Shelton, CT
Nicholds, Ken of Westport, CT
Reitzas, Joshua T. of White Plains, NY
Rifkind, Neil Charles of New York, NY
Ripple, Raymond Matthew of Canton, MA
Silpe, Steven Mitchell of New York, NY

Notice of Hearing for Reinstatement

NO. FBT-CV03-0404638-S. STATEWIDE GRIEVANCE COMMITTEE, ET AL
V. JOSEPH P. GANIM. SUPERIOR COURT, J.D. OF FAIRFIELD AT BRIDGE-
PORT, JULY 15, 2022.

The Standing Committee on Recommendations for Admissions to the Bar Hartford County hereby serves notice that it intends to hold a hearing on the Respondent's Application for Reinstatement (Entry #124.00) at the Superior Court, Judicial District of Hartford at Hartford, 95 Washington Street, Hartford, CT 06106 beginning on Monday, August 8th, 2022 at 10:00AM.
