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CONNECTICUT REPORTS

Vol. 344

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

WIND COLEBROOK SOUTH, LLC *v.* TOWN OF COLEBROOK (SC 20594)

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

Syllabus

Pursuant to statute (§ 12-64 (a)), the following property, if not exempted, shall be taxed as real property: "Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, [and] all other buildings and structures . . . ."

Pursuant further to statute (§ 12-41 (c)), "[t]he annual declaration of the tangible personal property owned by such person on the assessment date, shall include, but is not limited to . . . [m]achinery used in mills

and factories, cables, wires, poles, underground mains, conduits, pipes and other fixtures of water, gas, electric and heating companies . . . ."

The plaintiff, which owns and operates a wind to electricity generation facility in the defendant town, appealed to the trial court from the decision of the town's board of assessment appeals. The board had denied the plaintiff's appeal from the town assessor's allegedly improper classification of its two wind turbines and the equipment associated with the turbines as real property pursuant to § 12-64 (a), rather than personal property pursuant to § 12-41 (c), and its appeal from the assessor's overvaluation and overassessment of the plaintiff's property. The turbines, which each consist of a tower, a hub, a nacelle, and a three blade rotor, are located on one parcel of land and controlled by a remote computer system, which, along with its associated equipment and software, is stored on an adjacent parcel of land. The tower of each turbine is more than 300 feet in height, contains a control panel and other equipment accessible through an exterior door at its base, and is bolted into a separate concrete foundation. The turbines were designed to remain in place for twenty years, after which the plaintiff agreed to decommission them. On its 2015 declaration of personal property, the plaintiff apparently included the value of the turbines and the associated equipment. The town assessor, however, determined that the turbines should be taxed as real property and that the costs incurred in the development of the facility containing the turbines should be considered in the valuation of the turbines for purposes of assessment and taxation. The town then hired a certified general real estate appraiser, whose appraisal the assessor used to determine the assessed value and fair market value for the parcel on which the turbines were situated. The assessor continued to use those values on the town's grand list in 2016, 2017, and 2018. On appeal to the trial court, the plaintiff claimed, inter alia, that the assessor had improperly classified the turbines as real property and had overvalued and overassessed its property. In support of the latter claim, the plaintiff introduced testimony from its own appraiser, D, who based his appraisal on the cost and income approaches, treated the wind turbines and associated equipment as personal property, and ultimately determined that the fair market value of the plaintiff's property was significantly less than the town's fair market valuation. The trial court rejected those claims, concluding, inter alia, that the assessor properly classified the wind turbines as real property under § 12-64 (a) because they were "buildings" or "structures" within the meaning of that statute and that the equipment associated with the turbines was also real property. The court also found that, given those conclusions, the plaintiff had failed to establish its allegations of overvaluation and overassessment because D's appraisal treated the wind turbines and associated equipment as personal property. From the judgment rendered thereon in favor of the town, the plaintiff appealed. *Held*:

1. The trial court correctly concluded that the wind turbines were taxable as real property pursuant to § 12-64 (a) but incorrectly concluded that the equipment associated with the turbines also was taxable as real property instead of personal property under the "fixtures of . . . electric . . . companies" provision of § 12-41 (c): this court previously has construed and applied the word "building," as used in § 12-64 (a), to include edifices that are enclosed and suitable for occupancy or storage and that are virtually permanent, the trial court found that the interior of the base of each wind turbine was large enough to be occupied by several individuals at one time and that the turbines were virtually permanent, insofar as they were completely enclosed, designed to remain in place for twenty years, and would cost up to approximately $3 million to decommission, and, therefore, the trial court correctly determined that the turbines were taxable as buildings pursuant to § 12-64 (a); moreover, the wind turbines also constituted structures within the meaning of § 12-64 (a), as a review of the legislative history of the statute, including a recent amendment thereto, revealed that, when the legislature added the word "structures" to the "all other buildings and structures" catchall provision of § 12-64 (a), it intended the broad, commonly approved usage of the word, namely, "something . . . that is constructed," and applying the canon of ejusdem generis to limit "structures" narrowly to edifices, like those enumerated in the statute, that are enclosed and suitable for occupancy would render the addition of the word "structures" to that catchall provision superfluous; furthermore, although the wind turbines themselves could not be considered fixtures, insofar as they did not have the character of personal property, the turbines' associated equipment could be considered fixtures and, therefore, was taxable as personal property pursuant to the "fixtures of . . . electric . . . companies" provision of § 12-41 (c), and, because the trial court incorrectly determined that the equipment associated with the turbines was taxable as real property pursuant to § 12-64 (a) rather personal property taxable pursuant to § 12-41 (c), a remand to the trial court was necessary for, inter alia, a factual determination regarding the valuation of the equipment taxable under § 12-41 (c).
2. The trial court incorrectly concluded that the plaintiff had not established its allegations of overvaluation and overassessment, and, accordingly, the case was remanded for a determination regarding the amount of the reassessment that would be just: the trial court's rejection of D's appraisal, which treated the turbines and associated equipment as personal property, was premised on the conclusion that the turbines and associated equipment were taxable as real property, and, in light of this court's conclusion that the associated equipment must be treated as personal property pursuant to § 12-41 (c), the trial court's failure to consider D's appraisal lacked a legal basis and, thus, was clearly erroneous; moreover, because the record established that the valuation the trial court accepted classified the associated equipment as real property

when it should have been classified separately as personal property, it could not be reasonably contended that the defendant did not overvalue the real property.

(*One justice concurring separately*)

Argued January 19—officially released August 2, 2022

Procedural History

Appeal from the decision of the defendant's board of assessment appeals concerning the tax assessment on certain of the plaintiff's property, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Shaban*, *J.*; judgment in part for the defendant, from which the plaintiff appealed. *Reversed in part*; *further proceedings.*

Gregory F. Servodidio, with whom was *Michael J. Marafito*, for the appellant (plaintiff).

Patrick E. Power, for the appellee (defendant).

Opinion

ROBINSON, C. J. The principal issue in this appeal is whether wind turbines used for the generation of electricity, and their associated equipment, are properly classified for purposes of taxation as real property pursuant to General Statutes § 12-64 (a)[1] or, instead, as personal property pursuant to General Statutes § 12-41

[1] General Statutes § 12-64 (a) provides in relevant part: "All the following mentioned property, not exempted, shall be set in the list of the town where it is situated and, except as otherwise provided by law, shall be liable to taxation at a uniform percentage of its present true and actual valuation, not exceeding one hundred per cent of such valuation, to be determined by the assessors: Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings and structures . . . [and] all other lands and improvements thereon and thereto . . . ."

(c).[2] The plaintiff, Wind Colebrook South, LLC, appeals[3] from the judgment of the trial court rendered primarily in favor of the defendant, the town of Colebrook, in this municipal property tax appeal brought pursuant to General Statutes §§ 12-117a[4] and 12-119.[5] On appeal, the

[2] General Statutes § 12-41 (c) provides in relevant part: "The annual declaration of the tangible personal property owned by such person on the assessment date, shall include, but is not limited to, the following property: Machinery used in mills and factories, cables, wires, poles, underground mains, conduits, pipes and other fixtures of water, gas, electric and heating companies, leasehold improvements classified as other than real property and furniture and fixtures of stores, offices, hotels, restaurants, taverns, halls, factories and manufacturers. . . ."

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

[4] General Statutes § 12-117a provides in relevant part: "Any person, including any lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom, with respect to the assessment list for the assessment year commencing October 1, 1989, October 1, 1990, October 1, 1991, October 1, 1992, October 1, 1993, October 1, 1994, or October 1, 1995, and with respect to the assessment list for assessment years thereafter, to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. . . . The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable, and, if the application appears to have been made without probable cause, may tax double or triple costs, as the case appears to demand; and, upon all such applications, costs may be taxed at the discretion of the court. If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes, together with interest and any costs awarded by the court, or, at the applicant's option, shall be granted a tax credit for such overpayment, interest and any costs awarded by the court. . . ."

[5] General Statutes § 12-119 provides in relevant part: "When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set, or that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions

plaintiff claims that the trial court improperly upheld the defendant's (1) classification of its two wind turbines and their associated equipment as real property pursuant to § 12-64 (a), (2) overvaluation and overassessment of its property, and (3) double assessment of the plaintiff's declared personal property. Although we conclude that the wind turbines were properly classified as real property, we agree with the plaintiff's claim that their associated equipment should have been classified as personal, rather than real, property. Accordingly, we reverse in part the judgment of the trial court.

The record reflects the following relevant facts, as found by the trial court, and procedural history. The plaintiff owns and operates a wind turbine facility on two parcels of land located at 17 and 29 Flagg Hill Road in Colebrook. The facility, the first and only full-scale wind-to-electricity generation facility in Connecticut, consists of two 2.85 megawatt wind turbines, both located at 29 Flagg Hill Road. The turbines are controlled by a remote computer known as the Supervisory Control and Data Acquisition System (computer system). The computer system and its accompanying equipment and software are all stored at 17 Flagg Hill Road. The turbines, which collectively weigh 418,657 pounds, each consist of a tower, a hub, a nacelle, and a rotor with three blades that have a 338 foot diameter. Each tower is approximately 328 feet in height and contains a control panel and other equipment accessible through an exterior door at its base. According to the

of the statutes for determining the valuation of such property, the owner thereof or any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. . . . If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

defendant, each turbine, including the tower and blade, is a total of 492 feet high measuring from the top of a blade in its full upright position. Secured by 124 large anchor bolts, the turbines are mounted on separate concrete foundations, each of which is 58 feet in diameter and 9 feet deep. Construction of the turbines was completed in October, 2015, and the facility began commercial operation in November, 2015.

Both parties agreed that the turbines have "an approximate useful life of at least twenty years," after which the plaintiff has agreed to decommission them. Decommissioning the turbines is a complex process that will require unfastening the 124 anchor bolts that are cemented into the foundation and removing the turbines. The estimated cost of decommissioning the turbines is between $1,650,000 and $3,200,000. Although the trial court did not make a finding as to the effect on the land of decommissioning the turbines, the defendant argues that it will cause substantial damage to the land.

The defendant first taxed the plaintiff's turbines on its grand list of October 1, 2015. The defendant's assessor, Michele Sloane, determined that the turbines should be taxed as real property and that the costs incurred in the development of the facility should be considered in the valuation of the turbines for purposes of assessment and taxation. Subsequently, the plaintiff filed its 2015 declaration of personal property, which requires taxpayers to differentiate property by line item or code numbers. The plaintiff reported the value of its property under code 16—which includes furniture, fixtures, and equipment—to be $9,628,795, and the value of its property under code 20—which includes electronic data processing equipment—to be $367,000, with no supporting information or documentation to explain the derivation of each value. In light of the amount listed under code 16, Sloane determined that the plaintiff's proposed

valuation of that property must have included the turbines, and, as a result, she did not accept the plaintiff's code 16 valuation. She did, however, accept the plaintiff's code 20 valuation. Additionally, because the plaintiff did not explain or substantiate the values reported on its 2015 declaration of personal property, the defendant hired Glenn C. Walker, a certified general real estate appraiser experienced in the appraisal of energy production facilities, to appraise the properties. Sloane relied on Walker's appraisal to conclude that the assessed value for 29 Flagg Hill Road was $9,274,640, with a fair market value of $13,300,100. Sloane continued to use these values on the grand list in 2016, 2017, and 2018.

In its 2017 personal property declaration, the plaintiff listed three new items as code 16 property for 2015 through 2017, again providing no information or explanation about the derivation of those values, according to Sloane. Paul J. Corey, one of the plaintiff's employees, testified that the additional items reported in 2017 were all associated with the turbines. However, Sloane was under the impression that the additional values were not associated with the turbines,[6] and, for the 2015 through 2017 personal property declarations, she continued to disregard the original amount reported by the plaintiff on its 2015 declaration of personal property. Sloane accepted the additional values as personal property, while also adding a 25 percent penalty for late reporting. Sloane used these valuations again in 2018 for that year's grand list.

The plaintiff challenged Sloane's assessment by appealing to the defendant's board of assessment appeals (board), claiming that Sloane improperly (1)

[6] Although the trial court credited Corey's testimony that the additional values were associated with the turbines, it also credited testimony from Sloane that she did not recall receiving any information or explanations from Corey regarding the additional values.

overvalued and overassessed the property, (2) disregarded information regarding the wind turbines reported in the plaintiff's 2015 through 2018 declarations of personal property, (3) classified the wind turbines as real property, and (4) included items that were declared and assessed as personal property in her assessment of the real property, thus subjecting the plaintiff to double assessment and double taxation. The board denied the appeal. Subsequently, the plaintiff appealed from the decision of the board to the trial court pursuant to §§ 12-117a and 12-119.

In its tax appeal, the plaintiff renewed the claims it raised before the board. The plaintiff introduced testimony from an appraiser, P. Barton DeLacy, to challenge the defendant's $13,300,100 fair market valuation of the real property at 29 Flagg Hill Road, which included the turbines. DeLacy prepared a 2015 appraisal report using the cost[7] and income[8] approaches and treating the wind turbines and associated equipment as personal property. He ultimately determined that the fair market value of the plaintiff's properties as a whole, both real and personal property at 17 and 29 Flagg Hill Road, was $9,850,500.[9]

The trial court subsequently issued a memorandum of decision, first concluding that the defendant properly

[7] "Under the cost approach to valuation, the appraiser estimates the current cost of replacing the subject property, with adjustments for depreciation, the value of the underlying land, and entrepreneurial profit." *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 17 n.8, 807 A.2d 955 (2002).

[8] "[T]he income approach is used to value real estate through the capitalization of the property's earning power, such as the collection of rental income." (Internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 97 n.10, 61 A.3d 461 (2013).

[9] Although DeLacy did not calculate the assessed value in his report, General Statutes § 12-62a (b) provides in relevant part that "[e]ach . . . municipality shall assess all property for purposes of the local property tax at a uniform rate of seventy per cent of present true and actual value . . . ." Accordingly, the assessed value under DeLacy's appraisal would be $6,895,350.

classified the wind turbines as real property for purposes of taxation under § 12-64 (a) because they were "structures" or "buildings" within the contemplation of that statute. Although the trial court did not provide an additional analysis regarding the turbines' associated equipment, it further concluded that the associated equipment was also real property. Given these conclusions, the trial court further determined that the plaintiff failed to establish (1) its allegation of overvaluation and overassessment because the appraisal submitted by DeLacy treated the wind turbines and associated equipment as personal property, (2) that there was a double assessment and double taxation of the plaintiff's declared personal property, and (3) that the assessment of property was manifestly excessive, as Sloane properly used the methods of valuation outlined in General Statutes § 12-62 (b) (2).[10] The trial court did, however, conclude that the plaintiff established that the defendant's imposition of a 25 percent late filing penalty was improper. Accordingly, the trial court rendered judgment in favor of the plaintiff on the illegality of the penalty and in favor of the defendant in all other respects. This appeal followed.

On appeal, the plaintiff claims that the trial court incorrectly concluded that (1) the wind turbines and associated equipment are taxable as real property pursuant to § 12-64 (a), (2) the plaintiff failed to establish that the defendant's assessor overvalued and overassessed the property, and (3) the plaintiff failed to establish that there was a double assessment and, thus, double taxation

[10] General Statutes § 12-62 (b) (2) provides: "When conducting a revaluation, an assessor shall use generally accepted mass appraisal methods which may include, but need not be limited to, the market sales comparison approach to value, the cost approach to value and the income approach to value. Prior to the completion of each revaluation, the assessor shall conduct a field review. Except in a town that has a single assessor, the members of the board of assessors shall approve, by majority vote, all valuations established for a revaluation."

of its declared personal property. We address each claim in turn.

I

We begin with the plaintiff's claim that the turbines are personal property rather than real property for purposes of taxation. In Connecticut, the taxation of real property is governed by § 12-64, whereas the taxation of personal property is governed by General Statutes § 12-71,[11] which provides that personal property must be listed subject to, among other statutes, § 12-41. See footnotes 1 and 2 of this opinion. The plaintiff argues that the turbines are "machines," which are personal property as defined by § 12-41 (c), insofar as they are comprised of the various components expressly identified in that statute, such as cables, wires, and poles. The plaintiff also argues that the turbines do not have any of the defining characteristics of the "structures" enumerated in § 12-64 (a), which would be characteristic of real property. In response, the defendant argues that the turbines are properly classified as real property pursuant to § 12-64 (a), given our interpretation of that statute in *Eastern Connecticut Cable Television, Inc.* v. *Montville*, 180 Conn. 409, 412, 414, 429 A.2d 905 (1980) (*Eastern Connecticut Cable*), which held a communications tower to be a structure, and *Stratford* v. *Jacobelli*, 317 Conn. 863, 877, 120 A.3d 500 (2015), which held portable aircraft hangars to be buildings or sheds. We agree with the defendant and conclude that the turbines are taxable as real property pursuant to § 12-64 (a).

Whether the trial court correctly concluded that the wind turbines and associated equipment were subject to taxation as real property pursuant to § 12-64 (a), rather

[11] General Statutes § 12-71 (a) provides in relevant part: "All goods, chattels and effects or any interest therein, including any interest in a leasehold improvement classified as other than real property, belonging to any person who is a resident in this state, shall be listed for purposes of property tax in the town where such person resides, subject to the provisions of sections 12-41, 12-43 and 12-59. . . ."

than personal property under § 12-41 (c), is a question of statutory construction over which we exercise plenary review. See, e.g., id., 870–71. "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*." (Emphasis added; internal quotation marks omitted.) *Dish Network, LLC* v. *Commissioner of Revenue Services*, 330 Conn. 280, 291, 193 A.3d 538 (2018). In seeking to determine that meaning, it is well established that we follow the plain meaning rule pursuant to General Statutes § 1-2z. See, e.g., *Boardwalk Realty Associates, LLC* v. *M & S Gateway Associates, LLC*, 340 Conn. 115, 126, 263 A.3d 87 (2021).

We begin with the text of § 12-64 (a). That statute provides for taxation of real property, including "[d]welling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings and structures . . . [and] all other lands and improvements thereon and thereto . . . ." General Statutes § 12-64 (a). In contrast, § 12-41 (c), on which the plaintiff relies, defines personal property to include "[m]achinery used in mills and factories, cables, wires, poles, underground mains, conduits, pipes and other fixtures of water, gas, electric and heating companies . . . ." Although turbines are not expressly included in the language of § 12-64 (a), the defendant argues that the turbines are real property because they are structures, improvements, or buildings, as enumerated in that statute, or because they are fixtures annexed to and taxable as a part of any of the categories of real estate set forth therein.

In construing § 12-64 (a), "we do not write on a clean slate, but are bound by our previous judicial interpreta-

tions of the language and the purpose of the statute." (Internal quotation marks omitted.) *Stratford* v. *Jacobelli*, supra, 317 Conn. 871. This court previously has defined "building" in this context as a "constructed edifice *designed to stand more or less permanently*, covering a space of land, [usually] covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy." (Emphasis added; internal quotation marks omitted.) *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 412. In *Eastern Connecticut Cable*, this court was tasked with determining whether a communications tower, which was a 385 foot high assembly of twenty tubular steel sections that rested on a three feet by three feet concrete foundation embedded six feet into the ground, was a building pursuant to § 12-64 (a). Id., 410, 414–15. We recognized that, although a building is always a structure, not all structures are buildings, and concluded that, although the communications tower was a structure, it was not a building. Id., 414. Because the revision of § 12-64 in effect at that time did not provide for the taxation of structures but, instead, was limited to buildings,[12] this court concluded that the towers at issue in *Eastern Connecticut Cable* were not taxable as real property. Id. It was not until 1993, subsequent to *Eastern Connecticut Cable*, that the legislature added the term "structures" to § 12-64 (a). See Public Acts 1993, No. 93-64, § 1 (P.A. 93-64).

[12] The revision of the statute in effect when this court decided *Eastern Connecticut Cable* provided for the taxation of real property including "[d]welling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, *all other buildings* . . . ." (Emphasis added.) General Statutes (Rev. to 1985) § 12-64.

Notwithstanding the amendment to § 12-64, the trial court in the present case concluded that the plaintiff's turbines were "buildings," as defined by this court in *Eastern Connecticut Cable* and as applied in *Jacobelli*. The plaintiff argues that the turbines in this case are distinguishable from the property as issue in *Jacobelli*, in which this court held that portable aircraft hangars are real property pursuant to § 12-64 (a) because, in that case, the parties stipulated that the hangars were used for storage. We disagree that *Jacobelli* is distinguishable in this regard. As we stated in *Jacobelli*, the controlling inquiry is not the actual use of the property but, rather, the use for which it is suitable.[13] See *Stratford* v. *Jacobelli*, supra, 317 Conn. 873–74. Unlike the tower in *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 414, which this court determined was unsuitable for occupancy, the trial court in the present case determined that the turbines were suitable for occupancy or storage. That conclusion was supported by the trial court's unchallenged factual findings that there was enough room in the interior of the base of each turbine for several individuals to be present at one time and that its design allowed it to be occupied much like a garage, shed, barn, or silo, which are buildings or structures expressly enumerated in § 12-64 (a).

Further, in comparison to the hangars determined to be buildings or sheds in *Jacobelli*, the turbines in the present case are also "virtually permanent . . . ." (Internal quotation marks omitted.) *Stratford* v. *Jacobelli*, 317 Conn. 877. As this court noted in *Jacobelli*, the definition of "buildings" imposes no strict permanency requirement, only that the structure is "more or less permanent . . . ."

[13] We emphasize this point, as the concurring opinion suggests that this inquiry should focus on the "true and essential function" of the property. Part II of the concurring opinion. We note that this suggestion is not in line with our current case law. See *Stratford* v. *Jacobelli*, supra, 317 Conn. 873–74. As we stated, the controlling inquiry is the use for which the property is suitable.

(Internal quotation marks omitted.) Id., 873. The hangars in *Jacobelli* were portable, temporary structures, and this court nevertheless held that the hangars were "virtually permanent as any other building might be . . . ." (Internal quotation marks omitted.) Id., 877. The trial court found that, like the hangars in *Jacobelli*, the turbines at issue in the present case were "more or less permanent. . . . [T]hey have interior space completely enclosed by walls, which makes them suitable for occupancy, and are used for the storage of equipment related to their operation. . . . The wind turbines also have roofs similar to that of a silo, [an] enumerated building, in that they are narrower than the base but complete the building by protecting the interior from external elements." Moreover, it is undisputed that the turbines are designed to remain in place for twenty years. Further, DeLacy testified that decommissioning the turbines at the end of their lifespan would cost up to $3,162,501. Thus, despite there being no strict permanency requirement in the classification of a building, the turbines are virtually permanent. Accordingly, we conclude that the trial court correctly determined that the turbines were taxable as buildings pursuant to § 12-64 (a).

In addition to arguing that the turbines are not buildings, the plaintiff argues that they are not structures and that the inclusion of the turbines within the "all other buildings and structures" catchall provision of § 12-64 (a) "requires a torturing and an expansion" of the statute. We disagree. The term "structure" is not defined in § 12-64 (a) or elsewhere in the tax chapter. "Generally, in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage." *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 697, 258 A.3d 1268 (2021). Contemporary to the 1993 amendment of § 12-64 (a), the word "structure" was defined as "something ([such] as a building) that is constructed . . . ." Merriam-Webster's Collegiate Dic-

tionary (10th Ed. 1993) p. 1167; see also Webster's Third New International Dictionary (1986) p. 2267 (defining "structure" as "something made up of more or less independent elements or parts").

As required by § 1-2z, we must determine whether this statutory language is ambiguous. "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 828, 251 A.3d 56 (2020). As opposed to the commonly approved usage of "structures," the plaintiff argues that the phrase "all other buildings and structures" must be construed in the context of the preceding structures enumerated and that, because all of those enumerated structures are enclosed and suitable for occupancy, any nonspecified item of property must share those characteristics in order to be taxable pursuant to § 12-64 (a). Consistent with the canon of ejusdem generis,[14] the plaintiff's interpretation of the language as included in the statute is reasonable. Thus, we are left with more than one reasonable interpretation of the statute and turn to extratextual sources to resolve this ambiguity.

We begin with the legislative history. As we noted previously, the legislature added the term "structures" to § 12-64 (a) in 1993. See P.A. 93-64, § 1. The debate during the proceedings in the House of Representatives on the bill enacted as P.A. 93-64 demonstrates that its purpose was to "simply clarify that *all* structures and improvements not exempted are subject to the property tax" and to reduce tax appeals involving structures that the legislature intended to be assessed as taxable entities, such as gaze-

[14] "[T]he rule of ejusdem generis . . . explains that [when] a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to . . . things of the same general kind or character as those specified in the particular enumeration." (Internal quotation marks omitted.) *Stratford* v. *Jacobelli*, supra, 317 Conn. 871–72.

bos and swimming pools. (Emphasis added.) 36 H.R. Proc., Pt. 7, 1993 Sess., pp. 2436–37, 2439–40, remarks of Representative Nancy Beals; see id., pp. 2440–41, remarks of Representative Robert M. Ward. Identifying a gazebo as a structure within the meaning of the statute, however, demonstrates that the legislature did not intend for structures to have to be buildings, as the enumerated structures are, to be taxable pursuant to § 12-64 (a). A conclusion that the only nonenumerated structures taxable pursuant to § 12-64 (a) are those that are enclosed and suitable for occupancy or storage—thereby rendering them "buildings" as defined by *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 412—would render the addition of the term "structures" in the 1993 amendment to the statute superfluous. See, e.g., *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 722, 780 A.2d 1 (2001) ("it should not be presumed that the legislature has enacted futile or meaningless legislation or that a change in a law was made without a reason" (internal quotation marks omitted)); see also *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 260, 125 A.3d 172 (2015) ("[t]he legislature is presumed to be aware of the interpretation [that] the courts have placed [on] one of its legislative enactments" (internal quotation marks omitted)). Thus, applying the canon of ejusdem generis would be inconsistent with the legislative history. See *In re Elianah T.-T.*, 326 Conn. 614, 623, 165 A.3d 1236 (2017) (rule of ejusdem generis applies unless contrary intent appears); see also *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 811 n. 25, 873 A.2d 965 (2005) ("[although] canons certainly do have their place in the construction of statutes, it strikes us as unwise to elevate them over all other forms of 'extratextual evidence' because, for almost every maxim found in the 'grab bag' of canons, an equal and opposite proposition may be found"); 2A N. Singer & J. Singer, Sutherland Statutes and Statutory Construction (7th Ed. 2007) § 47:22, pp. 392–94 ("[T]he general

words are not restricted in meaning to objects of the same kind . . . if there is a clear manifestation of a contrary intent. . . . If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the [l]egislature shall not fail." (Footnote omitted.)).

Further, the word "structure" is consistently defined broadly in other sections of the General Statutes as "any combination of materials that is affixed to the land" or "any combination of materials, other than a building, which is affixed to the land . . . ." See General Statutes § 7-147a (a) (historic districts);[15] General Statutes § 7-147p (a) (historic properties);[16] General Statutes § 8-13a (a) (1) (nonconforming land uses);[17] General Statutes § 29-265 (c) (certificates of occupancy).[18] Accordingly, we conclude that the legislature intended not the narrow construction propounded by

[15] General Statutes § 7-147a (a) provides in relevant part: "As used in this part . . . 'structure' means any combination of materials, other than a building, which is affixed to the land, and shall include, but not be limited to, signs, fences and walls . . . ."

[16] General Statutes § 7-147p (a) provides in relevant part: "As used in this part . . . 'structure' means any combination of materials, other than a building, which is affixed to the land, and shall include, but not be limited to, signs, fences and walls . . . ."

[17] General Statutes § 8-13a (a) (1) provides in relevant part: "For purposes of this section, 'structure' has the same meaning as in the zoning regulations for the municipality in which the structure is located or, if undefined by such regulations, 'structure' means any combination of materials, other than a building, that is affixed to the land, including, without limitation, signs, fences, walls, pools, patios, tennis courts and decks."

[18] General Statutes § 29-265 (c) provides in relevant part: "For the purposes of this section, 'structure' has the same meaning as in the zoning regulations for the municipality in which the building permit was issued, or if undefined by such regulations, 'structure' means any combination of materials that is affixed to the land, including, but not limited to, a shed, garage, sign, fence, wall, pool, patio, tennis court or deck."

the plaintiff but, rather, the commonly approved usage of "structure," which squarely encompasses the turbines at issue in the present case. This conclusion is also supported by references to both wind turbines and structures in other authorities. See, e.g., Regs., Conn. State Agencies § 16-50j-2a (36) (defining "[w]ind turbine tower" as "the base structure that supports a wind turbine rotor and nacelle"); see also *Daggett* v. *Feeney*, 397 P.3d 297, 306 (Alaska 2017) ("[a] wind turbine affixed to a [forty-nine foot] tower is clearly a fixed structure in the plain sense of the phrase, and towers have been recognized as 'structures' in other statutory contexts such as zoning codes").

The plaintiff maintains, however, that the turbines are not buildings or structures because they are "machines" taxable as personal property under § 12-41 (c). The defendant maintains that the turbines are properly classified as structures, improvements, or buildings and that, even if the turbines were classified as machinery, they would be machines pursuant to § 12-64 (a).[19]

At oral argument before this court, counsel for the plaintiff argued that "the tower simply assists in positioning the turbine in the right location in order to function properly." This factual representation is consistent with the trial court's finding that most of the equipment used to operate the turbines is contained

[19] Several arguments throughout the concurring opinion are premised on the parties' agreement that the turbines are machines. However, we note that the defendant frames its discussion conditionally. It states that, "even *if* the plaintiff's wind turbines or any individual components thereof are regarded as machinery, they are assessable under the provision of § 12-64 (a) that defines 'machinery' as real estate . . . ." (Emphasis added.) The defendant even went so far as to add a qualifying designation—"if machinery"—to one of the headings in its brief to this court to avoid conceding that the turbines were machinery. At oral argument before this court, the defendant's counsel argued that the turbines were "clearly structures" and that the turbines satisfied the definition of a building. However, at no point did the defendant's counsel argue that the turbines were machines.

within the nacelle, which is a section of the turbine distinct from the tower. Thus, at the very least, the towers of the turbines are not "machines," as this court held the same to be true of the communications towers determined to be structures in *Eastern Connecticut Cable* when it stated that "[*t*]*he town's contention that the tower is taxable as machinery is similarly unavailing*. The tower is used simply as a support for the various antennas [that] receive and transmit broadcasting signals. The tower itself neither transmits nor changes the application of energy." (Emphasis added.) *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 414. Additionally, as the trial court pointed out, even if the turbines do have characteristics of machines, they do "not constitute 'machinery used in mills and factories,' " as set forth in § 12-41 (c).

The plaintiff also argues that the turbines must be classified as personal property because similarly situated property must be assessed equitably, and the only other commercial wind turbine in Connecticut, which is located in New Haven, is assessed as personal property.[20] This argument is unconvincing insofar as the

[20] At oral argument before this court, there was also discussion regarding a 1999 report from the Office of Legislative Research observing that most assessors in Connecticut treat cell towers as personal property, despite this court's determination in *Eastern Connecticut Cable* that the communications tower was a structure that would be taxable as real property after the 1993 revisions to § 12-64 (a). See Office of Legislative Research, OLR Research Report: Property Taxation of Telecommunications Facilities (January 28, 1999) available at https://www.cga.ct.gov/PS99/rpt/olr/htm/99-R-0131.htm (last visited July 27, 2022). This report does not, however, support the plaintiff's argument in this appeal because it acknowledged that, under the post-1993 version of § 12-64 (a), under which "structures are considered real property . . . the common practice is *inconsistent with the law* with regard to towers, *which are structures*." (Emphasis added.) Id. A subsequent report stated that "[i]t appears that treating towers as real property is consistent with the law. [Section 12-64 (a)], which defines real property for tax purposes, includes all structures, although it does not specifically mention towers. Similarly . . . § 16-50j-2a [(30) of the Regulations of Connecticut State Agencies] defines a tower as a structure for purposes of establishing the Connecticut Siting Council's jurisdiction." Office of Legislative Research, OLR Research Report: Property Tax Treatment of Cell Towers (January

statute the plaintiff cites in support of this argument, General Statutes § 12-55 (b),[21] requires only that "assessors . . . equalize the assessments of property *in the town* . . . ."[22] (Emphasis added.) This argument is equally unconvincing in regard to the hydroelectricity generating turbine located in Colebrook because, as the trial court found as a factual matter, the hydro turbine "was not at all similar to the wind turbines," and its "significant differences from the wind turbines do not warrant similar treatment." Crediting Sloane's testimony, the trial court found that the hydro turbine located in Colebrook was, unlike the wind turbines, moveable and removed when not in use.

In the alternative, the plaintiff argues that, as fixtures of a company engaged in the production of electrical

12, 2001) available at https://www.cga.ct.gov/2001/rpt/2001-R-0071.htm (last visited July 27, 2022); see also *Snake Meadow Club, Inc.* v. *Killingly*, Superior Court, judicial district of Windham, Docket No. CV-07-4006068-S (July 24, 2008) (45 Conn. L. Rptr. 827, 829) (following § 12-64 (a) in dismissing tax appeal claiming cell tower was improperly taxed as real property).

[21] General Statutes § 12-55 (b) provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law. The assessor or board of assessors may increase or decrease the valuation of any property as reflected in the last-preceding grand list, or the valuation as stated in any personal property declaration or report received pursuant to this chapter. . . ."

[22] The plaintiff also references a wind turbine and associated tax appeal in which the Intermediate Court of Appeals of Hawaii concluded that the wind turbines at issue were not taxable as real property pursuant to the Maui County Code. See *In re Tax Appeal of Kaheawa Wind Power, LLC* v. *Maui*, 135 Haw. 202, 211, 347 P.3d 632 (App. 2014), cert. rejected, Hawaii Supreme Court, Docket No. SCWC-12-0000728 (February 19, 2015). The Hawaii case is distinguishable because the parties in that case agreed that the wind turbines at issue were "machinery" as a matter of law; id., 208; and because the relevant provision of the tax code provided only for the taxation of machinery "[the] use [of which] is necessary to the utility of such land . . . ." (Internal quotation marks omitted.) Id., 207. The court determined that those wind turbines were not necessary or useful to the land for "whatever business may be carried on upon it" and, accordingly, concluded that those wind turbines were not taxable as real property under the language of the governing provision. (Internal quotation marks omitted.) Id., 211. In contrast, § 12-64 (a) contains no such limiting language, and, thus, the Hawaii case does not support the plaintiff's claim.

energy,[23] the turbines are personal property pursuant to § 12-41 (c). See footnote 2 of this opinion. Specifically, the plaintiff argues that, even if the turbines are structures, as contemplated by § 12-64 (a), they are also fixtures of an electric company pursuant to § 12-41 (c), and that, as the statute more specifically on point, well established principles of statutory construction require this court to apply § 12-41 (c). See, e.g., *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 302, 21 A.3d 759 (2011) ("[I]t is a [well settled] principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute [that] might otherwise prove controlling. . . . The provisions of one statute [that] specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage." (Internal quotation marks omitted.)). We agree with the plaintiff with respect to the associated equipment. We disagree, however, with respect to the turbines themselves and conclude that the fixture analysis proposed by the plaintiff is factually inapplicable to the turbines.

A fixture is "a piece of personal property [that] has become so connected to realty . . . as to have lost its character as personalty . . . ." *ATC Partnership* v. *Windham*, 268 Conn. 463, 480, 845 A.2d 389 (2004); see *Capen* v. *Peckham*, 35 Conn. 88, 93 (1868) ("Property is divided into two great divisions, things personal and things real, and fixtures may be found along the dividing line. They are composed of articles that were once chattels, or such in their nature, and by physical annexation to real property have become accessory to it and parcel of it."). Examples of property held to be fixtures

[23] As the trial court stated, "[n]either party disputes that the plaintiff is a company engaged in the production of electrical energy."

pursuant to Connecticut common law include articles such as machinery in a textile mill; see *ATC Partnership* v. *Windham*, supra, 481; burial crypts; see *Norwalk Vault Co. of Bridgeport, Inc.* v. *Mountain Grove Cemetery Assn.*, 180 Conn. 680, 690, 433 A.2d 979 (1980); and a bell located in the bell tower of a factory. See *Alvord Carriage Mfg. Co.* v. *Gleason*, 36 Conn. 86, 87–88 (1869). Unlike these articles, the turbines cannot be found along the dividing line between personal and real property, as they have no character of personalty.[24] The turbines, as constructed, were not once chattels that only became real property through physical annexation to the land and, thus, cannot be considered a fixture.[25] To the extent that the plaintiff believes that the wind turbines should be classified as personal property

[24] This court has also declined to apply a fixture analysis in the context of § 7-147a (a), which defines a "structure" as "any combination of materials, other than a building, *which is affixed to the land*, and shall include, but not be limited to, signs, fences and walls . . . ." (Emphasis added; internal quotation marks omitted.) *Historic District Commission* v. *Hall*, 282 Conn. 672, 678, 681, 923 A.2d 726 (2007). We stated that, "although the term 'affix' is derived from the law of fixtures, a determination that an object is 'affixed to the land' under *this* statute does not require consideration of permanency and intent." (Emphasis in original.) Id., 681.

[25] The concurring opinion asserts that "[t]he wind turbine plainly was not realty before being attached to the land . . . ." Part I of the concurring opinion. Perhaps this is true of machinery, but, as determined, at the very least, the towers of the turbines are not machinery. Because the turbines satisfy this court's definition of a "building," claiming the turbines were not realty before being attached to the land is like saying that a house transported to a plot of land was not realty before being affixed to that land. Although there are venerable decisions from this court referring to buildings as "fixtures," the historical usage of the term cannot be understood in context to reference the well established prevailing principles of our fixture jurisprudence with respect to personal property. See, e.g., *Van Auken* v. *Tyrrell*, 130 Conn. 289, 293, 33 A.2d 339 (1943) ("[w]hen the house was built [on] the lot some three years later, it became a fixture, and as such a part of the realty, and title to it merged in the land"); *Landon* v. *Platt*, 34 Conn. 517, 524–25 (1868) (treating buildings as permanent fixtures annexed to soil); see also *ATC Partnership* v. *Windham*, supra, 268 Conn. 480 (standard by which this court determines "whether a piece of personal property has become so connected to realty so as to have lost its character as personalty and become a fixture" has been "reaffirmed consistently").

regardless, its recourse lies with the legislature. See, e.g., *Commission on Human Rights & Opportunities* v. *Edge Fitness, LLC*, 342 Conn. 25, 43, 268 A.3d 630 (2022) (recognizing "the legislature . . . [as] the policy-making branch of our government").

Although the turbines cannot properly be considered fixtures of an electric company, the associated equipment can be. As the trial court noted, § 16-50j-2a of the Regulations of Connecticut State Agencies defines the term "associated equipment" to include "any . . . fuel tank, backup generator, transformer, circuit breaker, disconnect switch, control house, cooling tower, pole, line, cable, conductor or emissions equipment . . . ." Regs., Conn. State Agencies § 16-50j-2a (1) (B). As we stated, § 12-41 (c) specifically enumerates "cables, wires, poles, underground mains, conduits, [and] pipes" as tangible personal property. However, the statute also includes "other fixtures of . . . electric . . . companies"; General Statutes § 12-41 (c); and, thus, would encompass all associated equipment considered to be fixtures of the turbines. According to our common-law principles, if articles "are fixtures, the personalty becomes part of the property and they are [taxable as] realty." (Internal quotation marks omitted.) *Vallerie* v. *Stonington*, 253 Conn. 371, 372, 751 A.2d 829 (2000). However, in light of the specific language in § 12-41 (c) identifying cables, wires, poles, underground mains, conduits, pipes and other fixtures of electric companies as tangible personal property, we agree with the plaintiff that well established principles of statutory construction compel us to conclude that the associated equipment is personal property pursuant to § 12-41 (c).[26]

[26] Because cables, wires, poles, underground mains, conduits, and pipes are enumerated in § 12-41 (c), any of these articles affixed to the plaintiff's wind turbines are, without question, personal property. However, a determination of which other equipment associated with the turbines must be considered personal property is dependent on what properly can be considered a fixture as required by the statute. "The question as to whether a particular piece of property is personalty or a fixture is a question of fact."

See *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, supra, 301 Conn. 302. Accordingly, we conclude that the trial court correctly determined that the turbines are taxable as real property pursuant to § 12-64 (a). We also conclude, however, that the trial court incorrectly determined that the equipment associated with the turbines is taxable as real property pursuant to § 12-64 (a). Because the associated equipment is personal property taxable pursuant to § 12-41 (c), remand to the trial court is necessary for the factual determination of the valuation of the items taxable under that statute.

II

We next address the plaintiff's claim that the trial court incorrectly concluded that the plaintiff had not established its allegations of overvaluation and overassessment. The plaintiff argues that the trial court improperly failed to consider or to evaluate the merits of DeLacy's appraisal. In response, the defendant argues that the trial court did not reject the method of appraisal used by DeLacy but, rather, concluded that the appraisal was inadequate because it did not include an appraisal of the real property at 29 Flagg Hill Road. We conclude that we must remand the plaintiff's claim of overvaluation and overassessment for a determination of the amount of the reassessment in accordance with § 12-117a.

By way of background, "[§] 12-117a . . . provide[s] a method by which an owner of property may directly call in[to] question the valuation placed by assessors [on] his property . . . . In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is [on] the plaintiff to show that he has,

ATC Partnership v. *Windham*, supra, 268 Conn. 479. As such, identification of the associated equipment and the fixtures among it must be determined on remand.

in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12-117a] . . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier. . . . The trier arrives at [its] own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and [its] own general knowledge of the elements going to establish value including [its] own view of the property." (Internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 99–100, 61 A.3d 461 (2013). "Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of [assessment appeals] to alter the assessment was improper, however, may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . . If a taxpayer is found to be aggrieved by the decision of the board of [assessment appeals], the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant's property." (Internal quotation marks omitted.) *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 776, 946 A.2d 215 (2008).

In the present case, the trial court determined that the appraisal conducted by DeLacy for the plaintiff was insufficient to establish that the plaintiff was entitled to relief under § 12-117a because it was inconsistent with the trial court's conclusion that the turbines and associated equipment are taxable as real property. Because we conclude in part I of this opinion that the associated equipment must be treated as personal property pursuant to § 12-41 (c), the trial court's rejection of DeLacy's appraisal lacks a legal basis, rendering it

clearly erroneous by definition. See *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 100–101 ("[T]he question of overvaluation usually is a factual one subject to the clearly erroneous standard of review . . . . Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citation omitted; internal quotation marks omitted.)). Put differently, the record establishes that the valuation accepted by the trial court included the associated equipment as real property, when it should have been classified separately as personal property. Thus, it cannot be reasonably contended that the defendant did not overvalue the real property, and, accordingly, we conclude that, as a matter of law, the plaintiff has satisfied its burden of proving that its property has been overvalued. See, e.g., *Allstate Ins. Co.* v. *Palumbo*, 296 Conn. 253, 266–67, 994 A.2d 174 (2010) (establishing that reviewing court need not remand for factual determination when unchallenged evidence vitiates need to do so). Although we need not remand to determine whether the property was overvalued, we conclude that remand to the trial court is required to determine the amount of the reassessment that would be just pursuant to § 12-117a.[27] See footnote 4 of this

[27] The plaintiff also brought this property tax appeal pursuant to § 12-119. See footnote 5 of this opinion. "Claims that an assessor has misclassified property and, consequently, overvalued it, comprise a category of appeals frequently pursued under the aegis of § 12-119." *Griswold Airport, Inc.* v. *Madison*, 289 Conn. 723, 740, 961 A.2d 338 (2008). "In such cases, the determinative issue typically is whether, as a matter of law, the property at issue properly was subject to taxation as the type of property falling within the classification applied by the assessor. . . . If the plaintiff can show that it was not, it necessarily follows that the resulting assessment was manifestly excessive." (Citation omitted.) Id., 741. Because we conclude that the equipment associated with the turbines improperly was classified as real property, it necessarily follows that the defendant's assessment was

opinion; see also *Ireland* v. *Wethersfield*, 242 Conn. 550, 558, 698 A.2d 888 (1997) ("[i]f . . . the trial court finds that the taxpayer, in light of the persuasiveness, for example, of his appraiser, has demonstrated an overvaluation of his property, the trial court must then undertake a further inquiry to determine the amount of the reassessment that would be just").

Additionally, because the trial court must determine the amount of reassessment on remand given the classification of the associated equipment as personal property, the plaintiff's final claim that the defendant improperly double assessed and double taxed certain equipment associated with the turbines is unlikely to arise on remand,[28] and we need not address the claim.

The judgment is reversed as to the classification of the associated equipment and the case is remanded for further proceedings according to law on the overvalu-

manifestly excessive. However, this court has recently stated that, although "an insufficiency of data or the selection of an inappropriate method of appraisal could serve as the basis for not crediting the appraisal report that resulted, it could not, *absent evidence of misfeasance or malfeasance*, serve as the basis for an application for relief from a wrongful assessment under § 12-119. . . . In short, when reviewing a claim raised under § 12-119, a court must determine whether the plaintiff has proven that the assessment was the result of illegal conduct. . . . Put differently, tax relief under § 12-119 is available only in an extraordinary situation." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Tuohy* v. *Groton*, 331 Conn. 745, 760, 207 A.3d 1031 (2019). Accordingly, we conclude that the plaintiff is entitled to relief only pursuant to § 12-117a.

[28] Specifically, the plaintiff claims that the computer system at 17 Flagg Hill Road was included in its 2015 through 2018 declarations of code 20 personal property, which was accepted by the defendant's assessor, *and* in the assessor's valuation of real property associated with 29 Flagg Hill Road, resulting in a double assessment. The plaintiff also claims that, when the assessor accepted its amended 2016 declaration of code 20 personal property costs associated with the completion of the turbines while classifying the turbines as real property, she caused another double assessment. Because we conclude that, on remand, the associated equipment must be considered as personal property pursuant to § 12-41 (c), the issue of specific equipment being taxed as both real and personal property is unlikely to arise.

ation and overassessment claims; the judgment is affirmed in all other respects.

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

ECKER, J., concurring. I agree that a wind turbine is properly classified as real property for taxation purposes under General Statutes § 12-64 (a), and I therefore join the result reached by the majority. But I would reach that outcome by way of a different analysis. The plaintiff, Wind Colebrook South, LLC, concedes—indeed, it insists—that the wind turbines at issue are machines. In my view, that concession is dispositive because "machinery" is taxed as realty under the express terms of § 12-64 (a) unless it falls within the narrow exception carved out by General Statutes § 12-41 (c), which provides in relevant part that "[m]achinery used in mills and factories" is taxed as personalty. Wind turbines do not fit within this exception and, therefore, are classified as real property under the statutory scheme. This result is compelled by the language of the relevant statutes construed, in accordance with the applicable canons of construction. It has the virtue of avoiding a number of concerns raised by the alternative construction contained in the majority opinion.

As a preliminary point, I observe that, although I ultimately consider the outcome of the statutory analysis to be an easy call in this particular case, the relevant statutes made the task of interpretation far more difficult than necessary. Their text consists of what appears to be a randomly arranged series of specifically enumerated items deemed to be either real or personal property, conjoined with one or more broad, open-ended phrases, all without any apparent internal cohesion or structure. Sections 12-64 (a) and 12-41 (c) contain no definitions of their key terms: real property, personal

property, buildings, structures, improvements, fixtures or machinery. Worse, neither statute contains any discernable standards that would enable tax assessors, taxpayers, or courts to classify property as personalty or realty. The statutes give every appearance of having been stitched together over hundreds of years by a committee of strangers. It may well be that there is an explanation for this apparent lack of legislative upkeep and maintenance; the legislature well knows how to give careful attention to such matters when it considers the task worthwhile.[1] Perhaps there is no felt need to update these particular statutes because they serve their function as written; taxation, after all, is a specialized and esoteric field, and the proper application of these statutes in all but the most unusual case may be obvious to experts and tax professionals privy to whatever unwritten conventions have emerged over

[1] For example, it is clear that the legislature attends frequently to the subject of *exemptions* from property taxation for any particular class of property. See, e.g., General Statutes § 12-81 (1) (exempting United States property); General Statutes § 12-81 (12) (exempting personal property of religious organizations devoted to religious or charitable use); General Statutes § 12-81 (18) and (19) (exempting property of veterans' organizations and veterans); General Statutes § 12-81 (31) through (35) (exempting personal property, such as household furniture, private libraries, musical instruments and electronics, watches and jewelry, and wearing apparel); General Statutes § 12-81 (57) (exempting certain types of renewable energy sources); General Statutes § 12-81 (72) (exempting machinery and equipment in manufacturing facilities). These statutes, and the frequency with which they are amended, demonstrate that the legislature is regularly engaged in the task of setting public policy with regard to property taxation generally. I acknowledge the possibility that the legislature has deliberately chosen not to revise and modernize §§ 12-64 (a) and 12-41 (c) because it has determined that the distinction between realty and personalty is relatively unimportant; perhaps what matters most is property tax exemptions, not the classification of taxable property as either realty or personalty. During oral argument in the present case, the plaintiff's counsel stated that the significance of the classification arises because different rules governing depreciation apply depending on whether the subject property is classified as real property or personal property. Compare General Statutes § 12-63 (b) (6) (permitting annual depreciation for personal property), with General Statutes § 12-62 (b) (1) (permitting depreciation of real property only once every five years).

time to guide the cognoscenti. In any event, this court has no choice but to decide the present case as presented, under the statutes as written.

I

The plaintiff's wind turbines[2] are taxable either as real property pursuant to § 12-64 (a) or as personal property pursuant to § 12-41 (c). It is one or the other; no claim of exemption has been raised by the taxpayer. Reciting the relevant provisions goes a long way toward illustrating why the classification scheme can lead to interpretive difficulties with respect to property that is not expressly enumerated. Section 12-64 (a) provides in relevant part: "All the following mentioned property, not exempted, shall be [taxed as real property]: Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings and structures, house lots, all other building lots and improvements thereon and thereto, including improvements that are partially completed or under construction, agricultural lands, shellfish lands, all other lands and improvements thereon and thereto, quarries, mines, ore beds, fisheries, property in fish pounds, machinery and easements to use air space whether or not contiguous to the surface of the ground. . . ."

Section 12-41 (c) provides in relevant part: "The annual declaration of the tangible personal property owned by such person on the assessment date, shall include, but is not limited to, the following property: Machinery used in mills and factories, cables, wires, poles, underground mains, conduits, pipes and other

[2] By "wind turbine," I refer to the entire assembly, including the tower, hub, nacelle, and rotor. The associated equipment that is used to operate the turbines includes wires, conduits, electrical equipment, transformers, and cabling.

fixtures of water, gas, electric and heating companies, leasehold improvements classified as other than real property and furniture and fixtures of stores, offices, hotels, restaurants, taverns, halls, factories and manufacturers. . . .''

I believe that the present case is an easy one under the express terms of these statutes. More particularly, I agree with the defendant that a wind turbine is properly classified as real property because it is machinery that is not located in a mill or factory.[3] ''Machinery'' is included as the penultimate category of real property enumerated in § 12-64 (a), listed between ''property in fish pounds'' and ''easements to use air space whether or not contiguous to the surface of the ground.'' A wind turbine plainly does not fall within the single exception to this categorization, the provision in § 12-41 (c) deeming ''[m]achinery used in mills and factories'' to be personal property. The plaintiff's wind turbines are not

[3] The majority suggests that the defendant makes efforts in its brief ''to avoid conceding that the turbines were machinery.'' Footnote 19 of the majority opinion. I do not interpret its brief in the same manner—nor do I understand why the defendant would want to avoid ''conceding'' an argument that conclusively clinches its case that the wind turbines must be classified as real property. The relevant argument heading in the defendant's brief asserts in relevant part that ''the trial court correctly [concluded] that the wind turbines are structures, improvements, buildings, machinery affixed to the land (if machinery) . . . taxable as real estate under § 12-64 (a).'' The argument then proceeds to explain, seriatim, why the turbines are properly considered structures, improvements, buildings, and machinery. The paragraph considering the turbines as machinery provides in relevant part that, ''even if the plaintiff's wind turbines or any individual components thereof are regarded as machinery, they are assessable under the provision of § 12-64 (a) that defines 'machinery' as real estate because they are attached directly to land by means of the foundations and towers, the other components of the turbines are attached to the towers, and all of the components are essential to the operation of the turbines as an integrated whole.'' The conditional phraseology, in my view, is not intended to eschew the characterization of the turbines as machinery but to indicate that the plaintiff cannot prevail *even on its own terms*, i.e., even if the plaintiff is correct that its wind turbines are treated as machinery. In any event, it does not matter whether the defendant embraces or resists this characterization; if the *plaintiff* deems the turbines to be machinery for purposes of property taxation,

located "in" any building, and certainly not in a mill or a factory. In my view, the analysis ends there.[4] The

it cannot complain about the consequences of that characterization under the statutory scheme.

[4] It is hardly intuitive or obvious that machinery is real property for property tax purposes, and I make no effort to explain the result by reference to general principles of property law. Many states treat portable or movable machinery as personal property for tax purposes, unless it is a fixture. See 84 C.J.S. Taxation § 99 (2022); 35A Am. Jur. 2d 707–708, Fixtures § 1 (2021). Commentators do the same. See, e.g., 16 E. McQuillin, The Law of Municipal Corporations (3d Ed. Rev. 2003) § 44.45, pp. 202–205. Connecticut, however, evidently has historically taxed business owned machinery as part of the realty. See *Sprague* v. *Lisbon*, 30 Conn. 18, 19–20 (1861) (under then existing statutes, machinery contained in mill is taxable as part of mill regardless of machinery's prior classification as personal property); *Stamford Gas & Electric Co.* v. *Stamford*, 6 Conn. Supp. 505, 513–15 (1938) (providing overview of relevant tax legislation between 1796 and mid-nineteenth century and explaining that, in Connecticut, as of 1938, "machinery permanently affixed to land is to be assessed with such land, if devoted to manufacturing uses and with the buildings where it is incorporated therein . . . [and] the building is employed for manufacturing purposes and so, in either case, as realty"); see also *Reconstruction Finance Corp.* v. *Naugatuck*, 136 Conn. 29, 30, 68 A.2d 161 (1949) ("[t]he machinery, being attached to the real estate, would . . . have been subject to taxation in Connecticut to the same extent as real property"). There are numerous cases suggesting that machinery has sometimes been treated as personal property, but those cases appear to involve specific exemptions applicable to machinery and equipment used in manufacturing facilities. See, e.g., *Lombardo's Ravioli Kitchen, Inc.* v. *Ryan*, 268 Conn. 222, 233–34, 842 A.2d 1089 (2004) (upholding denial of personal property tax exemption for machinery and equipment on ground that taxpayer was related to or affiliated with seller); *United Illuminating Co.* v. *Groppo*, 220 Conn. 749, 762, 601 A.2d 1005 (1992) ("the 'manufacturing industries' exempted from taxes on the purchase of machinery and equipment and services rendered thereto were 'intended to be such as might go elsewhere' "); *Phelps Dodge Copper Products Co.* v. *Groppo*, 204 Conn. 122, 135, 527 A.2d 672 (1987) (observing that "one of the purposes behind the exemption [of certain machinery used in manufacturing] is to stimulate manufacturing industries in Connecticut"). This court has held that the generation of electricity does not constitute "manufacturing" in the cognate exemption for sales and use taxes; see *United Illuminating Co.* v. *Groppo*, supra, 755; and, thus, the wind turbines in the present case evidently would not qualify under the existing exemptions for machinery used in designated manufacturing operations. See General Statutes § 12-81 (60), (70), (72), (76) and (78). Presumably, this explains why the plaintiff has not claimed the benefit of any such exemption.

I note that there are two nineteenth century cases that do not appear to fit into the framework that I have described in this footnote regarding the generic treatment of machinery as real property under Connecticut law. See *Gaylor* v. *Harding*, 37 Conn. 508, 517–18 (1871) (referring to moveable machinery as personal property); *Swift* v. *Thompson*, 9 Conn. 63, 67 (1831)

plaintiff agrees that its wind turbines are machinery. Indeed, it repeatedly insists that a wind turbine "squarely meet[s] the definition of a machine" in support of its argument that wind turbines should be classified as personal property under § 12-41 (c) and should not be treated as a "building" or a "structure" under § 12-64 (a).[5] Focusing specifically on the language in § 12-41 (c) providing that "cables, wires, poles, underground mains, conduits, pipes and other fixtures of water, gas, electric and heating companies" are personal property, the plaintiff contends that the wind turbines "unequivocally fall within this statute as they are machinery of an electric company and are primarily comprised of the articles specifically enumerated in . . . § 12-41 (c)." This argument is flawed for the following reasons.[6]

First, the "fixtures" provision on which the plaintiff relies does not mention the words machine or machinery; it does not appear to refer to machines at all. Cables, wires, poles, underground mains, conduits, and pipes are not machines; they are equipment used for the transmission or transportation of water, gas, electricity, and heat. Of course, machines may *include* cables, wires, pipes, and the like as component parts—the plaintiff contends that its wind turbines contain some of those components—but the enumerated items themselves are not machines or machinery, as those words are commonly and ordinarily used. Wind turbines, by contrast, are machines. As the plaintiff itself describes them in its brief, wind turbines are machines that generate

(describing machine in cotton mill as personal property). I leave it to more ambitious students of the historical treatment of fixtures in Connecticut law to resolve the apparent tension. The fact remains that the relevant statutes, as currently written, treat machinery (other than machinery used in mills or factories) as realty.

[5] The defendant agrees that the wind turbines are machinery but contends that, as such, it is real property under the plain language of § 12-64 (a).

[6] There is no dispute between the parties that the plaintiff is an electric company within the meaning of that term, as used in § 12-41 (c).

power.[7] It is clear that the legislature used the word "machinery" in these statutes when it meant to do so, not only in § 12-64 (a), discussed previously, but also in § 12-41 (c), where the text refers to "[m]achinery used in mills or factories," the category immediately preceding the phrase now under consideration. Particularly in light of the proximity of this explicit reference to machinery used in mills or factories, it is not plausible that the phrase relating to transmission equipment was intended to include machinery such as the wind turbines in the present case.

We should also consider, as the majority does, whether a wind turbine, although not among the enumerated items in the provision at issue in § 12-41 (c), nonetheless falls within the intended scope of the phrase "and other fixtures" accompanying the specific enumeration under review. The canon of construction known as ejusdem generis ("of the same kind") is useful in this context because it teaches that, when " a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to . . . things of the same general kind or character as those specified in the particular enumeration, unless there is something to show a contrary intent." *Easterbrook* v. *Hebrew Ladies Orphan Society*, 85 Conn. 289, 296, 82 A. 561 (1912); accord *Eastern Connecticut Cable Television, Inc.* v. *Montville*, 180 Conn. 409, 413, 429 A.2d 905 (1980) (*Eastern Connecticut Cable*);[8] see also *24 Leggett Street Ltd. Partnership* v.

[7] The plaintiff refers in its brief to the wind turbine as a machine that "transform[s] wind energy into electricity."

[8] Not incidentally, *Eastern Connecticut Cable* applied this rule of construction as an aid to interpret a prior version of the very statute at issue in the present case, namely, § 12-64 (a). See *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 413 (holding that "the general term 'all other buildings' [in the statute] must be construed in light of the immediately preceding enumeration of buildings which includes dwelling houses, garages, barns, sheds, stores, shops, mills, ice houses, warehouses, and silos"). Section 12-64 (a) was amended in 1993 to include "all other buildings and structures," which is the phrase that is the subject of the present dispute.

Beacon Industries, Inc., 239 Conn. 284, 297, 685 A.2d 305 (1996).[9] The phrase "and other fixtures," as used in § 12-41 (c), must be understood by the company it keeps.[10]

The category created by the enumerated items appears to be equipment for the transmission or transportation of water, gas, electric, and heating companies. Historically, the phrase appears to originate as a common reference in statutes and cases determining the rights of telegraph, telephone, electric, and other utility companies to install transmission equipment—poles, cables, wires, conduits "and other fixtures"—on, over, or under land owned by others. See, e.g., *Connecticut Light & Power Co.* v. *Costello*, 161 Conn. 430, 434, 288 A.2d 415 (1971) (condemnation proceeding involving

Public Acts 1993, No. 93-64, § 1. The effect of the 1993 amendment is discussed subsequently in this opinion.

[9] Our decision in *24 Leggett Street Ltd. Partnership* explains the parameters of the rule: "The principle of ejusdem generis applies when '(1) the [clause] contains an enumeration by specific words; (2) the members of the enumeration suggest a specific class; (3) the class is not exhausted by the enumeration; (4) a general reference [supplements] the enumeration . . . and (5) there is [no] clearly manifested intent that the general term be given a broader meaning than the doctrine requires.' 2A J. Sutherland, Statutory Construction (5th Ed. Singer 1992) § 47.18 [p. 200]. Thus, '[t]he doctrine of ejusdem generis calls for more than . . . an abstract exercise in semantics and formal logic. It rests on particular insights about everyday language usage. When people list a number of particulars and add a general reference like "and so forth" they mean to include by use of the general reference not everything else but only others of like kind. The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the [clause's] provisions by force of general reference.' " *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 239 Conn. 297.

[10] The rule of construction known as noscitur a socii ("it is known by its associates") canonizes the commonsense idea that, "[w]hen determining the legislature's intended meaning of a statutory word, it also is appropriate to consider the surrounding words . . . . By using this interpretive aid, the meaning of a statutory word may be indicated, controlled or made clear by the words with which it is associated in the statute." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 23, 151 A.3d 367 (2016).

charter empowering plaintiff's predecessor in interest "to take real estate by condemnation for erecting and maintaining its *poles*, *wires*, *conduits and fixtures*, outside of the cities and villages, public grounds and highways for conducting electricity" (emphasis added)); *Connecticut Light & Power Co.* v. *Bennett*, 107 Conn. 587, 588, 141 A. 654 (1928) (adjudicating petition to erect "lines of *towers*, *poles and wires*, *conduits and fixtures* from its general [electricity] transmission system near Meriden to the plant . . . near Montville" (emphasis added)); *In re New York, New Haven & Hartford Railroad Co.*, 80 Conn. 623, 626, 636, 70 A. 26 (1908) (deciding whether municipality maintained authority to control street railway company's placement of conduits containing wires and other equipment for transmitting electricity notwithstanding statute authorizing such companies "to establish and maintain . . . along or across and upon, above, or under the streets, highways, and public grounds . . . suitably constructed and supported conductors, including *lines of poles and wires and underground conduits and wires*, *and properly supported cables*, *and including all proper fixtures and appurtenances*, and also to transmit therewith, thereby, or therein electricity . . . necessary for the best conduct of its business" (emphasis added; internal quotation marks omitted)). The same language found its way into our statutes governing utility companies. See, e.g., General Statutes § 16-1 (a) (22) (" '[e]lectric distribution services' means the owning, leasing, maintaining, operating, managing or controlling of *poles*, *wires*, *conduits or other fixtures* along public highways or streets for the distribution of electricity, or electric distribution-related services").[11]

[11] The terminology has been used outside of Connecticut, as well. See *Western Union Telegraph Co.* v. *Louisville & Nashville Railroad Co.*, 258 U.S. 13, 16 n.1, 42 S. Ct. 258, 66 L. Ed. 437 (1922) (Kentucky statute involving right of "any telegraph, telephone, electric light, power, or other wire company" to install "poles, cables, wires, conduits, or other fixtures" on any property over which railroad company enjoys easement or right of way

It is clear from this historical background that the reference in § 12-41 (c) to "other fixtures of . . . electric . . . companies" does not include the plaintiff's wind turbines, which are used to generate electricity, and shares little in common with the "cables, wires, poles, underground mains, conduits, [and] pipes" listed in the statute, which refer to equipment used to transmit or to transport products such as electricity.

The plaintiff fares no better even if we were to remove the word "fixtures" from its statutory context and construe it broadly to mean any fixture treated as realty for tax purposes under Connecticut law. On the factual record as developed in the present case,[12] I agree with the majority's conclusion that the plaintiff's wind turbines are not fixtures under our case law, although I reach that result on different grounds.[13] The majority

(internal quotation marks omitted)); *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 663, 32 S. Ct. 572, 56 L. Ed. 934 (1912) (addressing right of telephone company to install "poles, conduits, wires, and fixtures" on public streets).

[12] We review the trial court's factual findings on the elements of the fixture analysis, such as the intent of the annexer, under a clearly erroneous standard. "The question as to whether a particular piece of property is personalty or a fixture is a question of fact. *Vallerie* v. *Stonington*, 253 Conn. 371, 372–73, 751 A.2d 829 (2000); *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, [193 Conn. 208, 217, 477 A.2d 988 (1984)]; see also *Pfeifle* v. *Tanabe*, 620 N.W.2d 167, 174 (N.D. 2000) (whether parties intended to treat existing fixtures as personalty and thereby constructively severed property from realty is question of fact). As such, our review . . . is limited to deciding whether the findings of the trial court were clearly erroneous." *ATC Partnership* v. *Windham*, 268 Conn. 463, 479, 845 A.2d 389 (2004). I agree with the majority, however, that the trial court's interpretation of the relevant statutes regarding the classification of property is subject to plenary review. See part I of the majority opinion.

[13] Normally, categorizing property as a fixture results in its classification as real property for tax purposes. See, e.g., *ATC Partnership* v. *Windham*, 268 Conn. 463, 472, 845 A.2d 389 (2004). The result is reversed in the present case—the wind turbine would be taxed as personal property as a fixture—only because the plaintiff argues that the wind turbines fall within the "other fixtures" provision in § 12-41 (c), which carves out an exception to the general rule.

concludes that the turbine assembly is not a "fixture" within the scope of § 12-41 (c). It reasons that "the turbines cannot be found along the dividing line between personal and real property, as they have no character of personalty. The turbines, as constructed, were not once chattels that only became real property through physical annexation to the land and, thus, cannot be considered a fixture." (Footnote omitted.) Part I of the majority opinion.

I cannot agree with this reasoning because it is based on a flawed premise. Whatever class of property the wind turbine "became" once affixed to the land, it unquestionably was personalty prior to being affixed to the land. Property is either personalty or realty for taxation purposes; there is no third category. See *Capen* v. *Peckham*, 35 Conn. 88, 93 (1868) ("[p]roperty is divided into two great divisions, things personal and things real"). The wind turbine plainly was not realty before being attached to the land, and, so, assuming that it was taxable property at all, it necessarily was personalty prior to installation, precisely as were the pulleys, blocks, ropes, yokes, hooks, and other components of the slaughterhouse equipment at issue in *Capen*, the leading case relied on by the majority. See id., 88–89 (preliminary statement of facts and procedural history). In any event, the only question requiring our attention is whether the wind turbine, as constructed, is a fixture and, thus, realty, *after* being attached to the land. The majority concludes that it is not, and I agree, but not because it "ha[d] no character as personalty" at some prior time.[14] Part I of the majority opinion.

[14] Again, to be clear, I would not construe the statute to extend to all fixtures under the broad definition of that term because I believe that the legislature intended the word to be understood as limited by the enumerated examples, as discussed previously. The present discussion explains why the plaintiff does not prevail even under the broader definition.

Generally speaking, an item of property will be considered a "fixture" only if, once physically annexed to real property, "it should clearly appear from an inspection of the property itself, taking into consideration the character of the annexation, the nature and the adaptation of the article annexed to the uses and purposes to which [the realty] was appropriated at the time the annexation was made, and the relation of the party making it to the property in question, that a *permanent* accession to the freehold *was intended* to be made by the annexation of the article." (Emphasis added.) *Capen* v. *Peckham*, supra, 35 Conn. 94; see *ATC Partnership* v. *Windham*, 268 Conn. 463, 480, 845 A.2d 389 (2004). It is also well established that "our test focuses on the objectively manifested intent of the annexer." *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, 193 Conn. 208, 216, 477 A.2d 988 (1984). Simply stated, the permanency of the annexation and the intention of the annexer are crucial factors when discerning the proper tax classification between personalty and realty.

I would hold that the wind turbine assembly at issue in the present case is not a fixture within the scope of § 12-41 (c) because it never was intended to be permanent in nature. To the contrary, the record demonstrates that the plaintiff intended to remove the wind turbines approximately twenty years after installation. The decommissioning and removal process was anticipated with sufficient certainty that the plaintiff's lender for the project required the plaintiff to reserve funds for that purpose, and the expert appraisers for both the plaintiff and the defendant testified at trial regarding the removal costs based on a useful life of twenty years.[15] My analysis is

[15] The trial court summarized this evidence: "Both the plaintiff's expert . . . and the defendant's expert . . . presented written appraisals and credible testimony that the turbines have an approximate useful life of at least twenty years. The plaintiff has agreed to decommission the turbines at the end of their useful life by unfastening the bolts that currently affix the turbines to the concrete foundations on 29 Flagg Hill Road and removing

consistent with the conclusion reached by the Hawaii court in *In re Tax Appeal of Kaheawa Wind Power, LLC* v. *Maui*, 135 Haw. 202, 211, 347 P.3d 632 (App. 2014), cert. rejected, Hawaii Supreme Court, Docket No. SCWC-12-0000728 (February 19, 2015).[16]

the turbines altogether. Because of the anticipated cost and complexity of the decommission[ing] process, the plaintiff's lender for the project required the plaintiff to hold approximately $1 million in reserve to complete the process. The plaintiff's expert has estimated the cost of removal to be between $1,650,000 and $3,200,000."

[16] For reasons that are not clear to me, the majority seeks to distinguish *In re Tax Appeal of Kaheawa Wind Power, LLC*. See footnote 22 of the majority opinion. The confusion may arise because the conclusion that the wind turbine was not a fixture resulted in it being classified as personal property under Hawaii law. See *In re Tax Appeal of Kaheawa Wind Power, LLC* v. *Maui*, supra, 135 Haw. 211. Under our statutory scheme, by contrast, the same conclusion results in the opposite classification; if the wind turbine assembly is not a "fixture" owned by an electric company within the meaning of § 12-41 (c), it is real property under Connecticut law pursuant to § 12-64 (a). Unlike Connecticut, Hawaii, like many other jurisdictions, treats machinery as personal property unless it is a fixture. See 84 C.J.S. Taxation § 99 (2022); Annot., "What Is Within Tax Exemption of Machinery, Tools, Apparatus, Etc., Used in Manufacturing," 172 A.L.R. 313, 313–16 (1948); see also footnote 4 of this opinion. In any event, I disagree with the majority that Hawaii's definition of a "fixture" is inconsistent with or substantially different from the meaning of that term under Connecticut law. Hawaii uses "[t]he traditional [common-law] test for determining whether an item of personal property has become a 'fixture' [which] requires three elements: (1) the actual or constructive annexation of the article to the realty, (2) the adaptation of the article to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold." (Emphasis omitted; internal quotation marks omitted.) *In re Tax Appeal of Kaheawa Wind Power, LLC* v. *Maui*, supra, 210. The analysis in Connecticut is expressed in different terms, but the inquiries are not incompatible, as the majority suggests. Specifically, I do not agree that Connecticut omits consideration of the second prong of the analysis articulated in *In re Tax Appeal of Kaheawa Wind Power, LLC*, "the adaptation of the article to the use or purpose of that part of the realty with which it is connected . . . ." (Emphasis omitted; internal quotation marks omitted.) Id. The Connecticut analysis puts the issue in these terms: "[T]he nature and the adaptation of the article annexed to the uses and purposes to which [the realty] was appropriated at the time the annexation was made . . . ." *Capen* v. *Peckham*, supra, 35 Conn. 94; see *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, supra, 193 Conn. 219 (observing that "the trial court's finding

II

I owe some explanation as to why I do not agree with the majority's conclusion that the wind turbine is a "building" and "structure" within the meaning of 12-64 (a). The short answer is that a specific statutory term governs over a more general one; the wind turbine is machinery, and that word provides a more accurate and particularized description than does either "building" or "structure." See, e.g., *Branford* v. *Santa Bar-*

that the tanks were not specially adapted to some special or peculiar use of the land, when viewed in light of the trial court's concomitant finding that the tanks were an 'indispensable element' to the business . . . is also consistent with the trial court's conclusion that the tanks are personalty" and not fixtures); *Toffolon* v. *Avon*, 173 Conn. 525, 535, 378 A.2d 580 (1977) (upholding finding by trial court that processing plant, which was specially adapted for prospective use, constituted fixture); *Merritt-Chapman & Scott Corp.* v. *Mauro*, 171 Conn. 177, 185, 368 A.2d 44 (1976) (concluding that, unlike prior cases in which buildings had been adapted for particular uses, "the building . . . as constructed, was not adapted to bowling alleys, but the alleys were installed in a vacant area in a shopping center already built and adapted to produce rental income from any source"); *Cleaveland* v. *Gabriel*, 149 Conn. 388, 392, 180 A.2d 749 (1962) (noting that, because "some of the equipment . . . was adapted primarily to [be] use[d] in a barn, there was some objective indication of an intention to annex the equipment to the barn"); *Lesser* v. *Bridgeport-City Trust Co.*, 124 Conn. 59, 64, 198 A. 252 (1938) (recognizing "the proposition that [when] a building is specially adapted to certain uses, the instrumentalities to carry out those purposes are ordinarily considered a part of the realty" as fixtures); *Radican* v. *Hughes*, 86 Conn. 536, 543, 86 A. 220 (1913) (concluding that small toolhouse that "was not adapted to or necessary for the use and enjoyment of the land [on] which it stood" is not fixture); *Stockwell* v. *Campbell*, 39 Conn. 362, 365 (1872) (concluding that furnaces, for which "[p]its were made in the bottom of the cellar [that were] adapted to [the furnaces] in size and depth, and for the express purpose of receiving them," were fixtures); *Fernwood Realty, LLC* v. *AeroCision, LLC*, 166 Conn. App. 345, 362–63, 141 A.3d 965 (concluding that electrical components that were specifically adapted to property were fixtures), cert. denied, 323 Conn. 912, 149 A.3d 981 (2016). In other words, the personalty affixed to the realty is more likely to be considered part of that realty if it becomes "indispensable to the [utility] of the freehold" or "peculiarly adapted to the real property"; an item that is removable and "usable at other locations is not peculiarly adapted for use on the land in [question] . . . ." (Internal quotation marks omitted.) *In re Tax Appeal of Kaheawa Wind Power, LLC* v. *Maui*, supra, 211.

bara, 294 Conn. 803, 813, 988 A.2d 221 (2010) (it is well settled principle of statutory construction that "specific terms in a statute covering a given subject matter will prevail over the more general language of the same or another statute that otherwise might be controlling" (internal quotation marks omitted)). This point is sufficient, standing alone, to eschew the majority's construction of the statutory scheme.

The longer answer begins with the observation that the majority conducts the tax classification analysis of the entire wind turbine assembly by focusing solely on the physical characteristics of the *tower* alone, which the majority considers to be a building and/or a structure. "[A]t the very least," the majority states, "the towers of the turbines are not 'machines' . . . ." Part I of the majority opinion. The majority quotes *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 414, in support of this proposition, but that case is inapposite because the property at issue involved no *machinery* at all—the communications tower in *Eastern Connecticut Cable* supported transmission antennas, which are equipment, not machinery. See id., 410. *Eastern Connecticut Cable* therefore does not address or resolve the issue here, which is whether machinery becomes something other than machinery simply because *one of its component parts* is a tower.[17] It is not apparent why the component parts of the wind turbine assembly should be considered separately and in isolation rather than as an integrated whole, that is, why the tower is analyzed separately from the hub, nacelle, and three blade rotor. Even if the component parts properly are considered in isolation for these purposes, some explanation is required as to why the char-

[17] The majority accurately summarizes the trial court's findings in this regard: "The turbines, which collectively weigh 418,657 pounds, each consist of a tower, a hub, a nacelle, and a rotor with three blades that have a 338 foot diameter."

acteristics of the *tower* should be dispositive of the tax classification of the integrated unit.

In my view, Connecticut law compels, or at least commends, a result contrary to that reached by the majority. The proper classification of the wind turbine assembly must be based on the entire integrated unit, including all of its component parts—structural and otherwise—because those parts are all physically and functionally connected and operate as a single mechanism, and no single part has any purpose or utility without the others.[18] Indeed, the statutory provisions that exempt manufacturing related "machinery"[19] from property taxation expressly define the key word as follows: " 'Machinery' means the basic machine itself, *including all of its component parts* and contrivances such as belts, pulleys, shafts, moving parts, *operating structures* and all equipment or devices used or required to control, regulate or operate the machinery, including, without limitation, computers and data processing equipment, together with all replacement and repair parts therefor, whether purchased separately or in conjunction with a complete machine, and regardless of whether the machine or component parts thereof are

[18] It cannot be that the relative size of the component parts determines the classification. Even if it were so, the tower is large (328 feet tall), but the rotor is even larger (338 feet in diameter).

[19] General Statutes § 12-81 (72) and (76) provides exemptions for machinery that is "installed in a manufacturing facility and claimed on the owner's federal income tax return as either five-year property or seven-year property . . . *and the predominant use of which is for manufacturing, processing or fabricating* . . . ." (Emphasis added.) Subdivision (72) relates to property assessments prior to October 1, 2011, whereas subdivision (76) relates to property assessments commencing thereafter. Although the plaintiffs made no claim that its wind turbines fall within this exemption, the definition of machinery contained therein is part of the same statutory scheme and bears on the meaning of the same word used in § 12-64 (a). See, e.g., *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 475–76, 28 A.3d 958 (2011) (examining related statute to construe meaning of statutory term).

assembled by the taxpayer or another party. . . .'' (Emphasis added.) General Statutes § 12-81 (72) (A) (i); accord General Statutes § 12-81 (76). The component parts of a machine are machinery for purposes of the property taxation statutes.

Logic leads to the same conclusion. The overall assembly is a machine, not because the plaintiff says so; see footnote 19 of the majority opinion; but because it was designed as a machine, it functions as a machine, and its valuation, even using the cost approach, is not limited to the component parts alone but includes ''all of the improvements necessary to develop [the] turbines.'' The tower is an integral part of the wind turbines every bit as much as wings are an integral part of an airplane or the axle is an integral part of a waterwheel; each of these components serves to locate another component of the machine in a place (the air, the water) where it can perform its function.

Even if the statutes made no mention of machinery, I would find it altogether implausible that a wind turbine is a building. It is readily understandable why sheds, icehouses, and garages would be considered buildings. Airplane hangars, even portable ones, also are buildings, as that word is commonly understood, and clearly fit within the category of enumerated buildings in § 12-64 (a) because they are used to store airplanes, much like garages store motor vehicles and silos store grain. See *Stratford* v. *Jacobelli*, 317 Conn. 863, 871, 120 A.3d 500 (2015) (holding that characteristics of airplane hangars ''place them within the purview of the proper construction of the words 'sheds' or 'all other buildings' '').

But I do not see how a wind turbine is a building, especially because the phrase ''all other buildings'' is subject to the limiting principle contained in the ejusdem generis canon, and the phrase therefore should be understood to include only those kinds of buildings

that are in the same class suggested by the specifically enumerated types of buildings surrounding the general term. A wind turbine is nothing like the kinds of buildings enumerated in § 12-64 (a). It bears no similarity in appearance or function to any of the other buildings listed. Indeed, the turbine assembly is not a building in any conventional meaning of the word, and I do not believe that anyone would refer to the wind turbine as such in common and ordinary usage. See General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language"); *Barker* v. *All Roofs by Dominic*, 336 Conn. 592, 612, 248 A.3d 650 (2020) ("[w]hen a term is not defined in a statute, we begin with the assumption that the legislature intended the word to carry its ordinary meaning" (internal quotation marks omitted)). I have not found any dictionaries that define the word "building" to include anything even remotely similar to a wind turbine (or any of its component parts). Nor have I seen any description of a wind turbine or its components using the word "building" to explain the appearance or function of that equipment.

The majority's contrary conclusion rests on the fact that the base section of the 385 foot tall tower supporting the rotor has a door, which opens into a compartment that allows access for maintenance and is used to store unspecified equipment related to the operation of the wind turbine assembly.[20] See part I of the majority opinion. According to the majority, this small compart-

[20] The trial court explained that the tower "consists of five sections: the top section, midsections A, B, [and] C, and a door section." The trial court described the door section as the "enclosed interior of the base . . . [which] was designed to provide enough space for more than one individual to work therein, whether to monitor the computer systems and other equipment stored therein or [to] access other interior areas of the tower to do any necessary maintenance or repairs." The trial court later observed that this base area is "used for storage of equipment related to [the] operation [of the turbine]."

ment at the base of the tower makes the entire wind turbine a "building" because the compartment is large enough to be "occupied" by two or more people and to store unspecified maintenance items, presumably tools. Id. I disagree that this incidental feature of the overall assembly, wholly collateral and auxiliary to its true and essential function (a machine used to generate power), changes the fundamental character of the property. Using language in its ordinary sense, the wind turbine is a very large piece of production machinery connected to the ground by its tall tower, which is bolted into a concrete slab. The wind turbine does not become a "building" merely because the machinery's large size permits internal access or storage of certain items for maintenance and repair. In doctrinal terms, the interpretive tool of ejusdem generis instructs us to limit the meaning of the word "building" to things similar to the enumerated examples contained in the statute; none of the buildings listed in § 12-64 (a) indicates a legislative intention to include a machine like a wind turbine.[21]

Whether a wind turbine would come within the meaning of the phrase "all other . . . structures" in § 12-64 (a) is a closer call. As a purely lexical matter, a wind turbine is a structure in a literal sense. As the majority observes, a structure is " 'something ([such] as a building) that is constructed . . . .' " Part I of the majority opinion, quoting Merriam-Webster's Collegiate Dictionary (10th Ed. 1993) p. 1167; see also American Heritage Dictionary (2d College Ed. 1985) p. 1208 (defining "structure" as "[s]omething made up of a number of parts

[21] Very large machinery often contains internal space compartments that may allow for internal access for operation, repair, or maintenance. The compartment within the base of the wind turbine can be used to store tools or similar items. The same can be said of other large machines used in the construction, mining, and power production industries. Indeed, some large machines are designed to be occupied by an operator in an enclosed compartment. No one would call such a machine a building.

that are held or put together in a particular way," "[t]he way in which parts are arranged or put together to form a whole," and "[s]omething constructed, [especially] a building or part"); Black's Law Dictionary (9th Ed. 2009) p. 1559 (defining "structure" as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together"). If the statute contained no reference to machinery, I might agree with the majority that the wind turbine assembly is a structure within the meaning of § 12-64 (a). But it is at the very least a close call for two reasons.

First, even more than the word "building," the word "structure," when used as a noun, is an extremely broad, general, and open-ended term that can refer literally to anything that is constructed, from a toy LEGO creation to a bronze statue to a fence to a skyscraper. Context therefore matters in determining the meaning of the word in any given instance, and, in the case of § 12-64 (a), one contextual clue is that the words "other . . . structures" must mean something different from (or in addition to) the word "building" because, otherwise, the phrase "all other buildings and structures" would contain a superfluous term.[22] See, e.g., *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 217, 38 A.3d 1183 ("[I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning

[22] The implication is especially strong in the present case because, prior to 1993, the statute expressly referred only to buildings, not structures. The version of § 12-64 in effect before the 1993 amendment provided for the taxation of real property, including "[d]welling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, *all other buildings* . . . ." (Emphasis added.) General Statutes (Rev. to 1985) § 12-64. The legislature added the term "structures" to § 12-64 (a) when it enacted § 1 of Public Acts 1993, No. 93-64.

. . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.)), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). Unfortunately, it is entirely unclear from the statutory text *what* meaning the words "other . . . structures" is intended to add. There are no specific structures (except buildings) enumerated in the statute, and, therefore, the rule of ejusdem generis, which significantly aided our effort to construe the word "building," is of no assistance; we cannot derive a category of like things without any specific examples to serve as a template. The word "structures" cannot be intended to be subject to taxation as real property every object that has been constructed and occupies physical space, but the text of the statute fails to provide the limiting principle.[23]

Second, equally unilluminating is the legislative history of the 1993 amendment that added the word "structure" to the statute. See Public Acts 1993, No. 93-64, § 1 (P.A. 93-64); see also 36 H.R. Proc., Pt. 7, 1993 Sess.,

[23] I agree with the majority that the rule of ejusdem generis is not available to assist our interpretation of the words "other . . . structures," but not because the legislative history so clarifies the meaning that the rule is inapplicable, as the majority posits. See part I of the majority opinion. Ejusdem generis cannot be used because the canon loses all utility when, as here, there are no specific examples of structures (as opposed to buildings) enumerated in the statute to inform the meaning of the general term. I disagree in particular with the suggestion that the canon becomes inapplicable because the legislative history includes a statement that the "purpose [of the bill] was to 'simply clarify that *all* structures and improvements not exempted are subject to the property tax' . . . ." (Emphasis in original.) Id., quoting 36 H.R. Proc., Pt. 7, 1993 Sess., pp. 2436–37, remarks of Representative Nancy Beals. That statement begs the same question left open by the statute: what defines or characterizes other *structures*, "all" of which are real property? The relevant legislative history only magnifies the ambiguous meaning of the word "structures" because the illustrations supplied by the sponsor of the relevant legislation to illustrate the word's meaning—gazebos and swimming pools—are nothing at all like a wind turbine or a comparable item of property.

pp. 2436–42. Using reason as a guide, it is sensible to assume that the legislature added the word "structures" to § 12-64 (a) to make it clear that real property includes things on (or in) the land that are building-like but that lack an essential attribute of a building proper—no roof, for example. The legislative history bears this hypothesis out. The sponsor of the bill explicitly explained that the purpose of the statute was to make it clear that physical structures such as "gazebos" and "swimming pools" were taxable as real property; 36 H.R. Proc., supra, pp. 2439–40, remarks of Representative Nancy Beals; in order to generate "a small revenue increase at the municipal level and possibly a decrease in property tax appeals . . . ." Id., p. 2437, remarks of Representative Beals.

Unfortunately, this legislative history sheds no light on the legislature's intentions with regard to things like a wind turbine, which has nothing in common with gazebos and swimming pools. Interestingly, the legislative history contains no reference whatsoever to *Eastern Connecticut Cable*, decided in 1980, which held that the word "building," as used in § 12-64 (a), did not include a 385 foot tall radio tower constructed of tubular steel and bolted into a concrete block embedded 6 feet into the earth. See *Eastern Connecticut Cable Television, Inc.* v. *Montville*, supra, 180 Conn. 410, 414. The 1993 legislative history is bereft of any reference, direct or indirect, to that case. We stated in *Eastern Connecticut Cable* that the radio tower was a "structure"; id., 414; which it clearly was, but we cannot ascertain from the legislative history of P.A. 93-64 whether the legislature intended its amendment to bring structures like the radio tower at issue in *Eastern Connecticut Cable* within the scope of 12-64 (a).[24] We could resolve that

[24] Tax assessors across Connecticut are generally instructed to classify "towers" as personal property. Property Code and Description No. 22 of Connecticut's Personal Property Declaration applies to "[c]ables, conduits, pipes, poles, towers (if not currently assessed as real estate), underground mains, wires, turbines, Class I Renewables, etc., of gas, heating, or energy

uncertainty by invoking the fiction of legislative omniscience to presume that the legislature had *Eastern Connecticut Cable* firmly in mind,[25] but I would have more confidence that our construction was rooted in reality if the legislative history, even obliquely, reflected some awareness of *Eastern Connecticut Cable* or some intention to include towers or other commercial assemblies, machinery, or equipment when it amended the statute to add the word "structures."

Accordingly, I respectfully concur.

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producing companies, telephone companies, water and water power companies."

[25] See, e.g., *State* v. *Ashby*, 336 Conn. 452, 493, 247 A.3d 521 (2020) (observing that this court may presume that legislature was aware of its decision interpreting statute when legislature later passed statutory amendment). Numerous canons of construction assume legislative omniscience in one respect or another. See R. Posner, "Statutory Interpretation—in the Classroom and in the Courtroom," 50 U. Chi. L. Rev. 800, 811 (1983) ("Most canons of statutory construction go wrong not because they misconceive the nature of judicial interpretation or of the legislative or political process but because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process."). Here, I refer specifically to the "[the] fiction propos-[ing] that the legislature, as the agent responsible for enacting statutes, is somehow 'aware' when it enacts those statutes of all its past enactments as well as their application by courts and agencies, and that courts may proceed to apply the legislature's enactments in light of that supposed awareness." K. Petroski, "Fictions of Omniscience," 103 Ky. L.J. 477, 478 (2014–2015).

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CONNECTICUT APPELLATE REPORTS

Vol. 214

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* EDWIN RONALD GLASS (AC 43092)

Bright, C. J., and Alvord and Seeley, Js.*

Syllabus

Convicted of the crimes of burglary in the first degree and robbery in the first degree, the defendant appealed to this court. An intruder entered the house of the victim, F, one night while she was at home and, inter alia, struggled with her before stealing money and other various items. F never saw the intruder's face, but he left behind what appeared to be the fingertip of a latex glove. The police responded to the home shortly after the crime was committed. With the assistance of a canine officer, they recovered the stolen items, which had been discarded in the neighborhood, and tracked the intruder's scent past the defendant's house to a garage that was a couple of houses north of the defendant's, where the trail disappeared. Various officers spoke with the defendant that night, after encountering him outside of his home during their investigation. Although the defendant matched F's general description of the intruder, his clothing did not match her description, and one of the officers determined that the defendant's breathing and heart rate appeared to be normal shortly after the crime was completed. Touch DNA evidence was recovered from the glove fragment and certain of the recovered stolen items, and the defendant was determined to be a major contributor to a mixture of DNA found on what was believed to be the interior side of the glove fragment. The state was unable to identify the defendant as a contributor to the DNA found on the other items tested. On the defendant's appeal to this court, *held* that the cumulative force of the state's evidence, even when viewed in the light

* This appeal originally was argued before a panel of this court consisting of Chief Judge Bright, Judge Alvord, and former Justice Sullivan. Thereafter, Judge Seeley replaced Justice Sullivan. Judge Seeley has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

most favorable to sustaining the verdict, was insufficient to establish, beyond a reasonable doubt, the defendant's identity as the intruder: the DNA evidence alone was insufficient for the jury to determine that the defendant had worn the glove during the robbery because there was no testimony or other evidence as to whether the DNA on the interior piece of glove was deposited via primary or secondary transfer, as to the significance of the defendant being a major contributor to the DNA mixture found on the glove fragment, or as to whether the defendant, in contrast with the two other unknown DNA contributors, was more likely to be the individual who wore the glove during the commission of the crime; moreover, because the state could not identify the defendant as a contributor to the touch DNA found on the other items tested, there was no other physical evidence connecting the defendant to the crime; furthermore, the nonphysical evidence, even when considered with the DNA evidence, was insufficient to prove beyond a reasonable doubt that the defendant was the perpetrator, as such evidence did not provide any compelling reason for the jury to conclude that the defendant, rather than any other black male of average build in the neighborhood, was the perpetrator of the offenses; accordingly, this court reversed the trial court's judgment and remanded the case with direction to render a judgment of acquittal.

Argued November 10, 2021—officially released August 2, 2022

Procedural History

Substitute information charging the defendant with the crimes of burglary in the first degree, robbery in the first degree, and sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, and tried to the jury before *Graham*, *J.*; verdict and judgment of guilty of burglary in the first degree and robbery in the first degree, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

John R. Weikart, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Richard J. Rubino*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Edwin Ronald Glass, appeals from the judgment of conviction, rendered after a jury trial, of burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), and robbery in the first degree in violation of General Statutes § 53a-134 (a) (3).[1] On appeal, the defendant claims that there was insufficient evidence to establish his identity as the person who committed the burglary and robbery.[2] We agree and, accordingly, reverse the judgment of the trial court.

The jury was presented with evidence of the following facts. On the evening of September 4, 2016, F[3] was alone at her home on Ferncrest Drive in East Hartford. Although her son, S, lived with her, he was away for the weekend. At about 8 p.m., F remembered that she had left a bag in her car from a shopping trip earlier that day. She went outside to retrieve the bag and saw a person dressed in all black walking in front of her driveway. She felt uneasy, went back into her house, and locked all the windows and doors on the first floor. She placed her car keys on the end table by the couch in the living room.

[1] The defendant also was charged with sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2). The jury found him not guilty of that charge.

[2] The defendant also claims that the court improperly admitted scientific evidence generated by a DNA analysis software without first conducting a hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), and that he was deprived of his constitutional right to a fair trial as a result of prosecutorial impropriety during closing arguments. We do not reach these claims because we conclude that the evidence was insufficient to support the defendant's conviction, and we reverse the judgment of conviction on that basis.

[3] In accordance with our policy of protecting the privacy interests of victims in cases involving alleged sexual assault, we decline to identify F or others through whom her identity may be ascertained. See General Statutes § 54-86e.

Around 10:30 p.m., while F was watching television in the living room, she heard a noise upstairs, which she thought was her cat. After hearing the noise two more times, she thought her cat was stuck behind a door and went upstairs to investigate. She peeked into her bedroom, went into S's room and her spare bedroom, and then opened the door to her "junk room."[4] At that time, an intruder came out from behind the door. F described him as a black man, in his late twenties or early thirties, wearing all black clothing, including pants, a shirt, sneakers, and a baseball cap, and about F's height or a little bit taller.[5] The intruder grabbed her, and the two wrestled to the ground while she tried to get away. The intruder pushed her into the spare bedroom as they continued to wrestle. F had a pen in her hand, and she attempted to jab the intruder with the pen.[6] F screamed, and the intruder told her not to scream and put a blanket over her head. He told her he had a knife and poked it into her leg. When she tried to grab "something," the intruder told her that she did not want to cut herself, and she let go. He then tied her hands behind her back using a soft cloth.

During the struggle, F smelled a strong odor of latex.[7] She was not able to see the intruder's face because he told her not to look at him and he kept twisting her body so that he was behind her. At trial, F testified that she could not identify the intruder who robbed her. F also testified that she did not recognize the defendant and that she never had allowed him into her home.

The intruder pushed F into her bedroom and face forward down onto her bed. At that time, he saw her

[4] F stored S's sports equipment and other various items in the junk room.

[5] F testified that she is five feet, seven inches or five feet, eight inches.

[6] F did not think she ever had made contact with him. At some point, he took the pen from her.

[7] When asked how she identified the smell of latex, she testified that it "smelled like a condom," and she thought that the intruder was there to sexually assault her.

purse on the dresser and asked whether there was money in it. When she replied that there was no money in it, he accused her of lying. When he grabbed the purse, the strap got looped around her neck and she feared she was "gone." He then removed it from her neck and looked in the purse. F told him that there was money in another purse that was in the living room downstairs. He then pulled her by the hair and led her down the stairs. He pushed her face first onto the couch and dumped the contents of the second purse onto the couch. The intruder then told F that he was going to take her upstairs and "wash [her] down." He pushed her back up the stairs, all the while keeping her in front of him, and told her to get into the shower. He then washed her with a washcloth, untied her hands, and told her not to move. After he went into and out of different rooms, he came back and told her: "Listen to me, I know where you live; don't call the cops; if I see them in the area I will come back and I will kill you."

F heard the intruder go down the stairs and the front door open and close. She did not hear a vehicle start. The intruder took $400 from F's wallet, an orange vest from a teddy bear that was located in the spare bedroom, a baseball cap, a blanket, and the cloth, which F later testified was a T-shirt, that he had used to tie her hands. She waited four or five minutes and called the police at 11:02 p.m.

Officer Robert Jones of the East Hartford Police Department responded to F's home. He observed that other officers were present on the street, the front door to the home was open, F was standing in the doorway, and a set of keys was lying on the front steps. F identified the keys as belonging to her and stated that she had placed them on the end table earlier in the evening. Officer Jones went into the home and met with F, who told him what happened and gave him a description of the intruder. Officer Jones walked with F through the

house to make sure there was no one else in the home. While walking through F's bedroom, Officer Jones observed a piece of latex on the floor next to the bed.

Officer Todd Mona, together with Casus, his tracking canine, also responded to F's home. He was the first or second officer to arrive. Officer Mona brought Casus to the front steps to get the intruder's scent from F's keys that the police believed had been dropped there by the intruder. He subsequently gave Casus a command to track. Casus began tracking in a southerly direction across the front yard and continued south. He stopped in front of 58 Ferncrest Drive and "downed on"[8] a baseball cap and T-shirt, which Officer Mona described as a white tank top.[9] Officer Mona transmitted via radio a request for an officer to stand beside the evidence to preserve it. When Officer Jared Richards arrived and took control of the area, Officer Mona and Casus continued tracking across front yards in a southerly direction, to the end of Ferncrest Drive where it intersects with Woodycrest Drive.[10] Casus then tracked north on Woodycrest Drive, tracking by the defendant's house[11]

[8] Officer Mona testified that Casus alerts to an item, or "downs," by placing the item between his paws.

[9] Although the orange teddy bear vest also was located in that area, Casus did not alert to it.

[10] Officer Mona testified that Casus went off track at one point but that he circled back around, which he is trained to do, and put himself back on the trail.

[11] When asked to describe the difficulties in tracking when someone is inside their home, Officer Mona explained: "So using the example of the cigar or cigarette, if you were in here smoking and you walked into that room but you put out your cigarette here, the cigarette does not go—the smoke that you can visibly see, that represents scent in a comparison. The smoke is not going to go into that room if you close the door and put out the cigarette if it was sealed properly. I'm just giving this as kind of like a comparison. So when somebody enters a home, the dog technically can't follow it into the home. He can bring you to the home, circle the home, get very close, a house or two next to it, because if you can imagine that scent is—you have groundbreaking vegetation where you have the disturbance of the grass that breaks and then you have our scent."

at 31 Woodycrest Drive, and stopping a couple of houses north of the defendant's house, at 21 Woodycrest Drive. Casus took Officer Mona up to a garage window at 21 Woodycrest Drive. North of 21 Woodycrest Drive, Casus gave Officer Mona cues that the trail was no longer there, and Officer Mona ended the track. The entire track, which covered about fourteen houses, took approximately one minute, as it was a strong trail and they were moving at "almost a full sprint."

Officer Mona and Casus then walked back in a southerly direction on Woodycrest Drive, where they encountered the defendant talking with one or two other officers.[12] At that time, Casus was no longer tracking and he did not alert to the defendant. Officer Mona spoke with the defendant for a "brief minute." The defendant stated that he lived with his mother at 31 Woodycrest Drive, had just left his house, and was walking to his friend's house. Officer Mona placed his leather gloved hand on the defendant, over his clothing. Officer Mona stated that he appeared to be breathing normally and that his heartbeat felt normal and was not elevated. Officer Mona believed that the defendant met the description of the intruder in terms of his height and weight, although he was wearing clothing that did not match the clothing described by F. Officer Mona did not think he relayed to the other officers that the defendant said he was at home and that someone should go speak to his mother, as his function was handling his canine and he needed to return to the items to which Casus had alerted, to preserve the chain of evidence.

Detective Robert Zulick also was involved in the investigation. He responded to Ferncrest Drive and photographed and collected the baseball cap, orange teddy bear vest, and T-shirt. He then went to F's house, photographed the exterior of her house, and conducted a

[12] Officer Mona testified that he could not recall which officers were speaking with the defendant.

walk-through of the interior. Detective Zulick photographed and collected the piece of latex from the floor of F's bedroom, the washcloth, and the pieces of the pen with which she attempted to jab the intruder.[13]

Detective Donald Loehr was assigned to the investigation. A couple of days following the crime, Detective Loehr conducted a canvass of the neighborhood. He spoke with Tandra Denson, the defendant's mother, inside her home and also in the driveway. While speaking with Denson, Detective Loehr noticed that the defendant was watching the conversation from the front door. Denson told Detective Loehr that, on the night of the crime, she was home, she noticed flashlights outside the windows, and the defendant was coming out of the bathroom as she was looking out the window.

One or two days after the robbery, F noticed bruises, rug burns, and cuts on her body, and Detectives Christina Johnston and Zulick returned to her home to photograph them. Detective Zulick also took additional photographs of what was believed to be the point of entry to the home, where a screen in the window of the "junk room" on the second floor had been slit open. At trial, F testified that the window was unlocked.

The piece of latex was sent to the state forensics laboratory (laboratory), along with a buccal swab[14] taken from F. Subsequently, the police received notice that the DNA sample from the piece of latex was associated with the defendant by way of a "hit off a database." Detective Loehr answered yes when asked during cross-examination if the identification of the defendant by the DNA report ended the case as far as he was concerned. A buccal swab subsequently was taken from

[13] The pen was not submitted to the laboratory for testing.

[14] "A buccal swab involves rubbing a Q-tip like instrument along the inside of the cheek to collect epithelial cells." *State* v. *Walker*, 332 Conn. 678, 683 n.2, 212 A.3d 1244 (2019).

the defendant. Along with the buccal swabs of S and the defendant, the T-shirt, orange teddy bear vest, baseball cap, and washcloth also were submitted to the laboratory, and Jennifer Green, a forensic science examiner with the laboratory, swabbed these items for "touch DNA . . . ." At trial, Green testified that "[t]ouch-type DNA is the collection of basically your skin cells that may have been left behind on an object or an item from a person who has handled it. So if an evidence item comes in we try to determine which ways that item was handled and therefore collect the sampling to obtain any DNA that may have been left behind. [Wear] DNA is very similar, in that it's an item of clothing or something that may have been worn, so we would collect the sample from an area that may have been touching an individual that could have left behind their skin cells."[15] Green designated the sides of the latex, which appeared to be the fingertip portion of a latex glove, as "exterior" and "interior," on the basis of her own observation. She did not determine which way the glove had been worn.

Lana Ramos, a forensic science examiner with the laboratory, extracted the DNA, performed analysis, and developed DNA profiles for the samples taken from the orange teddy bear vest, baseball cap, and piece of latex.[16] She also prepared two reports of her find-

[15] Our Supreme Court recently recognized that "touch DNA does not necessarily indicate a person's direct contact with the object. Rather . . . abandoned skin cells, which make up touch DNA, can be left behind through primary transfer, secondary transfer, or aerosolization. Primary or 'touch' transfer occurs, for example, when you directly touch or pick up an object. Secondary transfer, alternatively, occurs when, for example, person A bleeds onto a table and, subsequently, person B walks by the table, accidentally brushes against it, and then sits in a chair. Person A's blood can potentially be on that chair via secondary transfer, although person A personally never came into contact with the chair. Finally, skin cells can be deposited on an object through aerosolization, which . . . occurs when, for example, a person speaks, breathes, coughs, or sneezes on or near an item." *State* v. *Dawson*, 340 Conn. 136, 153–54, 263 A.3d 779 (2021).

[16] No DNA analysis was performed on the samples taken from the T-shirt or washcloth.

ings.[17] Ramos testified that a sample is classified as a mixture "[w]hen we are looking at a DNA profile if the sample contains DNA from two or more individuals . . . ." She further testified that, "[w]hen we do our profile analysis, if there [are] higher peaks which would indicate more DNA from one contributor, we may be able to deconvolute out[18] that major contributor."[19] (Footnote added.) She also testified that, in the case of a major profile, "there is enough DNA from one individual as compared to the other individuals in the mixture that we were able to deduce out a major profile from the mixture."

With respect to the side of the piece of latex designated as the interior, Ramos concluded that the DNA sample contained a mixture and "[a] major profile was deduced at all loci tested except for [one]. . . . The results are consistent with [the defendant] being the source of the major DNA profile deduced from [the side of the piece of latex designated as the interior]. The expected frequency of individuals who could be the source of the major DNA profile deduced from [the side of the piece of latex designated as the interior] is less than one in seven billion in the African American, Caucasian, and Hispanic populations." When asked to explain the expected frequency of "less than one in seven billion," Ramos stated: "When we give the qualitative statement of a match we then give a quantitative statement of how many other individuals we would also

[17] The first report, dated September 27, 2016, analyzed the samples taken from the two sides of the latex and the buccal swabs of F and the defendant. The second report, dated January 4, 2017, referred to her earlier report and also analyzed the buccal swab of S along with the samples taken from the orange teddy bear vest and the baseball cap.

[18] Ramos testified that "[d]econvoluting" is the same as "deducing out . . . ."

[19] Ramos additionally testified that "[m]ajor contributor is when there's more DNA from one individual, that we are able to use our standard operating procedures to deduce that profile."

expect to match that DNA profile." Specifically, she explained that "if you obtained the DNA profile of seven billion African American, Caucasian, or Hispanic individuals you would not expect another individual to have—to match that DNA profile." Both F and S were eliminated as sources of the DNA profile from the side of the piece of latex designated as the interior.[20]

A mixture of DNA also was found on the side of the piece of latex designated as the exterior. Both F and S could not be eliminated as potential contributors. The results were inconclusive[21] as to whether the defendant could be a contributor.

DNA testing also was performed on the orange teddy bear vest and baseball cap. The exterior of the orange teddy bear vest contained a mixture of DNA. Both S and F were eliminated as contributors to that DNA profile. "[I]nsufficient amplification products[22] were

[20] The quantity of the DNA from the swab taken from the side of the piece of latex designated as the interior was 400 picograms. Each cell contains approximately 6.6 picograms. The swabs were consumed in the initial extraction.

[21] Ramos testified that inconclusive meant that "the data [was] not sufficient to make a conclusion, either positive or elimination." She further testified that results could be inconclusive "if there is a sufficient amount of DNA overall but we cannot draw a conclusion with comparing it to a known sample."

[22] Christine Hsiao, a forensic science examiner in the DNA unit of the laboratory, performed DNA testing on the known samples taken from F and the defendant and testified regarding the process of obtaining a DNA profile. She explained: "So we use the standard forensic DNA typing procedure. Basically we extract the DNA using chemicals and heat, and then we can estimate how much DNA we obtained. And then we move on to a step we call the amplification step, which you can think of it as the molecular Xeroxing, basically making millions of copies of specific regions of DNA and we analyze the result and obtain the DNA profile, which is represented by a series of numbers." Adrianne Schoefer, also a forensic science examiner in the DNA unit of the laboratory, testified as to the steps she performed in the present case. Specifically, she testified: "I start off with a DNA extraction, which is where we break open the cells and we remove the DNA from the cells. The next stage is called quantification; we determine how much DNA is present in the sample. After that we have a step called amplification, which is like a copying; we copy the DNA. We copy specific regions; we

detected from [the exterior of the orange teddy bear vest] for comparison to [the defendant]." (Footnote added.) Insufficient to compare means that "there's not enough DNA in the sample to produce a profile that is sufficient to compare to a known sample; we can only eliminate individuals."

The interior of the orange teddy bear vest also contained a mixture of DNA. "Assuming two contributors to the mixture, a major DNA profile was deduced at all loci tested except for [three loci]." The results were consistent with F being the source of the major profile. Both the defendant and S were eliminated as sources of the major DNA profile. A minor profile was deduced at three loci. Both the defendant and S were eliminated as sources of the minor profile.

The black rimmed arm holes of the orange teddy bear vest also contained a mixture of DNA. F was eliminated as a contributor to the DNA profile. "Insufficient amplification products were detected from [the black rimmed arm holes of the orange teddy bear vest] for comparison to [the defendant and S]."

The interior rim of the baseball cap also contained a mixture of DNA. Both F and the defendant were eliminated as contributors to the DNA profile from the interior rim of the baseball cap. The data was "inconclusive" as to whether S could be a contributor to the DNA profile.

Ramos testified that she understood the distinction between primary and secondary transfer of DNA.[23] Defense counsel provided Ramos with the following example of a possible secondary transfer: "[I]f I were to come up to you today and shake your hand . . .

don't copy all of the DNA. And once we have the copies we then develop a DNA profile and that's represented by a series of numbers."

[23] Both Detectives Zulick and Loehr also testified that they are aware of secondary transfer.

and you were to leave the courtroom and shake [the prosecutor's] hand . . . there's a pretty good chance some of my DNA would be on [the prosecutor's] hand," to which Ramos responded, "[p]ossibly." Defense counsel asked: "And that would be the kind of DNA that you would detect in your testing. Correct?" Ramos responded: "Possibly." Ramos testified that her testing does not draw a distinction between primary and secondary transfers.[24]

Following the issuance of Ramos' second report in January, 2017, the laboratory "validated and implemented a new software analysis . . . ." Jillian Echard, a forensic science examiner with the laboratory, was asked to reexamine the samples in this case, applying the laboratory's "latest, newest protocols . . . ." In August, 2018, Echard reanalyzed the samples,[25] recompared the samples to the known samples, and prepared a report dated August 8, 2018. Echard testified that the new software analysis "deconvolutes DNA profiles into their most probable components and creates statistical findings of knowns to that deconvoluted profile." Echard explained that the statistic generated had changed from a "combined probability of inclusion or a random match probability" to a likelihood ratio.[26] Echard testified that

[24] In *State* v. *Dawson*, 340 Conn. 136, 154, 263 A.3d 779 (2021), the forensic science examiner testified that "when analyzing a sample, there is no way to determine whether DNA was deposited through primary transfer, secondary transfer, or aerosolization."

[25] Echard explained that "[t]he testing to generate the DNA profile had already been done, so I received the electronic data that had already been generated and I reanalyzed that data."

[26] See *State* v. *Rodriguez*, 337 Conn. 175, 190–91, 252 A.3d 811 (2020) ("The random match probability is the probability that the defendant's DNA profile would match the DNA profile of an unrelated member of the general population who is chosen at random. . . . The combined probability of inclusion is employed when there is a mixed DNA profile, which indicates the presence of genetic material from two or more contributors. . . . This method takes all of the observed data and considers all possible profiles that could produce that data. Then, it generates a statistic, which expresses the probability that a random person would have any of those generated profiles. . . . Source probability is the probability that someone other than

a result of "included" meant that "the known DNA profile is present at every single one of the fifteen test sites that we perform our testing on." "Cannot be eliminated" meant that "there was genetic linkage of that person's DNA profile to the question sample, but their DNA type was not present at every single one of our fifteen test site locations." "The inconclusives were when a likelihood ratio was calculated but fell in our lab's inconclusive zone, which is a likelihood ratio between 1 and 10,000. When we receive a likelihood ratio between 1 and 10,000 we give it an inconclusive result as to not report out what we believe might be false positive associations."

Echard testified, with respect to the sample from the side of the piece of latex designated as the interior: "I had determined the DNA profile . . . to be a contributor of a mixture of three contributors with at least one of them being male. I manually compared the DNA profiles from [F] and [S] to that DNA profile and I eliminated them as contributors without the software. I had found that [the defendant] was included as a contributor to this DNA profile, which meant that his DNA profile was present at all of the fifteen test sites. So I deconvoluted the profile using our probabilistic genotyping software, which deconvoluted the DNA profile to its most probable components, and then I compared the DNA profile of [the defendant] to the DNA profile from the interior of the glove and calculated a likelihood ratio. And assuming three contributors, the DNA profile from [the side of the piece of latex designated as the interior] is at least a hundred billion times more likely to occur if it originated from [the defendant] and two unknown contributors as opposed to it originating from three unknown contributors."

the defendant is the source of the DNA found at the crime scene." (Citations omitted; internal quotation marks omitted.)).

Echard also reanalyzed the sample from the exterior of the piece of latex. Although Ramos' analysis had indicated that results were inconclusive with respect to the defendant, Echard's reanalysis determined that he was eliminated as a source. Echard also reanalyzed the samples from the orange teddy bear vest and the baseball cap. With respect to the exterior of the orange teddy bear vest, the results of the reanalysis differed from the original analysis in that the defendant was eliminated as a contributor to that DNA profile. With respect to the black rimmed arm holes of the orange teddy bear vest, the results of the reanalysis differed from the original analysis in that it was inconclusive as to whether F or the defendant were contributors, and S was eliminated as a contributor. With respect to the interior rim of the baseball cap, the results of the reanalysis differed from the original analysis in that it was inconclusive as to whether F could be a contributor to the DNA profile.

The defendant was charged with burglary in the first degree in violation of § 53a-101 (a) (3), robbery in the first degree in violation of § 53a-134 (a) (3), and sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2). Following a trial,[27] the jury found the defendant guilty of burglary and robbery and not guilty of sexual assault. Thereafter, the court sentenced the defendant to a total effective sentence of nineteen years of incarceration. This appeal followed.

"In reviewing criminal convictions for the sufficiency of the evidence, we apply a well established two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably

[27] At the close of the state's evidence, the defendant moved for a judgment of acquittal, which was denied.

could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty. . . . Although proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . [or] require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier [of fact], would have resulted in an acquittal . . . it does not satisfy the [c]onstitution to have a jury determine that the defendant is probably guilty. . . . [When] the evidence is in equipoise or equal, the [s]tate has not sustained its burden [of proof] . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Dawson*, 340 Conn. 136, 146–47, 263 A.3d 779 (2021).

"Although [t]here is no distinction between direct and circumstantial evidence as far as probative force is concerned . . . [b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the

link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Citation omitted; internal quotation marks omitted.) *State* v. *Bemer*, 340 Conn. 804, 812, 266 A.3d 116 (2021).

"The state has the burden of proving beyond a reasonable doubt the defendant's identity as the perpetrator of the crime. . . . [T]he issue of the identity of the defendant as [the] perpetrator of the robbery is one of fact for the jury." (Citation omitted; internal quotation marks omitted.) *State* v. *Hazard*, 201 Conn. App. 46, 55, 240 A.3d 749, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020).

On appeal, the defendant claims that the evidence of his identity as the intruder was insufficient to support his conviction. Specifically, the defendant argues that the DNA evidence, consisting of "his DNA within a tiny sample of a three person mixture of touch DNA," did not provide the jury with an "evidentiary basis allowing it to conclude that the defendant being a 'major contributor' to the DNA mixture meant that the defendant was the most recent or sole wearer of the latex glove." The defendant further contends that the non-DNA evidence was "particularly weak," in that "none of [it] directly links the defendant to the offenses of which he was convicted." We agree with the defendant that the evidence was insufficient to support his conviction.

Before turning to a discussion of the evidence in the present case, we examine our Supreme Court's recent discussion of touch DNA and decisions from other jurisdictions addressing the issue. In *State* v. *Dawson*, supra, 340 Conn. 139–40, the defendant was present with five other individuals in a courtyard of a housing complex. The defendant was seated at a picnic table with two of the individuals when police entered the courtyard and noticed a gun lying in plain view, resting on top of

leaves. Id., 140–41. Four of the six individuals, including the defendant, voluntarily provided a DNA sample. Id., 142. Touch DNA was collected from the gun. Id., 143. A forensic science examiner analyzed the sample and was able to generate a partial profile, obtaining results at seven out of fifteen loci tested. Id. The DNA profile consisted of a mixture of DNA. Id. Of the four individuals who provided samples, three individuals were eliminated as possible contributors to the DNA profile, but the defendant could not be eliminated as a contributor. Id. " 'The expected frequency of individuals who could not be eliminated as a contributor to the DNA profile is approximately one in 1.5 million in the African-American population, one in 3.5 million in the Caucasian population, and one in 930,000 in the Hispanic population.' " Id., 143–44. The defendant was charged with and convicted of criminal possession of a pistol or revolver. Id., 144. On appeal to this court, he claimed that there was insufficient evidence to support his conviction. Id. This court affirmed the judgment of conviction, and the defendant appealed to our Supreme Court. Id., 144–45.

Our Supreme Court reversed the judgment of conviction, concluding that "the jury could not reasonably have concluded beyond a reasonable doubt that the defendant had knowledge of the gun and, with intent, exercised dominion or control over it." Id., 150. Specifically, the court agreed with the defendant's argument that the DNA evidence did not establish that he constructively possessed the gun. Id., 153. The court found troubling "the sheer lack of conclusiveness regarding the DNA evidence in this case as it relates to the charged crime . . . ." Id., 156. The court's first concern was that the state's DNA expert, the forensic science examiner, "was not able to determine how the defendant's DNA ended up on the gun; [the examiner] could not say whether it was via primary transfer, secondary transfer, or aerosolization. In other words, [the examiner] could

not determine whether the defendant's DNA ended up on the gun because he touched the gun, because he touched something that subsequently came into contact with the gun, or because he breathed, sneezed, or coughed near the gun."[28] Id., 156–57. Second, the court noted that the DNA expert was "unable to determine when the defendant's DNA was deposited on the gun . . . ." Id., 157. Third, the court referred to the expert's testimony that the DNA sample was a mixture, "meaning that at least one other person's DNA was on the gun and possibly as many as three or four other people's DNA." Id. Fourth, the court stated that the expert had "conceded that, although the other three individuals at the picnic table were able to be excluded as contributors to the sample, that did not mean that their DNA was not on the gun; rather, it simply meant that it was not detected." Id. Fifth, the court noted that two of the individuals present in the courtyard were not DNA tested. Id. Finally, the court explained that the expert "could not definitively say that the DNA profile developed was that of the defendant; [the examiner] could determine only that he could not be excluded as a contributor." Id. On the basis of these several concerns, the court concluded that "there were simply too many unknowns for the jury to find beyond a reasonable doubt that the defendant had even touched the gun, much less that he was aware of its presence near where he was seated on the night in question and intended to exercise dominion or control over it." Id.

We note two key differences between the present case and *Dawson*. First, it was determined in *Dawson* only that the defendant "could not be excluded as a

[28] See also 2 P. Giannelli et al., Scientific Evidence (6th Ed. 2020) § 18.04 [4], pp. 18-100–18-101 (noting that one person's DNA can " 'hitchhike' " its way to crime scene through secondary DNA transfer, and, therefore, presence of one's DNA at crime scene no longer means that one was even at crime scene).

contributor"; id.; whereas here, the defendant was determined to be "included" not merely as a contributor, but as a major contributor. Second, we recognize that the issue presented in *Dawson* was whether the state proved beyond a reasonable doubt that the defendant constructively possessed the gun; id., 145–46; whereas the issue in the present case is whether the state proved beyond a reasonable doubt that it was the defendant who committed the crimes of burglary and robbery. Nevertheless, our Supreme Court's concerns regarding touch DNA as expressed in *Dawson* resonate in this case.

The state contends in its appellate brief that the DNA evidence "alone allowed the jury to find that the defendant was [F's] attacker, because it was undisputed that her attacker wore latex gloves and that a piece of a latex glove with the defendant's DNA on it was found in [F's] bedroom immediately after the assailant had restrained and struggled with [F] therein." We disagree.

At trial, there was no testimony or other evidence as to whether the DNA on the side of the piece of latex designated as the interior was deposited via primary or secondary transfer. To the contrary, Ramos testified that her analysis does not distinguish between the two forms of transfer and that her testing could "[p]ossibly" detect DNA deposited via secondary transfer. In addition, the DNA found on the side of the piece of latex designated as the interior contained a mixture of DNA of three contributors. Ramos testified that her results were "consistent with [the defendant] being the source of the major DNA profile deduced" from the side of the piece of latex designated as the interior. Ramos explained that a major contributor is "when there's more DNA from one individual" as compared to the other individuals in the mixture. Thus, the extent of the evidence regarding the defendant being a "major contributor" was that there was more of the defendant's

DNA than the other individuals' DNA. The jury was not presented with any evidence of a threshold for the determination of a major contributor or any evidence as to the amount of DNA of the other two contributors. Cf. *United States* v. *Perez*, United States District Court, Docket No. 3:18-CR-274-VLB-1 (D. Conn. December 20, 2021) (analyst from laboratory "conducted proportional analysis and determined that 85% of the DNA mixture was from the contributor associated with the [d]efendant").

More importantly, there was no evidence presented as to the significance of an individual being a major contributor to a DNA mixture. The jury was not presented with any evidence from which it could infer that the designation of a major contributor is correlated with the likelihood that DNA was deposited via primary transfer. Significantly, the state argued at trial that the latex glove was worn only once and stated that it was unknown what the defendant touched before he put the glove on. Extrapolating from the state's theory, the individual who wore the glove transferred his DNA, via primary transfer, along with the DNA of two other individuals, via secondary transfer. The jury was not provided any evidentiary basis, however, to determine the likelihood that the defendant, in contrast with the two other contributors, was the individual who wore the glove during the commission of the crime.

Accordingly, as in *Dawson*, we conclude that "there were simply too many unknowns" for the jury to find beyond a reasonable doubt that the defendant had worn the glove during the robbery. *State* v. *Dawson*, supra, 340 Conn. 157.

The state relies on *State* v. *Faust*, 161 Conn. App. 149, 166, 127 A.3d 1028 (2015), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016), to support its contention that the DNA evidence alone allowed the jury to find that

the defendant was the intruder. In *Faust*, the defendant was convicted of robbery with a firearm, among other charges. Id., 151–52. On appeal to this court, he claimed, inter alia, that the evidence was insufficient to permit the jury to find, beyond a reasonable doubt, that he had participated in the robbery. Id., 158. The evidence presented by the state included the testimony of a forensic science examiner that the defendant could not be eliminated as a contributor to mixtures of DNA found on the ends of two pieces of duct tape used to bind the legs and arms of the robbery victims. Id., 164. The defendant's specific argument on appeal was that there was "no evidence directly indicating that his DNA was left on the duct tape *at the time the crime took place* . . . ." (Emphasis added.) Id., 162. This court rejected the defendant's argument, explaining that, "[a]lthough DNA may be transferred to an object at any time, the jury reasonably could have concluded that, because the samples were taken from the torn ends of the duct tape, the DNA was impressed during the commission of the crime rather than at some other point in time." Id., 166.

We first note that *Faust* was decided in 2015, long before our Supreme Court expressed concern regarding the various methods of transference of touch DNA in 2021. Indeed, the defendant in *Faust* challenged the sufficiency of the DNA evidence on the basis that "there was no evidence directly indicating that his DNA was left on the duct tape *at the time the crime took place* . . . ." (Emphasis added.) Id., 162. This court rejected that claim on the basis of the forensic science examiner's testimony that she had collected DNA from "the ends of the torn fragments of duct tape," which were "more likely to contain the DNA of the person who handled the duct tape, and may have torn it at the ends, rather than the DNA of the person to whom the duct tape was applied." Id., 164. The opinion focuses on the time, during the commission of the crime or some other

time, when the defendant may have deposited the DNA and makes no mention of the methods, primary or secondary, of transfer of DNA. See id., 166. Thus, we find our Supreme Court's analysis in *Dawson* to be more instructive than that of this court in *Faust* in resolving the specific claim presented in this appeal.

Second, the DNA evidence in *Faust* is distinguishable from the present case. Notably, the DNA evidence in *Faust* included *two* samples from *two* pieces of duct tape, and the defendant could not be eliminated as a contributor to *either* sample. Id., 164. In the present case, the defendant was identified as a contributor only to the mixture of DNA found on the side of the piece of latex designated as the interior; he was not identified as a contributor to the DNA found on any of the items the intruder took from F's home.

Third, the non-DNA evidence implicating the defendant in *Faust*, his conduct prior to the robbery, significantly "add[ed] to the cumulative weight of the evidence presented at trial." Id., 166. Specifically, one witness identified the defendant as the driver of a stolen Mercedes, and a second witness, an employee of the jewelry store, identified the defendant as having approached the store the night before the robbery before then turning around and getting inside the stolen Mercedes. Id., 154. Moreover, the stolen Mercedes was recovered on the day of the robbery less than one-half mile from the jewelry store. Id., 155. Thus, this court concluded that the jury reasonably could have determined that the defendant was one of the perpetrators.[29] Id., 166.

[29] The state also relies on *State* v. *Rodriguez*, 337 Conn. 175, 252 A.3d 811 (2020), which is inapposite. *Rodriguez* involved a sexual assault perpetrated by two men, where the laboratory ultimately determined that the defendant was a potential contributor to a DNA mixture that had been extracted from the "sperm-rich fraction" of vaginal swabs taken from the victim's body. Id., 178–79, 182. Specifically, prior to conducting its analysis, the laboratory separated the epithelial—or skin—cells from the sperm cells, "[b]ecause it is preferable to analyze a profile of the semen sample alone . . . ." Id., 181 n.3. The defendant's claim on appeal was that "a random match probability

The defendant directs this court to *United States* v. *Bonner*, 648 F.3d 209, 211 (4th Cir. 2011), in which the United States Court of Appeals for the Fourth Circuit affirmed the District Court's granting of the defendant's motion for a judgment of acquittal on the basis that the government had failed to produce sufficient identity evidence placing the defendant at the scene of the robbery. In that case, two African American male assailants, wearing pantyhose over their faces, hooded sweatshirts, and hats, confronted a restaurant employee outside the back of the restaurant, forced him into the

of 1 in 230,000, by itself, is insufficient to prove that he is guilty beyond a reasonable doubt. Specifically, the defendant contend[ed] that a random match probability of 1 in 230,000 in the Hispanic population means that there are about ninety Hispanic males over the age of fifteen in the United States who could have contributed a DNA profile to the vaginal sample." Id., 198–99. In the present case, the defendant is not challenging the sufficiency of the evidence on the basis of the random match probability or likelihood ratio presented to the jury. Given that the claims on appeal were completely different, *Rodriguez* is inapplicable.

Moreover, in *Rodriguez*, the state responded to the defendant's claim that the random match probability was insufficient evidence by asserting that the defendant's claim was " 'meritless because the evidence establishing the defendant's identity was not based on the DNA evidence alone.' " Id., 199. Our Supreme Court ultimately concluded that "the circumstantial evidence, combined with the DNA evidence, was sufficient for the jury to find beyond a reasonable doubt that the defendant was one of the perpetrators of the sexual assault." Id., 201–202. The court focused heavily on statements made by the defendant to the police during recorded interviews. Id., 200–201. Specifically, "after denying ever having had a threesome during the first interview, during the second interview, the defendant admitted that he had engaged in threesomes on two occasions. When the detective asked him during the second interview what happened the day the victim reported being assaulted, the defendant abandoned his lack of recollection and offered an account of picking up a man and a woman in his car near an AutoZone in New Britain and engaging in a threesome. The defendant later explained that he could not remember when that occurred or whether it was the same incident the detective was referencing. The defendant's mention of an AutoZone was significant, however, because the jury was presented with evidence that an AutoZone was located in the vicinity of where the victim reported being abducted. Finally, when the detective informed him that, in addition to the assault, the victim stated that she had been robbed of several hundred dollars, the defendant replied with words to the effect of: 'That's not me. It's the other guy.' " Id.

restaurant, told him to call his supervisor, and ordered him to the floor. Id. The employee stated that one of the robbers was wearing a black and white Yankees hat. Id. The assistant manager gave one of the robbers money from the cash register, and the robbers left. Id. The robbery occurred at about 10 p.m. and took only about two minutes to complete. Id. The employee had observed a " 'pink' " or " 'reddish' " sport utility vehicle parked in the back of the restaurant seconds before the robbery and also saw the same vehicle in the vicinity after the robbers left. Id. The manager called the police and described the vehicle as a reddish pink Honda Passport. Id.

A police officer observed a burgundy Honda Passport exiting the restaurant's parking lot as the officer approached the scene. Id., 212. He conducted a stop of the vehicle, which contained one occupant. Id. Surveillance footage revealed that the occupant did not match the description of the robbers, and the employee did not identify the occupant as one of the robbers. Id. The defendant's wallet, however, was located in the vehicle.[30] Id. Police recovered a New York Yankees hat from near the dumpster behind the restaurant, and the manager identified the hat as belonging to one of the robbers. Id.

DNA testing was performed on the hat, which revealed "multiple DNA matches and that one of them, identified as the 'predominant' profile, belonged to [the defendant]." Id. Although there was other DNA on the hat,

[30] During a search of the vehicle, police found "several other items including: [the defendant's] identification and wallet, several rounds of .357 ammunition, a toy gun, two walkie-talkies, registration of the car to Tyra Edmonds (who was [the defendant's] girlfriend at that time), and some scattered clothing items. Three cell phones, belonging to [the vehicle's occupant], Ms. Edmonds, and LaMont Ruth ([the defendant's] cousin), were also recovered. [The defendant] placed several short calls to Ms. Edmonds' and Mr. Ruth's cell phones that night." *United States* v. *Bonner*, supra, 648 F.3d 212.

the forensic analyst "did not try to match that DNA to other individuals." Id. "The DNA analysis could not determine who last wore the hat." Id. One canine tracked the scent from the Yankees hat to a nearby condominium development and a second canine tracked it to a gas station less than one-half mile away. Id. Five hours after the search was completed, a phone call was placed from that gas station to the home of the defendant's girlfriend. Id.

The court in *Bonner* concluded that the evidence was insufficient to support the defendant's conviction. Id., 216. Specifically, with respect to the DNA evidence, the court considered and rejected the government's argument that the jury reasonably could infer that the defendant was the last wearer of the hat from the fact that the defendant's DNA was " 'predominant.' " Id., 214. The court stated: "[T]his confuses the permissible practice of viewing conflicting evidence and credibility in favor of one side, with the impermissible practice of allowing juries to invent new evidence based on unsubstantiated scientific assumptions." Id. The court found the government's position troubling, describing it as "draw[ing] unscientific conclusions based on two disparate pieces of scientific evidence . . . ." Id., 215. The court posited a number of other, also seemingly logical but nonetheless "analytically flimsy," conclusions that could be drawn. Id., 215. For example, the jury could have drawn the unscientific conclusions that as the robber wore pantyhose over his face during the robbery, there was a potential that his DNA was not on the hat at all, or that an individual who perspires more than other individuals also would have more " 'predominant' " DNA. Id. The court summed up the dangers of drawing these unscientific conclusions by stating that "a jury could draw a number of apparently plausible, but analytically flimsy conclusions that bor-

der on pseudo-science from the expert evidence presented by the government. However, not every articulable inference is proper because scientific rigor demands more than a theory of plausible deductions strung together." Id.

We also find persuasive *Jennings* v. *Commonwealth*, 67 Va. App. 620, 627, 798 S.E.2d 828 (2017). There, the Court of Appeals of Virginia reversed the defendant's conviction for robbery on the basis that the evidence was insufficient to prove that he was the perpetrator. Id., 628. On the day of the robbery of a gas station, a person entered the store wearing "a black stocking cap, a blue hooded sweatshirt, black jeans with white embroidery on the rear pockets, a scarf wrapped around his face, gloves, and sunglasses." Id., 623. The robber leapt over the counter and produced a knife, taking $38 from the cash register. Id. The only physical description the sales clerk could provide was that the robber was " 'tall' " and " 'slim.' " Id. Police arrived at the scene with a canine officer, who led the police to the woods behind the store to a brown bag and several $5 bills. Id. The canine then alerted on a black stocking cap and a scarf, which were found close together on a wooded path. Id., 624. A hooded sweatshirt also was discovered, approximately ten feet off the path, along with blue jeans and black tennis shoes. Id. The police also discovered a knife approximately twenty to twenty-five yards from the path. Id. The sales clerk subsequently identified the items as having been used by the assailant during the robbery. Id. DNA analysis was performed on samples collected from the stocking cap, the scarf, the knife, and the hooded sweatshirt. Id. Each of the items contained a combination of DNA from multiple individuals. Id. The state's expert, a forensic scientist in the field of forensic biology, determined that the defendant was the " 'major contributor' " of DNA on both the stocking cap and scarf, "meaning his DNA

was the most prominent on them." Id. The expert also testified that the defendant's DNA mixture represented about one half of that present on the knife. Id.

The defendant in *Jennings* argued on appeal that the evidence established only that he came into contact with the items at some point, not that he used or wore them during the robbery. Id., 626. The court agreed with the defendant, stating that "the evidence at best is legally in equipoise, because it equally supports a conclusion that the unknown contributor of DNA is just as likely as [the defendant] to have been the wearer of the clothing and possessor of the knife, and therefore, the robber." Id., 627. In support of its conclusion, the court noted that "it is equally reasonable to conclude from the evidence that [the defendant] was a major contributor because he either wore the clothing more often than any of the other DNA contributors, but not necessarily at the time of the robbery, or that another contributor wore the clothes less often but did so during the robbery." Id., 628. It further noted that there was "no evidence establishing whether the items containing DNA other than that of [the defendant] belonged to a single individual or multiple individuals, and if from multiple individuals, what the statistical significance of [the defendant's] DNA on all of those items would be." Id., 627. Accordingly, the court determined that the inference that the defendant wore the items during the robbery, formed on the basis that the defendant was a major contributor of DNA found on some of the items, lacked necessary evidentiary support. Id., 627–28; see also *Commonwealth* v. *Anitus*, 93 Mass. App. 104, 105, 110, 97 N.E.3d 700 (2018) (DNA major profiles developed from T-shirt and bandana discarded near crime scene that matched defendant's DNA profile were insufficient to establish that defendant was one of assailants who wore objects during crime).

We find persuasive the reasoning supporting the conclusions of the court in *Bonner* and *Jennings*. Both

courts rejected, as unsupported by evidence, the drawing of an inference that a defendant used an item during a crime on the basis of evidence that the defendant was a major contributor to a DNA mixture found on that item. Just as in *Bonner*, the state here "asked the jury to draw unwarranted inferences based on . . . scientific evidence through argument instead of specialized knowledge." *United States* v. *Bonner*, supra, 648 F.3d 215. Indeed, in closing argument, the state in the present case argued: "Ramos testified to you what a major contributor of DNA was. She did tell you the definition. More DNA from one individual in this case is coming from the defendant. The state would argue that this is not a reused latex glove. People usually don't do this; it's difficult to do. We don't know what the defendant touched before he put the glove on. But keeping in mind one thing: the defendant is the major contributor of the DNA in this case. . . . Ramos gave you those statistics and that would explain the mixture of the unknowns." Any inference, however, that the defendant wore the glove and, therefore, that his DNA was transferred via primary transfer, drawn from the evidence that he was the "major contributor," is unwarranted and lacks evidentiary support in the record. See *State* v. *Bemer*, supra, 340 Conn. 812 ("if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable" (internal quotation marks omitted)).

Counsel for the state, during oral argument before this court, stated that she did not think that an expert could tell whether just because someone was the major contributor that that necessarily meant the transfer was primary versus secondary.[31] DNA experts testifying in

[31] We note that experts have testified, consistent with the testimony in the present case, that DNA analysis cannot determine whether DNA was deposited via primary or secondary transfer. See, e.g., *Young* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4007713-S (March 18, 2019) (forensic science examiner from labo-

both the United States District Court for the District of Connecticut and courts in other jurisdictions, however, have offered the evidentiary basis lacking in the present case—that is, the correlation between the amount of DNA deposited on an item and the *likelihood* that such DNA was deposited via primary transfer as opposed to secondary transfer. See *United States* v. *Perez*, supra, United States District Court, Docket No. 3:18-CR-274-VLB-1 (A DNA expert testified that "the amount of DNA found from a secondary transferor when compared to a direct transferor is expectingly less, specifically stating 'I haven't seen an example where the primary toucher has less DNA than the secondary person' and '[t]ypically . . . the initial touching is going to give more DNA.' . . . He did testify that it was possible, but 'in general, [he] would think the direct touching is going to transfer more of that individual's DNA.' " (Citation omitted.)); see also *United States* v. *Brooks*, 678 Fed. Appx. 755, 758 (10th Cir.) (expert testified that there is no way to confirm secondary transfer on basis of forensic testing but also testified that secondary transfer was highly unlikely on basis that defendant was major contributor of DNA), cert. denied, U.S. , 138 S. Ct. 240, 199 L. Ed. 2d 154 (2017); *State* v. *Castro*, 206 So. 3d 1059, 1063 (La. App. 2016) (expert testified that "a lower level of DNA would be found through secondary transfer, and that, considering the high concentration of [the defendant's] DNA found on [the victim's] right breast, it was highly unlikely that the right breast swab would have contained transferred DNA"), writ denied, 227 So. 3d 285 (La. 2017); *State* v. *Shine*, 113 N.E.3d 160, 172 (Ohio App. 2018) (noting, in sufficiency of evidence analysis, that forensic scientist from regional

ratory testified that DNA analysis cannot determine who was last contributor to mixture, nor order in which contributors to mixture deposited their respective DNA, nor whether DNA was deposited via primary or secondary transfer), aff'd, 201 Conn. App. 905, 241 A.3d 215 (2020), cert. denied, 336 Conn. 904, 242 A.3d 1009 (2021).

laboratory had testified that defendant was major contributor to DNA found on shell casings, testified that minor contributor was present at " 'very low level,' " and opined that defendant's DNA was present through primary transfer). We emphasize, based on our review of decisions from other jurisdictions considering expert testimony elucidating DNA evidence, that such testimony can provide a jury with an evidentiary basis from which it reasonably can infer that a defendant's having been designated as a major contributor to a mixture of DNA makes it more likely that the defendant's DNA was deposited via primary transfer. Of particular importance to our review, the jury was presented with no evidence that the DNA of a major contributor was more likely the result of primary, as opposed to secondary, transfer.

Accordingly, given the absence of any evidence from which the jury reasonably could infer a connection between the defendant's status as a major contributor to the mixture of DNA found on the side of the piece of latex designated as the interior and the likelihood of the defendant having deposited his DNA via primary transfer, we are compelled to reject, on this record, the state's argument that the DNA evidence was sufficient, standing alone, to establish the defendant's identity as the perpetrator.

Because the state could not identify the defendant as a contributor to the DNA found on the other items tested, the orange teddy bear vest and baseball cap, and because the state never tested the T-shirt, washcloth or pen for DNA, there is no other physical evidence connecting the defendant to the crime. Instead, the state relies on the following additional, nonphysical evidence. First, it argues that the victim's "general description" of the attacker as a black male in his late twenties or early thirties, approximately 200 pounds, and a little taller than her (five feet, eight inches), fit

the defendant, who was a thirty-five year old black man, weighed 180 pounds, and stood five feet, nine inches tall. Second, the state highlights the assailant's warning that he would return to F's house and kill her if he saw a police presence in the future, which the state contends implied that he lived nearby. The state notes that the defendant lived one street over from F and that Casus tracked to a garage near the defendant's property before losing the scent. Third, the state points to the defendant's presence on the street at 11:30 p.m. when the police were investigating the crime.

The defendant responds that such evidence did not "provide any compelling reason for a jury to conclude that the defendant, rather than any other black male of average build in the neighborhood, was the perpetrator of these offenses." We agree with the defendant that the non-DNA evidence, when considered together with the DNA evidence, was insufficient to prove beyond a reasonable doubt that the defendant was the perpetrator. As the defendant points out, when the police encountered him on the street on the night of the crime, his clothing did not match the clothing described by F; nor was there any evidence that he owned clothing matching the description. Additionally, his heartbeat and breathing both seemed normal to Officer Mona. The intruder's threat, even if considered by the jury as suggesting that he is able to keep an eye on F's house, cannot overcome, as reasoned by the defendant, that the other two individuals who contributed DNA to the sample taken from the side of the piece of latex designated as the interior "are completely unknown, and there has been no showing eliminating any of the other neighbors as contributors, even though the state insists that residing in the neighborhood is one of the key indicators of guilt here." As to the defendant's presence on the street, Officer Mona testified that it would not

be unusual in this multiracial community to see a young black man walking along the street at night.

Moreover, Casus' track, which covered fourteen homes, took him *past* the defendant's house, where he did not pause, and brought him to a garage window at 21 Woodycrest Drive, a couple of houses away from the defendant's. Casus stopped at only one address, and it was not the home of the defendant. Although the state explains the failure of Casus to track to the defendant's house by noting that the defendant's entering of the home would have interrupted Casus' track, Officer Mona testified that "when somebody enters a home, the dog technically can't follow it into the home. He can bring you to the home, circle the home, get very close, a house or two next to it . . . ." Casus neither brought Officer Mona up to the house nor circled the house. Instead, he brought Officer Mona past the defendant's house, traveling two houses beyond that house and tracking up to a garage window. Thus, the correlation between Casus' track, following the scent from F's keys, past the defendant's home, and the conclusion that the defendant was the intruder who had dropped the keys following the commission of the crime is weak.

"Although we must not substitute our judgment for that of the jury, a reviewing court must determine whether the jury reasonably could have concluded as it did." *State* v. *Bemer*, supra, 340 Conn. 820. In the present case, the cumulative force of the state's evidence, including the DNA evidence, the canine tracking, the defendant's meeting the very general description given of the intruder, and the threat made by the perpetrator along with the defendant's presence on the street in his neighborhood, even when viewed in the light most favorable to sustaining the verdict, was insufficient to establish, beyond a reasonable doubt, the defendant's identity as the intruder.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion the other judges concurred.

KIRK B. DAVIS ET AL. *v.* PROPERTY OWNERS ASSOCIATION OF MOODUS LAKE SHORES, INC.
(AC 44707)

Prescott, Cradle and Clark, Js.

Syllabus

The plaintiff homeowners sought, inter alia, a judgment declaring that the defendant, a property owners association, violated the defendant's governing documents and restrictive covenants by improperly preventing the plaintiffs from accessing their driveway. The plaintiffs, whose real property abutted a portion of the association's property, claimed that the only means of access from their property to a certain public road was via a driveway that was located over a portion of the defendant's property and that the defendants had improperly barricaded the driveway by erecting a fence along the common boundary between the two properties. The plaintiffs had previously brought an action in the trial court to determine whether the plaintiffs had an easement by implication over the defendant's property. The trial court determined that the plaintiffs had failed to establish an interest in the defendant's property so as to grant an easement and rendered judgment for the defendant, which this court affirmed on appeal. Thereafter, the plaintiffs brought the present action, and the defendant filed a motion for summary judgment, claiming that the plaintiffs' claims were barred by the doctrine of res judicata. The trial court granted the defendant's motion, and the plaintiffs appealed to this court. *Held* that the trial court did not err in concluding that the plaintiffs' claims in the present action were barred by the doctrine of res judicata: the claims asserted in both actions arose out of the same series of connected transactions, as both actions concerned the same parties, the same property, the ability of the plaintiffs to access the road from their residence, and the defendant's legal capacity to construct a barrier between the two properties, and both actions sought similar remedies; moreover, although the plaintiffs argued that their present claims were separate and distinct from the claims raised in the first action, they failed to demonstrate why their present claims could not have been brought in the first action and, therefore, the plaintiffs had an adequate opportunity to litigate the claims of alleged breach of governing documents and deeded rights at the time of the first action

and their present claims were merely additional legal theories arising from the same transaction or nucleus of operative facts; furthermore, the combined facts of both actions constituted a single transaction that could have formed a convenient unit for the trial court in the first action, and their treatment as a unit would not have been unexpected by the parties.

Argued April 11 2022—officially released August 2, 2022

Procedural History

Action for, inter alia, a judgment declaring that the defendant improperly prevented the plaintiffs from accessing their driveway in violation of the defendant's restrictive covenants and deeded property rights, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Frechette, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Scott W. Jezek, with whom was *Deborah L. Barbi*, for the appellants (plaintiffs).

Troy Bataille, with whom was *Sam Westbrook*, for the appellee (defendant).

Opinion

CRADLE, J. In this property dispute action, the plaintiffs, Kirk B. Davis and Elyssa J. Davis, appeal from the summary judgment rendered by the trial court in favor of the defendant, Property Owners Association of Moodus Lake Shores, Inc. (association). On appeal, the plaintiffs claim that the court improperly concluded that the doctrine of res judicata barred the present action. We affirm the judgment of the trial court.

The record before the court, including this court's decision in *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, 183 Conn. App. 690, 193 A.3d 1245 (2018), viewed in the light most favorable to the plaintiffs as the nonmoving party, reveals the following facts

and procedural history. In 1998, the plaintiffs purchased a parcel of land located at 38 Hilltop Road in East Haddam (residence). Id., 695. Although the residence originally was intended for use as a seasonal property, between 2002 and 2003, the plaintiffs made significant renovations to the property in order to convert it into a year-round dwelling. Id., 695–96. The residence currently is comprised of a single-family dwelling and appurtenant garage, as well as a parking area and driveway.

Ownership of the residence includes and is subject to membership in the association,[1] a beachfront association created by No. 75-56 of the 1975 Special Acts (S.A. 75-56). The association governs the properties within its territorial boundaries according to the regulations and bylaws set forth in S.A. 75-56 (governing documents), and is charged with "provid[ing] for the improvement of the land [within the association], its maintenance as a residential and resort area and for the health, comfort, safety protection and convenience of the inhabitants thereof." S.A. 75-56, § 3.

In addition to its responsibility as a governing body, the association also owns certain real property located within the community. One such parcel directly abuts the eastern edge of the residence and is improved by a parking area and community beach area (association property). Both the residence and the association property have frontage on Hilltop Road.

At the northwest corner of the association property is a paved parking area, which runs adjacent to the plaintiffs' driveway and forms part of a thirty-five foot common boundary shared with the residence. See *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*,

[1] The plaintiffs' deed of purchase contains certain restrictive covenants, which limit the plaintiffs' use of the property in accordance with the association's bylaws and regulations set forth in No. 75-56 of the 1975 Special Acts.

Superior Court, judicial district of Middlesex, Docket No. CV-12-6006823-S (February 24, 2016) (reprinted at 183 Conn. App. 704, 193 A.3d. 1254), aff'd, 183 Conn. App. 690, 193 A.3d. 1245 (2018). The parking area is situated between the plaintiffs' driveway and Hilltop Road, and, following renovation on the residence, had been used by the plaintiffs as a means of ingress and egress from their property to Hilltop Road. Id. As such, the renovated driveway allowed vehicles to travel over the common boundary and permitted vehicles to travel in the vicinity of stairs on the association property, which provided access to the beach. *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, 183 Conn. App. 696. In 2011, as a means of protecting its property rights and ensuring the safety of pedestrians using the beach stairs, the association erected a fence along the common boundary between the residence and the association property. Id., 696–97. The plaintiffs removed the fence shortly after it had been installed.

On January 19, 2012, the plaintiffs filed a ten count complaint[2] against the association seeking, inter alia,

[2] The plaintiffs' complaint in the first action contained the following prayer for relief: "1. A declaratory judgment determining whether or not the plaintiffs have a right of way and/or easement over the land of the . . . association; 2. If the plaintiffs have such a right, the extent of permissible use, and fixing the location of said right of way and/or easement; 3. A judgment determining the rights of the parties in or to the said northwesterly portion of the association parcel and settling title thereto in accordance with § 47-31 of the . . . General Statutes; 4. An order enjoining and restraining the [association] from maintaining, erecting, constructing or building any fence, structure or barrier, that would adversely affect the plaintiffs' ability to access and egress its property; 5. A mandatory injunction requiring the [association] to remove any such fence, structure or barrier; 6. Money damages; 7. An order pursuant to . . . General Statutes § 33-1090 removing the . . . directors of the association and barring them from serving as directors for a period of time prescribed by the court; 8. An injunction against the malicious erection of any structure intended to annoy and injure the plaintiffs in respect to their use and enjoyment of the premises, pursuant to . . . General Statutes § 52-480; 9. Attorney's fees; 10. Such other and further relief as to equity appertains." *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, Superior Court, judicial district of Middlesex, Docket No. CV-12-6006823-S.

to quiet title to the strip of parking area that provided access and egress to Hilltop Road; a declaratory judgment establishing an easement over the same; a permanent injunction preventing the association from constructing any structure or barrier that would adversely affect their ability to access and egress the residence; monetary damages for the malicious erection of a fence;[3] and monetary damages for tortious conduct.[4] See generally *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, Superior Court, Docket No. CV-12-6006823-S.

A bench trial was held between November, 2014, and September, 2015, at which the parties presented evidence, including numerous photographic exhibits depicting the properties at issue, as well as witness testimony describing the historical use of the association parking area. See *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, 183 Conn. App. 698–99. On February 24, 2016, the court, *Domnarski, J.*, issued a memorandum of decision rendering judgment in favor of the association on each count of the operative complaint. Id., 697, 704. Specifically, the court determined that the plaintiffs had "failed to establish an interest in the [association's] property," so as to grant an easement by prescription or implication, and that "the plaintiffs presented insufficient evidence to establish that the fence was installed by the association with the intention to injure the plaintiffs' enjoyment of

[3] The court, *Aurigemma J.*, subsequently granted the defendants' motion for nonsuit on "the portion of count five seeking monetary damages." *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, 183 Conn. App. 695.

[4] Counts six through ten, which alleged, respectively, that the association and its directors committed intentional infliction of emotional distress, negligent infliction of emotional distress, private nuisance, civil conspiracy, fraud, and breach of fiduciary duties and authority, were later nonsuited. See *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, 183 Conn. App. 694–95.

their land." *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, Superior Court, Docket No. CV-12-6006823-S. The plaintiffs subsequently appealed to this court, claiming that the trial court improperly denied their motions in limine that sought to preclude the association's experts from testifying and misapplied the law of easements by failing to grant them an easement by implication. See *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, 183 Conn. App. 691–92. This court affirmed the judgment of the trial court on July 24, 2018.[5] Id., 703–704.

On August 27, 2018, following the conclusion of litigation and all potential appeal periods in the first action, the association sent notice to the plaintiffs via certified mail that it intended to reinstall the fence along the boundary between the residence and the association property. The plaintiffs never responded to the correspondence and, on September 29, 2018, the association erected a second fence separating the two properties.

On June 17, 2019, the plaintiffs commenced the present action by way of a four count complaint and a motion for a temporary injunction.[6] Count one of the complaint alleged that the association interfered with the plaintiffs' rights and privileges as members of the association, in violation of S.A. 75-56, by failing either to remove the fence or to otherwise provide the plaintiffs with reasonable access to enter the residence. Count two alleged that the association breached its membership contract with the plaintiffs by obstructing and preventing the plaintiffs from accessing the residence, thereby imposing an unauthorized sanction and

[5] The plaintiffs did not seek certification to appeal further.

[6] In their motion for a temporary injunction, the plaintiffs sought an order restraining the association, "its agents, servants, and employees, from erecting any barricade across the plaintiffs' driveway entrance or restricting vehicular access to the plaintiffs' property in any manner until further order of [the] court." The plaintiffs subsequently withdrew the motion.

denying the plaintiffs quiet enjoyment of their property. Count three claimed that the association wrongfully restricted the plaintiffs' use of the association's common areas. Count four alleged that the association maliciously erected a structure with the intent to "annoy, injure and deprive the plaintiffs of the full and reasonable use and engagement of [the residence]" in violation of General Statutes § 52-570.[7]

On August 7, 2020, the association filed a motion for summary judgment, arguing that the plaintiffs' claims were barred by the doctrine of res judicata. In its memorandum of law in support of its motion for summary judgment, the association contended that (1) the parties to both actions were the same, (2) the first action was rendered on the merits, (3) the parties had an adequate opportunity to litigate the matter fully, and (4) the claims were the same. Specifically, the association alleged that the parties had "already litigated [the] exact property line [and] fence, and the issues pertinent to both," and that the plaintiffs' first three counts, each of which sounded in breach of contract, could have been brought in the first action.

On September 8, 2020, the plaintiffs filed a memorandum of law in opposition to the association's motion for summary judgment, in which the plaintiffs argued,

[7] The plaintiffs' complaint contained the following prayer for relief: "1. A declaratory judgment that the [association] has wrongfully violated [S.A.] 75-56 of the . . . state legislature by wrongfully barricading their driveway; 2. A temporary and permanent injunction, pursuant to . . . General Statutes § 52-480, ordering the [association] to remove and refrain from installing or erecting any barricade preventing the plaintiffs from the reasonable use and access to their driveway; 3. A declaratory judgment that the common areas of the [association] are dedicated to the use in common of its members, including the plaintiffs, free from conduct impeding that use and enjoyment; 4. A declaratory judgment of the court that the conduct of the [association] in erecting a barricade to the plaintiffs' driveway violates the provisions of . . . § 52-570; and 5. All such other and further relief as may be available to the plaintiffs at law or in equity."

inter alia, that their claims were separate and distinct from the claims asserted in the first action. Specifically, the plaintiffs contended that their claims in the first action, which determined whether the plaintiffs had a claim of right over association property, arose out of a different "factual grouping" than their present claims, which sought, inter alia, to enforce the plaintiffs' rights as association members. The court, *Frechette*, *J.*, heard argument from both parties on the association's motion for summary judgment on January 14, 2021.

On April 26, 2021, the court granted the association's motion for summary judgment. In its memorandum of decision, the court determined that there was "no evidence to suggest that the plaintiffs were in any way precluded from alleging a breach of contract claim or any other claim against the [association]" in the first action. Accordingly, the court concluded that the plaintiffs' claims were barred by the doctrine of res judicata. This appeal followed.

We begin our analysis by setting forth our well established standard of review on appeal following a trial court's granting of a motion for summary judgment and the relevant legal principles that govern our resolution of the plaintiffs' claim. "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 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. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine

issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant 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.) *Peterson* v. *iCare Management, LLC*, 203 Conn. App. 777, 786, 250 A.3d 720 (2021). "Summary judgment is appropriate to determine whether a claim is barred by the doctrine of res judicata." *Santorso* v. *Bristol Hospital*, 127 Conn. App. 606, 614, 15 A.3d 1131 (2011), aff'd, 308 Conn. 338, 63 A.3d 940 (2013).

"Res judicata, or claim preclusion, express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. . . . Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue. . . . Res judicata bars the relitigation of claims actually made in the prior action *as well as any claims that might have been made there*. . . . Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate." (Emphasis added; internal quotation marks omitted.) *Peterson* v. *iCare Management, LLC*, supra, 203 Conn. App. 787. "Thus, res judicata prevents reassertion of the same claim regardless

of what additional or different evidence or legal theories might be advanced in support of it." (Internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 157–58, 129 A.3d 677 (2016).

On appeal, the parties do not contest the application of the first three elements, namely, that the first action was rendered on the merits by a court of competent jurisdiction, that the parties to both actions are the same, and that the parties previously had an opportunity to litigate the matter fully. Rather, the dispute centers on whether the plaintiffs' claims in the present action are the same as those raised in the first action, or whether the present claims could have been raised in the first action. The plaintiffs argue that their present claims, which arise out of their "rights as [association members]," as set forth in S.A. 75-56, the governing documents, and the restrictive covenants in their deed of purchase, are separate and distinct from the claims raised in the first action, which sought "determination of prescriptive rights and adverse possession." Accordingly, they contend that the court improperly determined that their present claims could have been raised in the first action. In response, the association argues that the plaintiffs' claims arise out of the "same underlying factual circumstances" and, therefore, "could have been brought in the first lawsuit." We agree with the association.

"[For] res judicata [to bar] claims that were not actually litigated in a prior action, the previous and subsequent claims must be considered the same for res judicata to apply. . . . To determine whether claims are the same for res judicata purposes, [our Supreme Court] has adopted the transactional test. . . . Under the transactional test, res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series

of connected transactions, out of which the action arose. . . . What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . [E]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action. . . . In applying the transactional test, we compare the complaint in the [present] action with the pleadings and the judgment in the earlier action." (Citations omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 159–60.

After closely reviewing the complaint in the present case, and comparing it against the pleadings and judgment in the first action, we conclude that the claims asserted in both actions arise out of the same series of connected transactions and, therefore, are the "same" under the doctrine of res judicata. See *Fisk* v. *BL Cos.*, 185 Conn. App. 671, 681–82, 198 A.3d 160 (2018). Indeed, both actions concern the same parties; the same strip of association property parking lot separating the residence from Hilltop Road; the plaintiffs' ability to access Hilltop Road from the residence; and the association's legal capacity to construct a barrier between the two properties. Furthermore, both actions seek similar remedies, namely, a court order enjoining the association from constructing a fence separating the two properties, or, in the alternative, a declaration that the plaintiffs' enjoy a legal right to cross over and use the association property. In particular, the fourth count in the present action and the fifth count in the first action are virtually identical; both allege malicious erection of a

structure in violation of § 52-570,[8] and seek relief pursuant to General Statutes § 52-480.[9]

With regard to the first three counts, although the plaintiffs did not specifically allege in the first action that the association violated their rights set forth in the association's governing documents and the plaintiffs' deed of purchase, it is well established that the doctrine of res judicata "bars not only subsequent relitigation of a claim previously asserted, but subsequent relitigation of any claims relating to the same cause of action . . . which might have been made. . . . [T]he appropriate inquiry with respect to [claim] preclusion is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Nipmuc Properties, LLC* v. *Meriden*, 130 Conn. App. 806, 815, 25 A.3d 714, cert. denied, 302 Conn. 939, 28 A.3d 989 (2011), cert. denied, 565 U.S. 1246, 132 S. Ct. 1718, 182 L. Ed. 2d 253 (2012); see also *Massey* v. *Branford*, 119 Conn. App. 453, 469–70, 988 A.2d 370 ("[a] judgment is final not only as to every matter which was offered to sustain the claim, *but also as to any other admissible matter which might have been offered for that purpose*" (emphasis in original; internal quotation marks omitted)), cert. denied, 295 Conn. 921, 991 A.2d 565 (2010).

It is undisputed that the plaintiffs became association members in 1998, subject to the governing documents and restrictive covenants set forth in their deed, when

[8] General Statutes § 52-570 provides: "An action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land."

[9] General Statutes § 52-480 provides: "An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

they purchased the residence from its prior owners. In fact, as part of their complaint in the first action, the plaintiffs alleged that they were association members and submitted into evidence the same governing documents they now rely on in asserting their present claims. See *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, supra, Superior Court, Docket No. CV-12-6006823-S. Accordingly, the plaintiffs' claims in the present action, alleging the association's violation of S.A. 75-56, governing documents, and deeded rights, were ripe for adjudication and could have been brought in the first action. Although the plaintiffs repeatedly have argued that their present claims are separate and distinct from the claims raised in the first action, they have failed to demonstrate why their present claims could not have been raised during the prior litigation.[10]

[10] The plaintiffs argue that the present action is analogous to *Mierzejewski* v. *Laneri*, Superior Court, judicial district of Middlesex, Docket No. CV-07-5003402-S (February 23, 2010), rev'd on other grounds, 130 Conn. App. 306, 23 A.3d 82, cert. denied, 302 Conn. 932, 28 A.3d 344 (2011). In that case, the trial court concluded that the doctrine of res judicata did not bar the plaintiff from seeking a determination of the boundary line between his property and the defendant's property, where the plaintiff previously had brought an action seeking to extinguish the defendant's easement burdening the plaintiff's property. See id; see also *Mierzejewski* v. *Brownell*, Superior Court, judicial district of Middlesex, Docket No. CV-03-0100645-S (September 15, 2005), aff'd, 102 Conn. App. 413, 925 A.2d 1126, cert. denied, 284 Conn. 917, 931 A.2d 936 (2007). Specifically, the court concluded that *Laneri*, "although involving much of the same evidence as presented in the first proceeding, d[id] not arise out of the 'same factual grouping' that formed the basis of the claims in the first [proceeding]. Accordingly, the claim in this case is not barred by res judicata." *Mierzejewski* v. *Laneri*, supra.

We find the plaintiffs' reliance on *Laneri* to be misguided. In *Brownell*, the plaintiff sought unsuccessfully to extinguish the defendant's easement over his property. See *Mierzejewski* v. *Brownell*, 102 Conn. App. 413, 414, 925 A.2d 1126, cert. denied, 284 Conn. 917, 931 A.2d 936 (2007). After this court affirmed the trial court's decision; id.; the plaintiff brought a second action seeking to clarify and determine the location of that easement. See *Mierzejewski* v. *Laneri*, supra, Superior Court, Docket No. CV-07-5003402-S. Accordingly, although the two actions arose out of a similar factual setting, they sought different remedies and could not have been maintained simultaneously. Indeed, there was no reason for the common plaintiff in

We conclude, accordingly, that the plaintiffs had an adequate opportunity to litigate the alleged breach of governing documents and deeded rights claims at the time of the first action and that their present claims are merely "additional . . . legal theories" arising from the same transaction or nucleus of operative facts. *Wheeler* v. *Beachcroft*, supra, 320 Conn. 157. The combined facts of both actions, therefore, constituted a single transaction that would have formed a convenient trial unit for the trial court in the first action, and their treatment as a unit would not have been unexpected by the parties. See *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 677, 259 A.3d 1239 (2021). As such, the court did not err in concluding that the plaintiffs' claims in the present action are barred by the doctrine of res judicata.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

both actions to commence an action seeking to clarify the location of the easement until the court had determined that a valid easement existed.

In the present case, by contrast, the plaintiffs' claims concerning the association's governing documents and their deeded rights seek the same remedy as their prior prescriptive easement and quiet title claims, and could adequately have been brought in the first action. We conclude, therefore, that the decisions in *Brownell* and *Laneri* are distinguishable from the present action.

[11] The plaintiffs also claim that the court improperly rendered summary judgment as a matter of law and, instead, should have considered "the facts and circumstances as applied to [the plaintiffs] as members of the . . . association and balance[d] their respective rights." Specifically, the plaintiffs contend that the court should have considered how the association's governing documents applied to the plaintiffs, as association members, and should have weighed the plaintiffs' interest, as year-round residents of the association community, against the association's interest in maintaining a seasonal community parking lot.

Although this claim is not entirely clear, we interpret the plaintiffs' contention as arguing that the court should have considered the merits of their governing documents and deeded rights claims before disposing of the action on summary judgment. Indeed, the plaintiffs cite Justice Vertefeuille's concurring opinion in our Supreme Court's decision in *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 478, 486, 52 A.3d 702 (2012), for the proposition

SARGENT, SARGENT & JACOBS, LLC, AS ESCROW AGENT *v.* ALAN THOELE ET AL.
(AC 44397)

Elgo, Alexander and Harper, Js.

Syllabus

The plaintiff escrow agent sought, by way of an action for interpleader, a determination of the rights to certain funds that the defendant purchaser had placed in escrow with the plaintiff as a deposit pursuant to a the purchase and sale agreement made in 2018 for certain real property owned by the defendant seller. Prior to closing, the purchaser learned that the seller had entered into an agreement (neighbor agreement) several years prior with the owners of neighboring properties, which included a provision for an easement on the seller's property in order to connect the neighbors' properties to the town's sanitary sewer system via a sewer line to be installed across the seller's property. The purchase and sale agreement did not reference the neighbor agreement or the potential sewer easement and further represented in § 16 (m) that the seller was not aware of any claims for rights of passage, easement, or other property rights to the property. Because of the neighbor agreement, the purchaser's title insurance company refused to issue a title policy.

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that a "latent ambiguity" involved in the application of a restrictive covenant creates a question of fact inappropriate for resolution on summary judgment. What the plaintiffs overlook, however, is that the pertinent legal issue on summary judgment was whether their claims survived the application of res judicata, not the extent or application of the association's governing documents and restrictive covenants set forth in their deed. To reiterate, the plaintiffs' claims concerning their rights as association members were available to them at the time of the first action. See *Nipmuc Properties, LLC* v. *Meriden*, supra, 130 Conn. App. 815.

To the extent that the plaintiffs argue that their interest in bringing a just claim outweighs the interest in finality served by the doctrine of res judicata; see *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 601–603, 922 A.2d 1073 (2007) (discussing public policy exception to claim preclusion); we conclude that the court properly determined that the plaintiffs' claims were barred. The plaintiffs had an opportunity to bring their present claims in the first action and allowing them to proceed would risk undermining the "doctrine's underlying policies," including the prevention of repetitive litigation and inconsistent judgments. (Internal quotation marks omitted.) Id., 601. We conclude, accordingly, that the balance of public policy considerations weighs in the association's favor.

As a result thereof, the purchaser invoked § 9 (b) of the purchase and sale agreement relating to encumbrances of title and the seller's obligation to cure such claimed encumbrance or other defect in marketable title, specifically the sewer easement, and thereafter terminated the contract when the seller failed to cure such claimed encumbrance prior to closing. Subsequently, the plaintiff initiated an interpleader action to determine the defendants' rights to the deposit held in escrow by the plaintiff. Thereafter, each of the defendants filed cross claims against the other, claiming, inter alia, breach of contract and return of deposit. At trial, the seller sought to introduce a letter of intent, signed by the defendants in 2016 during the early negotiations for the sale of the property, which provided that there was an existing sewer easement that ran with the land. The purchaser objected to the introduction of the letter of intent on the basis of the parol evidence rule, arguing that the purchase and sale agreement contained an integration clause, and, therefore, any extrinsic evidence related to the contract should be excluded. The trial court overruled the purchaser's objection and admitted the letter of intent as an exhibit, recognizing that it would not be considered in connection with interpretation or application of the contract and, therefore, could not be used to impute or presume knowledge on the purchaser or alter the contract, but could be used in connection with other claims such as fraudulent inducement. Following a trial, the trial court concluded that the seller breached the purchase and sale agreement and that the purchaser was entitled to a return of its deposit and rendered judgment in favor of the purchaser, from which the seller appealed to this court. On appeal, *held*:

1. Contrary to the seller's claims that the purchaser could not invoke § 9 (b) of the purchase and sale agreement and could not argue that the failure to include the existence of the neighbor agreement in the purchase and sale agreement resulted in a material breach of that agreement because the letter of intent established the purchaser's knowledge of the neighbor agreement and potential sewer easement at the time the purchaser signed the purchase and sale agreement, § 16 (m) of the purchase and sale agreement established the purchaser's knowledge at the time that the agreement was signed and any evidence offered to alter the purchaser's knowledge was impermissible under the parol evidence rule: the trial court correctly determined that the seller relied on the letter of intent to alter the extent and manner of the parties' understanding as established in the purchase and sale agreement, as the agreement was explicit that the property was not subject to any easements or potential easements and contained no reference to the neighbor agreement or any potential easement on the property, and, therefore, the letter of intent was offered to vary or contradict the terms of the written purchase and sale agreement and was not proper evidence regarding what the parties agreed to in 2018; moreover, the seller's claim that the court erred in determining that the purchaser had no actual

knowledge of the potential sewer easement failed, as the seller relied exclusively on the letter of intent and, therefore, constituted an additional, impermissible attempt to alter the understanding between the parties established when they signed the purchase and sale agreement in 2018.

2. This court declined to review the seller's claim that the neighbor agreement was not an additional encumbrance pursuant to § 9 (b) of the purchase and sale agreement because the purchase and sale agreement required *both* the refusal of the purchaser's title insurer to issue title insurance *and* a qualified encumbrance pursuant to title standards, that claim having been inadequately briefed as the seller failed to cite any law or analysis in support of this argument that could render the court's action improper.

3. This court declined to address the seller's claim that that the trial court erred when it determined that the failure to disclose the existence of the neighbor agreement was a material breach of the purchase and sale agreement: because the trial court found that the seller had breached the purchase and sale agreement both by failing to return the deposit after the purchaser terminated the purchase and sale agreement and in his misrepresentations in the contract itself, there was no practical relief that this court could grant the seller with respect to his claim regarding a material breach, even if the court agreed with such claim, because the seller failed to challenge the other basis the trial court found a breach of the contract, and the seller's liability for breach of the purchase and sale agreement would remain intact.

Argued February 1—officially released August 2, 2022

Procedural History

Action for interpleader to determine the rights of the defendants to certain funds held in escrow by the plaintiff in connection with a real estate transaction, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where each defendant filed a cross claim; thereafter, the case was tried to the court, *Hon. Kenneth B. Povodator*, judge trial referee; judgment for the defendant Merwin, LLC, on the named defendant's cross claim and in part on its cross claim against the named defendant, from which the named defendant appealed to this court. *Affirmed.*

Alan R. Spirer, for the appellant (named defendant).

Bruce L. Elstein, with whom, on the brief, was *John J. Ribas*, for the appellee (defendant Merwin, LLC).

Opinion

ALEXANDER, J. This interpleader action arises from a dispute between the defendant purchaser, Merwin, LLC (purchaser),[1] and the defendant seller, Alan Thoele (seller), concerning a failed commercial real estate transaction.[2] The seller appeals from the judgment of the trial court rendered in favor of the purchaser on its claims for breach of contract and return of deposit. On appeal, the seller claims that the court erred in concluding that (1) the parol evidence rule precluded consideration of a letter of intent from 2016, (2) the purchaser did not have actual knowledge of a potential sewer easement on the property, (3) the potential sewer easement was an encumbrance on the property, and (4) the seller's failure to disclose the potential sewer easement was a material breach of the purchase and sale agreement.[3] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. "On January 22, 2018, [the defendants] entered into a contract for the purchase and sale of a parcel of

[1] Franco Iannone is the sole member of the purchaser and will be referred to by name where appropriate.

[2] The plaintiff, Sargent, Sargent & Jacobs, LLC, as the escrow agent, initiated this action against the purchaser and the seller by way of an interpleader complaint requesting "[a]n interlocutory judgment requiring the defendants to interplead together concerning their claims to the funds now in the hands of the plaintiff" and noting that it "has and claims no interest in the funds and is willing to pay the same over to such person as is lawfully entitled to receive the same . . . ." The plaintiff is not a party to this appeal. For clarity, we refer to the two defendants as seller and purchaser throughout this opinion.

[3] For the sake of clarity and ease of discussion, we address the seller's arguments in an order different from the way in which they were briefed.

land located at 1480 Post Road East, Westport [(property)]. . . . Shortly thereafter (and before any closing date), the [purchaser] invoked a . . . provision of the contract relating to encumbrances of title and the obligation of the seller to cure such title defects, which ultimately led to the failure to close and this litigation."

Several years before this failed real estate transaction, in or around 2011, "the seller . . . sought to obtain a modification of the zoning of the rear portion of the subject property from residential to commercial. In connection with that change, the seller had entered into an agreement with an association of owners of neighboring residential properties [(neighbor agreement)] . . . ." The neighbor agreement "included a section relating to a sewer line that would connect the neighbors' properties to the town's sanitary sewer system, via a sewer line to be installed across the seller's property" by way of "an easement for that purpose." The neighbor agreement provided that "the easement and sewer line would be triggered by final approval of a site plan or special permit for development of the property." In addition, the neighbor agreement noted that "[t]he sewer easement would not be granted and recorded until after final site plans [for development], etc., were approved by the town." After the seller obtained the requested zone change from residential to commercial, no "actual site plan application or special permit application [was] submitted in connection with any proposed development/redevelopment . . . ."[4]

"With respect to the obligations . . . relating to the sewer line and sewer easement, [the neighbor agreement] provided that '[t]he parties agree to bind themselves, their heirs, successors and assigns, and the said obligations [shall] run with the land, unless otherwise

[4] The seller submitted "a conceptual—not actual—development plan . . . in conjunction with his applications to the town" for the zone change.

amended or modified by the parties. . . .' " Despite the fact that "[t]he neighbor agreement required the seller to file on the land records certain restrictions on the seller's rights with respect to development as well as certain obligations of the seller," including the agreement concerning the easement, the document that was recorded "made no mention of sewer easement issues/rights."

Several years after the seller entered into the neighbor agreement, he and the purchaser began discussing a potential sale of the property. In 2016, during the early stage of negotiations and approximately two years before the 2018 purchase and sale agreement was entered into, a letter of intent related to the sale of the property was drafted. Vincenzo Iannone, the father of the purchaser's sole member, signed the letter of intent on the purchaser's behalf as an agent of the purchaser. Under the heading "ACCESS & EGRESS," the letter of intent provided the following: "Sewer Easement for Cottage Lane is in place on the property and runs with the land for Access & Egress for [the property]." Early versions of the purchase and sale agreement,[5] as well as the 2018 purchase and sale agreement itself, did not expressly mention the existence of the easement "despite language in each contract version relating to a recitation of all known easements and claimed rights, and denying the existence of undisclosed rights and encumbrances."

Thereafter, on January 22, 2018, the purchaser and seller entered into the purchase and sale agreement. Several sections of the purchase and sale agreement are relevant to this dispute. Section 9 (b) provides in relevant part: "In the event of any objections to title as

[5] The contract at issue in this case was the third version of the purchase and sale agreement between the parties. The first two agreements were terminated largely due to environmental concerns.

set forth in the Purchaser's written notification pursuant to the above subsection (a) or any additional encumbrance that arise after the date of Purchaser's title search which either party become aware of . . . but prior to the Closing Date, then the Seller upon notice of such Additional Encumbrance, shall have a period not to exceed thirty (30) days (the 'Cure Period'), to enable the Seller to remove the Additional Encumbrances and Seller shall diligently use its good faith efforts to remove such Additional Encumbrances. In the event the Seller is not able to remove the Additional Encumbrances prior to the Closing or prior to the termination of the Cure Period, then either Purchaser or Seller may terminate this Agreement . . . . For purposes of this Agreement, nothing shall be deemed to be an objection or encumbrance against title unless (i) the Purchaser's title insurance company shall not be willing to issue an owner's title insurance policy insuring marketable title to the Premises without exception for such objection or encumbrance [(title insurance provision)], or (ii) such objection or encumbrance is considered an objection under the Standards of Title of the Connecticut Bar Association [(standards of title provision)] . . . ." In addition, § 16 (m) of the purchase and sale agreement, under the heading "Seller's Representations and Warranties," provides that the "Seller is not aware of any claims for rights of passage, easements or other property rights over, on or to the Premises, other than as set forth herein." The purchase and sale agreement made no reference to the neighbor agreement or the potential sewer easement.

The closing date initially was set for March 8, 2018. At some time in early 2018, after the purchase and sale agreement was signed, "the [purchaser] was made aware of the existence of [the neighbor agreement] . . . when a representative of the [purchaser] had been on the premises and had been approached by one or

more neighbors who articulated anticipation of installation of a sewer line across the subject property as soon as the property were to be developed." Because of the neighbor agreement, "[t]he [purchaser's] title insurance company refused to issue a title policy" and "would not provide coverage for any litigation or costs associated with [the neighbor agreement]." On February 28, 2018, the purchaser's attorney e-mailed the seller's attorney, "invoking [the] provision in the [purchase and sale] agreement allowing the [purchaser] to give the seller [thirty] days to cure a claimed encumbrance or other defect in marketable title, specifically the easement or right to an easement given to the neighbors in 2011." Communications continued between the seller and the purchaser; however, the seller contended that "there was nothing requiring a cure, and specified his insistence on a closing, initially [on] March 8, 2018, and later April 7, 2018.

"The [purchaser] refused/failed to appear for a closing of title on any specified closing date, and, further through counsel formally declared its unwillingness to close at all, absent curative action taken by the seller. The [purchaser] claimed/treated the contract as unenforceable against the [purchaser] and/or that the seller had breached the [purchase and sale] agreement by failing to cure the title issue within the time allowed, after due demand by the [purchaser]. The [purchaser] asserted the right to terminate the contract.

"Pursuant to the terms of the [purchase and sale agreement], $325,000 had been deposited with the plaintiff as escrow agent to ensure the performance of contract obligations. It had been agreed that, upon the transfer of title, this sum should be paid over to the seller to be applied to the purchase price, but if the [purchaser] improperly and contrary to its contractual obligations failed to perform its obligations under the [purchase and sale agreement], the deposit was to be

paid to the seller as liquidated damages. If the sale were not to be consummated but not as a result of any improper refusal by the [purchaser] to close, such as based on noncompliance by the seller with a material contractual obligation resulting in the [purchaser] terminating the [purchase and sale agreement], the deposit would be returned to the [purchaser]. An interpleader action was explicitly authorized in the event of an impasse as to disposition of the deposit." (Footnote omitted.)

Each of the defendants then filed cross claims against the other. The seller claimed that the purchaser had (1) breached the contract when it failed to close on the property and again when it failed to instruct the escrow agent to release the deposit as liquidated damages and (2) breached the covenant of good faith and fair dealing. In its amended cross claim, the purchaser contended: (1) it was entitled to return of its deposit because it made proper demand and terminated the transaction under § 9 (b) of the purchase and sale agreement; (2) the seller had breached the contract by failing to disclose the neighbor agreement and the potential sewer easement contained therein, entitling the purchaser to return of the deposit plus damages; and (3) the seller committed fraud in the inducement by failing to disclose the existence of the neighbor agreement. The case was tried to the court, *Hon. Kenneth B. Povodator*, judge trial referee, on October 2, 3, and 4, 2019.

Following the trial, the defendants submitted simultaneous posttrial briefs. The seller first argued that the purchaser could not invoke § 9 (b) because "the requirements [of that section] are predicated on the [purchaser's] discovery of an additional encumbrance after the [purchaser] has completed and accepted [the purchaser's] title search" and the purchaser "did not 'become aware' of the sewer easement in February, 2018." The seller also claimed that "[the purchaser] knew about

and acknowledged the sewer easement [from] the [letter of intent] signed and submitted [by the purchaser] in August, 2016." The seller further argued that the sewer easement was not an encumbrance because it did not diminish the value of the property or affect the marketability of title. The seller contended that the omission was not a material breach because the neighbor agreement "had already been acknowledged by [the purchaser] in the [letter of intent], would not impact the development of the property, would not cost [the purchaser] any money and might never need to be granted." Finally, the seller advanced that he was entitled to retain the deposit because the purchaser was not permitted to rescind the purchase and sale agreement.

In its posttrial brief, the purchaser claimed that it was entitled to a return of the deposit based on its proper request for cure under § 9 (b) and the seller's subsequent refusal to cure the encumbrance on the property as evinced by the neighbor agreement. In addition, the purchaser argued that the seller first breached the purchase and sale agreement by failing to disclose the existence of the neighbor agreement and then by failing to return the deposit. The purchaser also claimed fraud in the inducement because the seller failed to disclose the neighbor agreement.

On November 13, 2020, the court issued a memorandum of decision and rendered judgment in favor of the purchaser on its breach of contract claim and its return of deposit claim. The court rendered judgment in favor of the seller on the purchaser's fraud in the inducement claim. Finally, the court rendered judgment in favor of the purchaser on both of the seller's claims.

On appeal, the seller claims that the court erred in determining that (1) the parol evidence rule precluded consideration of the 2016 letter of intent in addressing the purchaser's knowledge of the neighbor agreement,

(2) the purchaser was not aware of the continued existence of the neighbor agreement until a neighbor spoke to one of its representatives about it, (3) the neighbor agreement created an additional encumbrance on the property under § 9 (b) of the purchase and sale agreement, and (4) the seller's failure to disclose the neighbor agreement in the purchase and sale agreement constituted a material breach of the purchase and sale agreement. We disagree with each of these claims.

I

We first consider the seller's claims that the court improperly determined that the parol evidence rule precluded consideration of the letter of intent in addressing the purchaser's knowledge of the neighbor agreement and that the purchaser did not have actual knowledge of the potential sewer easement until a neighbor spoke to one of the purchaser's representatives about it. We address these claims together because whether the letter of intent can be used to establish the purchaser's knowledge is dispositive of the seller's claim that the court erred in determining that the purchaser had no knowledge of the potential sewer easement. The seller argues that the letter of intent the purchaser's agent signed in 2016 established that the purchaser had actual knowledge of the neighbor agreement and potential sewer easement at the time it signed the purchase and sale agreement in 2018 and, therefore, could not invoke § 9 (b) and could not argue that the failure to include the existence of the neighbor agreement resulted in a material breach of the purchase and sale agreement. We disagree with both of these claims.

The following additional facts and procedural history are relevant to our resolution of these claims. At trial, the purchaser's attorney objected to the use of the 2016 letter of intent on the basis of the parol evidence rule, arguing that the purchase and sale agreement "has an

integration clause . . . and any extrinsic evidence related to the contract should be excluded . . . .'' The purchaser's attorney also pointed to § 16 (m) of the purchase and sale agreement, which disclaims any knowledge of easements or similar rights, to support his position that using the letter of intent would ''[run] . . . afoul of the parol evidence rule.'' In response, the seller's attorney asserted that ''[w]e're not trying to bury the terms of the contract or offer evidence to interpret the terms of the contract. . . . [T]he purpose of this letter of intent is to show that the [purchaser] had notice of the sewer easement . . . .'' The court admitted the letter into evidence, noting that ''[t]he parol evidence rule is varying the terms of the contract. You have non-contract claims and you have claims that . . . may depend upon determination of materiality. So I'm going to overrule the objection. It's not going to come in to vary the terms of the [purchase and sale] agreement.''

Later during the trial, the seller testified that Franco Iannone, the purchaser's sole member, and Vincenzo Iannone visited the property one or two months after the letter of intent was signed. The seller testified that Franco Iannone asked him where the sewer connection would run and that he showed Franco Iannone the location.[6] In his posttrial brief, the seller argued that because the 2016 letter of intent mentioned the potential sewer easement, the purchaser was aware of the potential easement, could not invoke § 9 (b), and was not entitled to request cure.

In its posttrial brief, the purchaser maintained that the letter of intent and the testimony about the meeting could not be used to contradict the terms of the integrated agreement because such evidence ''contradict[ed] the unambiguous terms of the [purchase and sale] agreement,'' violating the parol evidence rule.

[6] When asked about such a meeting at trial, although Franco Iannone remembered various meetings at the property with the seller he could not recall any discussion of the potential sewer easement or its placement.

In its memorandum of decision, the court first discussed the issue of the purchaser's knowledge of the neighbor agreement and potential sewer easement and then addressed the parol evidence rule. Specifically, the court determined that "[t]he [letter of intent] was signed on behalf of the [purchaser] by an individual allegedly with limited facility with English, and the [purchaser's] principal did not recall reading the [letter of intent] after (or implicitly, before) it was signed. An authorized signature would be sufficient to impute knowledge to the entity, but would not necessarily establish actual knowledge in 2018 in the sense of a then-present awareness. The conduct of the [purchaser], after speaking to the neighbor(s) about the claimed right to a sewer across the subject property, is indicative of a lack of actual functional knowledge as of early 2018—there was a diligent effort to obtain information about such rights, including efforts to obtain a copy of the neighbor agreement that embodied/created whatever rights the neighbors might have. Whether the [purchaser's] principal never knew, or knew in 2016 and forgot by 2018, the court is satisfied that the [purchaser] did not have actual knowledge/recollection of the existence or claimed existence of sewer rights as of the signing of the contract underlying this dispute.

"More important, the state of knowledge of the [purchaser's] principal is irrelevant for purposes of interpretation of the contract of sale and the seller's representations and warranties contained therein. This necessarily requires the court to address the parol evidence rule and its applicability. The [purchaser] objected to admission of the [letter of intent] as an exhibit based on the parol evidence rule. The court allowed the document as an exhibit, recognizing that it would not be considered in connection with interpretation or application of the contract, but would/could be used in connection

with other claims, with specific reference to the claim of fraudulent inducement. The contract addresses in a number of ways . . . the negation of nonidentified easements, claimed rights of access or passage, and anything that might constitute a cloud on title, as well as a right to insist on curative action being taken in appropriate circumstances. Any imputed or presumed knowledge on the part of the [purchaser] to the contrary, based on the [letter of intent] cannot be used to alter the contract." (Footnote omitted.)

Addressing the seller's testimony about meeting with Franco Iannone to discuss the potential sewer easement, the court noted that, "[a]ssuming that such a discussion did occur, it does not alter the parol nature of any evidence contradicting the statements in the contract relating to the affirmative identification of all known easements and similar rights and the negation of any such rights not specifically identified in the document including exhibits/schedules. The prompt efforts of the [purchaser] to seek documentation relating to any such easement rights after the 2018 encounter with neighbors tends to confirm that [Franco] Iannone had no then-current knowledge or recollection relating to the existence of easement rights. Knowledge of the existence of rights in 2016 does not necessarily mean that the rights continued into 2018, particularly given the affirmative statements in the contract executed in 2018 that such rights did not exist—the rights could have lapsed/expired, curative action could have been taken, etc."

On appeal, the seller argues that the letter of intent is not being used to vary the terms of the purchase and sale agreement but, rather, represents the purchaser's "actual knowledge" of the neighbor agreement, precluding the purchaser from taking advantage of § 9 (b). In response, the purchaser points to § 16 (m) of the purchase and sale agreement, which provides that the

"Seller is not aware of any claims for rights of passage, easements or other property rights over, on or to the Premises," and argues that this provision establishes its knowledge at the time the purchase and sale agreement was signed, meaning that any evidence offered to alter its knowledge is impermissible under the parol evidence rule. We agree with the purchaser.

"Ordinarily, [o]n appeal, the trial court's rulings on the admissibility of evidence are accorded great deference. . . . Rulings on such matters will be disturbed only upon a showing of clear abuse of discretion. . . . Because the parol evidence rule is not an exclusionary rule of evidence, however, but a rule of substantive contract law . . . the [seller's] claim involves a question of law to which we afford plenary review." (Internal quotation marks omitted.) *Colliers, Dow & Condon, Inc.* v. *Schwartz*, 77 Conn. App. 462, 466, 823 A.2d 438 (2003); see also *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 728, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021).

"The parol evidence rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. . . . The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such

evidence to vary or contradict the terms of such a contract. . . .

"Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence may still be admissible if relevant (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud." (Citation omitted; internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon*, supra, 207 Conn. App. 728–29.

At the outset, we note that the seller does not argue that the purchase and sale agreement is not integrated but, instead, contends that the letter of intent was not offered to vary the terms of the purchase and sale agreement. We conclude that the court correctly determined that the seller relied on the letter of intent in order to alter the purchase and sale agreement between the defendants. Although the purchaser may have been aware of the potential sewer easement at the time that its agent signed the letter of intent in mid-2016, the 2018 purchase and sale agreement that the purchaser signed made clear that the property was not subject to any easements or potential easements. The purchase and sale agreement signed in 2018 contained no reference to any potential easement on the property. Therefore, any attempt to use previous exchanges regarding the neighbor agreement is an attempt to alter the " 'extent and manner of [the parties'] understanding' " as established by the 2018 purchase and sale agreement. Id., 728. Consequently, the court correctly concluded that

the 2016 letter of intent was not proper evidence regarding what the parties agreed to in 2018. Additionally, the seller's arguments on appeal in support of his claim that the court erred in determining that the purchaser had no actual knowledge of the potential sewer easement rely exclusively on the letter of intent and, therefore, constitute an additional, impermissible attempt to alter the understanding between the parties established when they signed the purchase and sale agreement in 2018. Accordingly, this claim also fails.

II

We next address the seller's claim that the court erred in concluding that the neighbor agreement was an additional encumbrance pursuant to § 9 (b) of the purchase and sale agreement, therefore entitling the purchaser to request that the seller cure the issue and, later, to terminate the purchase and sale agreement when the seller failed to cure the issue. In support of this claim, the seller argues, inter alia, that the trial court incorrectly determined that § 9 (b) required that *either* the purchaser's title insurer refuse to issue title insurance because of the objection to title *or* that the title objection qualifies as an encumbrance pursuant to the Standards of Title of the Connecticut Bar Association. The seller contends that the purchase and sale agreement required *both* the refusal of title insurance *and* a qualified encumbrance pursuant to title standards. We decline to review this claim, however, as it is inadequately briefed.[7]

[7] The seller also argues that, because the purchaser became aware of the neighbor agreement when its agent signed the letter of intent in 2016, the purchaser cannot take advantage of § 9 (b). The seller points to the following language in § 9 (b) to support this position: "[i]n the event of any . . . additional encumbrance that *arise*[*s*] *after* the date of Purchaser's title search which either party *became aware* of . . . ." (Emphasis added.) On the basis of this provision, the seller argues that "[the purchaser] did not 'become aware' of the sewer easement in February, 2018." As discussed in part I of this opinion, however, the letter of intent cannot be used to alter the understanding contained in the purchase and sale agreement that there

The following procedural history is relevant to our resolution of this issue. In its memorandum of decision, the court assumed that the contractual provision at issue was ambiguous and then analyzed whether the seller's proposed interpretation—that the clause is conjunctive—would lead to "[un]reasonable or bizarre results." The court then determined that "[t]he seller has not made the case that treatment of 'or' as disjunctive leads to irrational or bizarre results, or that it somehow frustrates the intent of the drafting parties." Thus, the court read § 9 (b) as requiring curative action if "*either* the claimed problem is unacceptable to the title insurance company for coverage (it insists on an exception to coverage) *or* the claimed problem satisfies the definition set forth in the standards of title." (Emphasis added.) The court then determined that because the purchaser's title insurer "had indicated that it was 'not . . . willing to issue an owner's title insurance policy' " due to the existence of the neighbor agreement "the prospective purchaser was within its rights to invoke the cure provisions of the contract."

On appeal, the seller argues that "[t]he trial court has misread the provision" because, in order to request cure, the purchaser's objection must have satisfied *both* the title insurance provision *and* the standards of title provision. The seller argues that "the import of [§] 9 (b) is that a seller is required to cure/remove an objection

were no easements or potential easements on the property. The court determined that the seller failed to prove that the purchaser was aware of the neighbor agreement and the potential easement at the time it entered the purchase and sale agreement. We conclude that the court correctly determined that the purchaser was entitled to invoke § 9 (b).

Further, the seller argues in the alternative that the neighbor agreement did not affect marketability of title or diminish the value of the property and, therefore, the purchaser's objection did not satisfy the standards of title provision of § 9 (b). In light of our conclusion that we cannot review the seller's claim that the provisions in § 9 (b) should be read in the conjunctive due to the seller's inadequate briefing, we need not consider whether the standards of title provision was satisfied.

to title that affects marketability" and "a seller is not required to cure/remove an objection to title which will not affect marketability." The seller, however, did not provide any law or analysis in support of this argument.

"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. . . . In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021).

We conclude that the seller's claim that the provisions of § 9 (b) should be read conjunctively is inadequately briefed. The seller provides no discussion or analysis of the court's determination as to why the provisions should be read in the disjunctive. He fails to point to any evidence supporting his position. Further, he provides no citation to legal authority supporting his position. Finally, he provides no meaningful analysis of the claim. See id., 805 ("[a]lthough the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed" (internal quotation marks omitted)). Accordingly, we decline to review this claim.

III

Finally, we address the seller's claim that the court erred when it determined that the failure to disclose the existence of the neighbor agreement was a material breach. We need not consider the merits of this claim because the court also found that the seller had breached the purchase and sale agreement by failing to return the deposit after the purchaser terminated the purchase and sale agreement. Because the seller only claims that one of those determinations was in error, we cannot provide him with any practical relief.

At trial, the purchaser advanced two bases for its breach of contract claim. First, it argued that the seller breached the purchase and sale agreement when it failed to disclose the existence of the neighbor agreement. Second, it argued that the seller breached the purchase and sale agreement when it failed to return the deposit once the purchaser learned of the neighbor agreement and requested cure, a request which the seller refused to oblige. "The court . . . concluded that there was a breach of contract both in the sense of a failure to return the deposit after termination and in the sense of misrepresentations made in the contract itself." On appeal, the seller *only* contests the court's determination that its failure to disclose the neighbor agreement constituted a breach of contract. The seller has not challenged the court's determination that failing to return the deposit also constituted a breach of the purchase and sale agreement. Because the other basis for the claim of breach of contract is uncontested, even if we were to agree with the seller that its failure to disclose was not material, the seller's liability for breach of the purchase and sale agreement would remain intact. Therefore, we cannot provide the seller with any practical relief. See *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*, 113 Conn. App. 509, 517, 967 A.2d 550, cert. denied, 292 Conn. 907, 973 A.2d 103

(2009) ("even if we were to conclude that the court's decision as to one of the challenged counts was improper, [the appellant] could be afforded no practical relief because its liability would rest on the unchallenged finding"). Therefore, we need not address this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

RAUL IVAN DIAZ *v.* COMMISSIONER OF CORRECTION (AC 44504)

Moll, Cradle and Clark, Js.

Syllabus

The petitioner, who had been convicted of murder and several other crimes in connection with a shooting incident, appealed to this court from the judgment of the habeas court dismissing in part and denying in part his fourth petition for a writ of habeas corpus. The petitioner had reasserted claims he made in his prior unsuccessful habeas petitions, alleging that the trial court violated his right to due process by failing to instruct the jury that its verdict must be unanimous and that his trial counsel, F, and two of his prior habeas counsel, V and G, rendered ineffective assistance. The court in the present case denied the petitioner's claims against F and V and rejected the petitioner's claim that G rendered ineffective assistance in failing to file a petition for certification to appeal from the second habeas court's judgment because, as a special public defender, she had no legal obligation to file an appeal on his behalf. The court dismissed the petitioner's remaining ineffectiveness claims against G on the ground that they were not ripe for adjudication and, thus, not justiciable. The court reasoned that the petitioner could not demonstrate that he was prejudiced until he had been denied permission to untimely file certain posttrial pleadings, including a late petition for certification to appeal. After the close of evidence in the present habeas action, the petitioner filed with the second habeas court a motion for permission to file a late petition for certification to appeal from its judgment, which had not been adjudicated at the time the habeas court in the present case rendered judgment. The petitioner thereafter filed a motion to open the judgment in the present habeas case to consider the second habeas court's denial of his motion for permission to file a late petition for certification to appeal. The court denied the motion to

open, reasoning that no legal authority existed requiring a court to take judicial notice of pleadings and decisions after the close of evidence. *Held*:

1. The habeas court did not abuse its discretion in denying the petitioner certification to appeal as to his claim that his right to due process was violated when the trial court failed to instruct the jury that its verdict must be unanimous: the habeas court correctly concluded that the trial court properly denied the petitioner's request for a specific unanimity charge and his motion for a new trial, which was based on similar grounds, as the jury was instructed that its verdict on each count of the state's information must be unanimous, and the petitioner expressly conceded that the court's instructions did not sanction a nonunanimous verdict; moreover, contrary to the petitioner's assertion, the lack of a specific unanimity charge did not permit each juror to reach separate and distinct conclusions under different theories of liability premised on different evidence; furthermore, this court could not ignore the Supreme Court's determination in *State* v. *Famiglietti* (219 Conn. 605) that the petitioner was obligated to demonstrate that the jury instructions expressly sanctioned a nonunanimous verdict and that the absence of that threshold requirement ended review of his claim that he was deprived of his constitutional right to a unanimous verdict.

2. The habeas court did not abuse its discretion in denying the petitioner certification to appeal as to his ineffective assistance claims against F and V and correctly dismissed certain of his ineffective assistance claims against G for lack of justiciability:

   a. This court could not conclude that the habeas court erred in finding that F made a valid strategic decision not to obtain copies of the transcripts from the separate criminal trial of R and S, who were present at the time of the shooting, or that F's cross-examination of the state's witnesses was hindered by that decision; moreover, there was no merit to the petitioner's claim that F's failure to obtain the transcripts rendered him unable to make informed decisions as to which witnesses to call and how to cross-examine the state's witnesses, as F had attended the trial of R and S and observed the witnesses testify, the petitioner conceded to this court that F had pointed out inconsistencies in the witnesses' testimony, and F's concern that the transcripts could be used against the petitioner was not unfounded; furthermore, this court concluded that the habeas court did not err in finding that F did not render ineffective assistance by failing to obtain the transcripts from the trial of R and S, the petitioner could not prevail on his claim that V rendered ineffective assistance by failing to submit those transcripts to the court in the petitioner's first habeas trial and to assert that F's failure to do so at the criminal trial greatly inhibited F's ability to impeach the credibility of the state's witnesses.

   b. The petitioner could not prevail on his claim that the habeas court erred in dismissing as nonjusticiable his ineffective assistance of counsel

claim against G, which was based on the court's determination that the claim was not ripe for adjudication because he failed to file a petition for certification to appeal from the second habeas court's judgment: because the petitioner did not file a motion for permission to file a late petition for certification to appeal from the second habeas court's judgment until after the close of evidence in the present case, his right to seek appellate review of that judgment had not been foreclosed and, thus, he could not demonstrate that he suffered any prejudice; moreover, the petitioner could not demonstrate that the court's denial of his motion to open the judgment in the present case reflected an abuse of discretion, as he could have sought permission from the second habeas court to file a late petition for certification to appeal at any time since that court's 2006 judgment and, thus, could have presented to the court in the present case evidence that he sought to present had his motion to open the judgment been granted.

Argued February 3—officially released August 2, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin*, *J.*; thereafter, the petition was withdrawn in part; judgment dismissing the petition in part and denying the petition in part; subsequently, the court denied the petitioner's motion to open the judgment, and granted in part and denied in part the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed in part*; *appeal dismissed in part.*

James E. Mortimer, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, former state's attorney, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Raul Ivan Diaz, appeals from the judgment of the habeas court dismissing in

part and denying in part his fourth petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court erred in rejecting his claims that (1) his right to due process was violated when the court in his underlying criminal trial failed to instruct the jury on the requirement of unanimity in its verdict, and (2) he was denied effective assistance by his trial counsel, his first habeas counsel and his second habeas counsel. We affirm the judgment of the habeas court as to the petitioner's claims as to his second habeas counsel. We dismiss the appeal as to the petitioner's remaining claims.

Our Supreme Court set forth the following facts in its decision affirming the judgment of conviction on the petitioner's direct appeal. "On the evening of June 26, 1991, Hector Gonzalez (Gonzalez) and his wife, Valerie Falcon, drove to Seaside Park in Bridgeport with their two year old son, Hector Gonzalez, Jr., and Falcon's eight year old son, William Guisti, Jr. While at the park,

[1] The habeas court granted in part and denied in part the petitioner's petition for certification to appeal from the judgment of the habeas court. We are mindful of our jurisprudence that, following the granting of a petition for certification to appeal, "at least in the absence of demonstrable prejudice, the legislature did not intend the terms of the habeas court's grant of certification to be a limitation on the specific issues subject to appellate review." *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 138, 712 A.2d 947 (1998). Thus, "once the habeas court, in its gatekeeping function, certified that appellate review was warranted, any issue could be presented on appeal, so long as the opposing party is not prejudiced." *Logan* v. *Commissioner of Correction*, 125 Conn. App. 744, 753 n.7, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 13 A.3d 333 (2011). In *James L.*, however, the court expressly noted: "This case does not present a question of mixed certification, in which a habeas court expressly grants permission to appeal with regard to some, but not all, of the issues on which certification was requested." *James L.* v. *Commissioner of Correction*, supra, 138 n.7. It remains unsettled whether a habeas petitioner is limited in the claims he or she may pursue on appeal when a habeas court grants certification to appeal as to certain specific claims and denies certification to appeal as to others. Because neither party has challenged the propriety of the habeas court's unusual mixed certification order, we leave that issue for another day and simply address each of the petitioner's claims in turn.

they met Fitzgerald Guisti (Guisti), an uncle of William Guisti, Jr. Guisti informed Gonzalez and Falcon that he was planning to drive to the east side of Bridgeport to purchase some marijuana. Gonzalez and Falcon agreed to follow Guisti in their vehicle, a Ford Bronco. The two vehicles then left the park. Gonzalez, accompanied by Falcon in the front seat and the two children in the back seat, drove the Bronco, while Guisti drove alone in his car.

"Guisti, followed by Gonzalez and his three passengers in the Bronco, proceeded to the corner of Hallett and Jane Streets where several men, including Gerald Torres, Sammy Segarra, Juan Rivera, a man identified only as 'Edgar' and the defendant, were congregated. Guisti pulled his car over to the side of the road to inquire whether any of the men had marijuana for sale. Gonzalez drove the Bronco past Guisti's vehicle and continued down Jane Street toward Helen Street.

"Torres, in response to Guisti's inquiry, stated that he had some marijuana and told Guisti to get out of his car. As Guisti was exiting his automobile, he heard Torres yell, 'that's the truck, let's do the truck,' an apparent reference to the Bronco, which had just passed by and was proceeding down Jane Street toward Helen Street. Meanwhile, Gonzalez had turned the Bronco around on Helen Street and was traveling back toward Jane Street in the direction of Guisti's vehicle. Torres, Segarra, Rivera, Edgar and the defendant hurriedly retrieved guns from a nearby automobile and hid behind several cars parked on the street to await Gonzalez' return.

"As Gonzalez approached and passed the parked cars behind which they were hiding, the men ran out into the street and began shooting at the Bronco. One member of the group was armed with an Uzi-type machine gun and the others were carrying handguns. Guisti yelled to the group that there was a child in the Bronco, to

which Torres replied, 'Fuck it, keep on,' and the shooting continued. The men fired about thirty-five to forty shots at the Bronco . . . approximately ten of which actually struck the vehicle. Three of the bullets passed through the passenger compartment of the Bronco and exited through the front windshield. William Guisti, Jr., was fatally injured when a 9 millimeter bullet passed through his heart, lung and liver." (Footnotes omitted.) *State* v. *Diaz*, 237 Conn. 518, 521–23, 679 A.2d 902 (1996).

Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and he received a total effective sentence of 105 years of incarceration. His conviction was affirmed on direct appeal. Id., 520–21 and n.6.

In February, 1997, the petitioner filed his first habeas corpus action, in which he alleged that his trial counsel, Michael Fitzpatrick, and his appellate counsel, Kent Drager, rendered ineffective assistance. Attorney Joseph Visone represented the petitioner in that action. The habeas court rendered judgment dismissing the petition, and this court dismissed the petitioner's appeal from that judgment. See *Diaz* v. *Commissioner of Correction*, 92 Conn. App. 533, 886 A.2d 460 (2005), cert. denied, 277 Conn. 905, 894 A.2d 986 (2006).

In February, 2004, the petitioner filed a second habeas action, in which he challenged his criminal conviction on the grounds that his constitutional right to a unanimous verdict was violated and that the trial court improperly refused to poll the jury. Attorney Genevieve P. Salvatore represented the petitioner in that habeas

action. The petitioner and the respondent, the Commissioner of Correction, filed motions for summary judgment as to whether an amendment to the rule of practice pertaining to jury polling applied retroactively to the petitioner's case. See Practice Book § 42-31. The habeas court concluded that it did not and rendered judgment dismissing the petition. See *Diaz* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-04-0004379 (October 18, 2006). The petitioner took no appeal from the judgment of the second habeas court.

In May, 2007, the petitioner filed a third habeas action, and Attorney Cheryl Juniewic was appointed to represent him. In that action, the petitioner reiterated his claim that he was deprived of his constitutional right to a unanimous verdict and again attacked the adequacy of the representation provided by Fitzpatrick, Drager, Visone and Salvatore. Approximately one week prior to trial, however, the petitioner withdrew his petition.

On February 4, 2011, the petitioner filed this action, his fourth habeas petition. In his amended petition, the petitioner repeats his claims of ineffective assistance by Fitzpatrick, Visone and Salvatore.[2] He also reasserts his claim that his right to due process was violated when the court in his underlying criminal trial failed to instruct the jury on the requirement of unanimity for its verdict. On March 20, 2013, the respondent filed his return, admitting in part and denying in part the allegations set forth in the amended petition. On May 30, 2013, the matter was tried to the habeas court, *Sferrazza*, *J*. On August 14, 2013, the habeas court, sua sponte, dismissed the entire petition on the ground that the court was deprived of subject matter jurisdiction because the petition consisted of claims that had been deliberately bypassed as a result of the petitioner's withdrawal of his third habeas petition. This court reversed

[2] He also alleged that Juniewic represented him ineffectively in his third habeas action. He withdrew this claim prior to trial.

the judgment of dismissal and remanded the case to the habeas court for further proceedings. See *Diaz* v. *Commissioner of Correction*, 157 Conn. App. 701, 702–703, 117 A.3d 1003 (2015), appeal dismissed, 326 Conn. 419, 165 A.3d 147 (2017).

On October 28, 2019, the petitioner's claims were again tried to the habeas court, *Chaplin*, *J.*[3] The habeas court filed a memorandum of decision on September 4, 2020, dismissing the petitioner's claims of ineffective assistance as to Salvatore and denying the remainder of his claims. On September 10, 2020, the petitioner filed a motion to open the judgment with respect to his claims regarding Salvatore. The habeas court denied that motion. The habeas court thereafter granted certification to appeal as to its dismissal of the petitioner's claims of ineffective assistance as to Salvatore and denied certification to appeal as to the petitioner's remaining claims. This appeal followed. Additional facts will be set forth as necessary.

Our analysis of the petitioner's claims on appeal is guided by the following principles. General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

"Our Supreme Court has explained that one of the goals of this statute is to limit the number of appeals

[3] The petitioner and Fitzpatrick testified at the habeas trial. The parties also submitted transcripts of the testimony of Visone and Salvatore from the prior habeas trial before Judge Sferrazza.

filed in criminal cases and to hasten the conclusion of the criminal justice process. . . . Additionally, § 52-470 [g] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal. . . .

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Citations omitted; internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, 151 Conn. App. 559, 564–65, 96 A.3d 587, cert. denied, 314 Conn. 929, 102 A.3d 709 (2014), and cert. dismissed, 314 Conn. 929, 206 A.3d 764 (2014). "In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 215, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013).

As noted, the habeas court granted in part and denied in part the petitioner's petition for certification to

appeal. We address each of his claims on appeal with the foregoing principles in mind.

I

The petitioner first claims that the habeas court erred in rejecting his claim that his right to due process was violated when the court in his underlying criminal trial failed to instruct the jury that it was required to unanimously agree on the factual basis for its verdicts, or to grant his motion for a new trial wherein he argued, inter alia, that the court should have given such an instruction. The petitioner also argues that the habeas court abused its discretion in denying his petition for certification to appeal from the habeas court's denial of this claim. We are not persuaded.

At the petitioner's criminal trial, the court instructed the jury, inter alia, that "whatever your verdicts may be, they must be unanimous as to each count, which you are to consider separately and independently of each other." Fitzpatrick took exception to the court's failure to instruct the jurors "that they must be unanimous as to whether the murder was committed via the doctrine of transferred intent or was the murder committed via a direct theory of liability." The petitioner later filed a motion for a new trial asserting similar grounds. He argued that, "without a specific unanimity instruction, it is unclear whether . . . the petitioner was [found] guilty under the direct theory of liability, as opposed to the theory of transferred intent, or on the coconspiratorial theory under the *Pinkerton* doctrine."[4] The court denied the petitioner's motion.[5]

[4] See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). "Under the *Pinkerton* doctrine . . . a conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy." (Internal quotation marks omitted.) *State* v. *Apodaca*, 303 Conn. 378, 393–94, 33 A.3d 224 (2012).

[5] The petitioner did not challenge the denial of his motion for a new trial in his direct appeal, but the respondent did not claim in the habeas court

At the habeas trial, the petitioner reiterated his argument that the criminal trial court erred in failing to instruct the jury that it must be unanimous "as to whether the petitioner was guilty under the direct theory of liability, as opposed to the theory of transferred intent, or under the *Pinkerton* doctrine." The habeas court rejected this argument, ruling that, pursuant to *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), the petitioner was obligated to demonstrate that the trial court's instructions expressly sanctioned a nonunanimous verdict, and that, because the petitioner expressly conceded that the criminal trial court's instructions in this case did not do so, he was not entitled to relief. The habeas court rejected the petitioner's claim that the criminal trial court erred in denying his motion for a new trial for the same reason.

It is well established that a specific unanimity charge is not required in every case. "In *State* v. *Famiglietti*, [supra] 219 Conn. 619–20, [our Supreme Court] set forth a multipartite test to determine whether a trial court's omission of a specific unanimity charge warrants a new trial. We first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged. . . .

"This court is required to conclude, when reviewing a court's instruction to the jury, that [t]he absence of

that the claim was procedurally defaulted. Accordingly, we address the claim on the merits.

language expressly sanctioning a nonunanimous verdict means that the defendant has not met the first part of the *Famiglietti* test." (Citation omitted; internal quotation marks omitted.) *State* v. *Jessie L. C.*, 148 Conn. App. 216, 232, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014). Our Supreme Court has referred to that initial determination as to whether the trial court "expressly sanctioned" a nonunanimous verdict as a "threshold requirement" that must be met before considering the enumerated prongs of the *Famiglietti* test. Id., 233 n.5; see also *State* v. *Martinez*, 278 Conn. 598, 610–11, 900 A.2d 485 (2006).

In the present case, the petitioner concedes, as he must, that the trial court's instructions to the jury did not expressly sanction a nonunanimous verdict. He nevertheless argues that he was deprived of his constitutional right to a unanimous verdict because the lack of a specific unanimity charge "effectively permitted a jury free-for-all in deliberations for each juror to reach separate and distinct conclusions under different theories of liability and premised upon different evidence offered by the state at the [petitioner's] trial." In support of his claim, the petitioner cites to *State* v. *Martinez*, supra, 278 Conn. 598, in which our Supreme Court held that the defendant was deprived of his constitutional right to a unanimous jury verdict. See id., 601. Like the petitioner in this case, the defendant in *Martinez* was charged both under a theory of accessorial liability and liability under the *Pinkerton* doctrine. In *Martinez*, the trial court instructed the jury, inter alia: "It is not necessary . . . that you unanimously agree whether the defendant committed the crime of attempt to commit murder either as the principal or as an accessory or as a coconspirator. . . . You need not be unanimous as to any one theory of liability." (Emphasis omitted; internal quotation marks omitted.) Id., 606. The Supreme Court held that "[t]he trial court's instructions in the present

case satisfy the threshold requirement under *Famiglietti*, namely, that the trial court included in its instructions language 'expressly sanctioning' a nonunanimous verdict." Id., 610–11. Having so concluded, the Supreme Court then analyzed the defendant's claim under the two enumerated prongs of *Famiglietti*, ultimately holding that the defendant was deprived of his constitutional right to a unanimous verdict. See id., 611–20.

Martinez is readily distinguishable from this case in that the trial court here did not sanction a nonunanimous verdict. The petitioner contends that that is a "distinction without a difference . . . ." We disagree. The petitioner's argument essentially asks this court to ignore the threshold requirement set forth in *Famiglietti*. We are not permitted to do so.

As noted, our Supreme Court has expressly held that the absence of a jury instruction that sanctions a nonunanimous verdict ends our review of a claim that a defendant was deprived of his constitutional right to a unanimous verdict. See *State* v. *Famiglietti*, supra, 219 Conn. 619. In this case, there was no language in the court's jury instructions sanctioning a nonunanimous verdict. To the contrary, the court instructed the jury that its verdict on each count must be unanimous. "[G]iven the court's admonitions concerning unanimity, we must presume that the jury, in the absence of a fair indication to the contrary . . . followed the court's instruction as to the law." (Internal quotation marks omitted.) *State* v. *Jessie L. C.*, supra, 148 Conn. App. 233. Accordingly, the habeas court properly concluded that the petitioner's right to a unanimous verdict was not violated when the criminal trial court denied his request for a specific unanimity instruction or denied his motion for a new trial. Furthermore, because we do not believe that this issue is debatable among jurists of reason, we further conclude that the habeas court

did not abuse its discretion in denying the petition for certification to appeal as to this claim.

II

The petitioner also challenges the habeas court's rejection of his claims of ineffective assistance by Fitzpatrick, Visone and Salvatore. We begin by setting forth the well settled standard of review of claims of ineffective assistance of counsel. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The issue, however, of [w]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. *Strickland* v. *Washington*, [466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the *Strickland* test, when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of the *Strickland* test, failure to satisfy either prong is fatal to a habeas petition. . . .

"To satisfy the first prong, that his counsel's performance was deficient, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Id.] 689. Furthermore, the right to counsel is not the right to perfect counsel." (Internal quotation marks omitted.) *Quint* v. *Commissioner of Correction*, 211 Conn. App. 27, 32–33, 271 A.3d 681, cert. denied, 343 Conn. 922, 275 A.3d 211 (2022). With these principles in mind, we address the petitioner's claims of ineffective assistance of counsel in turn.

A

We begin with the petitioner's claim that his criminal trial counsel, Fitzpatrick, provided ineffective assistance. The petitioner also claims that the habeas court erred in denying certification to appeal as to his claims against Fitzpatrick. We disagree.

In his habeas petition, the petitioner alleged that Fitzpatrick's representation of him was deficient in that Fitzpatrick failed to obtain a copy of the transcripts from the trial of his coconspirators, Rivera and Segarra, who were tried jointly and acquitted prior to the petitioner's trial. The petitioner argued that Fitzpatrick's failure to obtain the transcripts from that trial rendered him unable to effectively cross-examine Guisti and Gonzalez. In rejecting this claim, the habeas court reasoned: "Fitzpatrick testified that he observed the historical witnesses who testified at the Rivera and Segarra trial, and he spoke to the attorneys representing Rivera and Segarra after each day of trial that he did not observe. [Fitzpatrick] testified that he made a strategic decision not to obtain the transcripts. He explained that he did not find the testimony of Gonzalez or Guisti helpful, and, thus, he did not want to memorialize the testimony

by obtaining transcripts. In elaborating on inconsistencies in Gonzalez' and Guisti's testimony, he noted that he strategically chose only to point out material inconsistencies that did not conflict with the defense strategy. When inconsistencies in the testimony of certain witnesses were highlighted, he explained that he did not find the portions of testimony to contain any meaningful inconsistencies, nor did he find the testimony helpful to the petitioner's defense, and he concluded that he was glad that he had not obtained the transcripts. Exhibit 17[6] demonstrates that [Visone] expressed a similar opinion to [that of Fitzpatrick]: that the purported inconsistencies were not helpful to the petitioner's case.

"Based upon the court's observations at trial and independent review of the exhibits, the court credits [Fitzpatrick's] testimony that he made a strategic decision not to obtain the transcripts from the Rivera and Segarra trial and not to submit the transcripts at the petitioner's underlying criminal trial."

The habeas court also rejected the petitioner's claim that Fitzpatrick failed to effectively impeach and to attack the credibility of Guisti and Gonzalez because he had not obtained the transcripts from the trial of Rivera and Segarra. The habeas court explained: "Fitzpatrick testified that he observed the testimony of historical witnesses at the Rivera and Segarra trial. In his posttrial brief, the petitioner concedes that [Fitzpatrick] did highlight inconsistencies in each witness' testimony at the petitioner's underlying criminal trial; however, he alleges that the cross-examination was ineffective

[6] Exhibit 17 is a transcript of Visone's testimony from the first habeas trial on May 30, 2013, before Judge Sferrazza. More specifically, Visone opined that the transcripts at issue did not, in fact, demonstrate an inconsistency in Gonzalez' testimony. At the Rivera/Segarra trial, Gonzalez testified that he observed four individuals with guns at the time of the incident at issue. One of those individuals was the petitioner.

due to a lack of obtaining the Rivera and Segarra transcripts. The petitioner's arguments amount to the petitioner second-guessing [Fitzpatrick's] representation after conviction, and extending an invitation for this court to examine [Fitzpatrick's] defense after it 'proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.' . . . However, this court declines the petitioner's invitation. [Fitzpatrick's] testimony demonstrates that the transcripts were not the only source by which [he] could have become aware of the inconsistencies that the petitioner claims were material and significant to his defense. [Fitzpatrick's] testimony also demonstrates that he made a tactical decision not to obtain the Rivera and Segarra transcripts because the balance of the testimony of Guisti and Gonzalez [was] not helpful to the petitioner's defense. Furthermore, this allegation is merely a restatement of the petitioner's allegation [that Fitzpatrick was ineffective in failing to obtain the transcripts from the trial of Rivera and Segarra]. Therefore, this court finds that the petitioner failed to demonstrate that [Fitzpatrick] failed to effectively impeach and attack the credibility of Guisti and Gonzalez. Therefore, this court also finds that the petitioner failed to demonstrate that such failure resulted from his failure to obtain the Rivera and Segarra trial transcripts." (Citation omitted.)

On the basis of the foregoing, the habeas court concluded that the petitioner failed to demonstrate that Fitzpatrick rendered ineffective assistance of counsel by failing to obtain the transcripts from the trial of Rivera and Segarra or by failing to effectively impeach and attack the credibility of Guisti and Gonzalez as a result of his failure to obtain those transcripts.

On appeal, the petitioner argues that the habeas court erred in reaching these conclusions. We disagree.

"[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 73, 272 A.3d 218, cert. granted, 343 Conn. 932, 272 A.3d 218 (2022). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . . [T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Citation omitted; internal quotation marks omitted.) Id., 73–74.

This court has explained that "[t]here may be cases where it is not necessary to read the entire transcript of the trial of the codefendant. . . . Therefore, defense counsel's failure to order and review the transcript of the codefendant's trial is not per se deficient performance. The scope of counsel's obligation to investigate must be addressed on a case-by-case basis, and we do not intend to suggest a blanket rule for all occasions." *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 552–53 n.11, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

The petitioner argues that the habeas court erred in rejecting his claim that Fitzpatrick "had an affirmative obligation to review the prior testimony of the primary witnesses in the Rivera and Segarra matter to ascertain viable areas of impeachment and make an informed decision as to what witnesses to call in support of his own case-in-chief." In so arguing, the petitioner ignores the undisputed fact that Fitzpatrick personally attended the trial of Rivera and Segarra and paid particular attention to the historical witnesses who would be pertinent to the petitioner's case. Therefore, the petitioner's contention that Fitzpatrick was unable to make an informed decision as to which witnesses to call in defending the petitioner and how to cross-examine the state's witnesses is without merit.

The petitioner also fails to acknowledge that the testimony of Gonzalez and Guisti at the trial of Rivera and Segarra was not entirely helpful to him and, in fact, was potentially harmful to his defense. For instance, although Gonzalez testified at the petitioner's trial that he was not able to see whether the petitioner had a gun on the night in question, he testified at the trial of Rivera and Segarra that he saw the petitioner with a gun in his hand. Accordingly, not only was it unnecessary for Fitzpatrick to obtain the transcripts from the trial of Rivera and Segarra, but Fitzpatrick's concern that those transcripts could be used against the petitioner was not unfounded.

Moreover, in his brief to this court, the petitioner concedes that Fitzpatrick "did point out some of the inconsistencies in [the] testimony [of Guisti and Gonzalez], [but] he was unable to effectively attack their credibility based upon the transcripts from the [trial of] Rivera and Segarra . . . ." Again, Fitzpatrick attended the trial of Rivera and Segarra and observed the witnesses testify in person. As we have noted, there is more than one way to provide effective assistance in

defending a client, and an attorney is not necessarily required to obtain the transcripts from the criminal trial in order to competently represent that client. See *Tatum* v. *Commissioner of Correction*, supra, 211 Conn. App. 73–74; *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 552–53 n.11. On the basis of the record before us, we cannot conclude that the habeas court erred in finding that Fitzpatrick made a valid strategic decision in choosing not to obtain the transcripts from the trial of Rivera and Segarra or that Fitzpatrick's cross-examination of the state's witnesses was hindered by his failure to obtain those transcripts when he had personally observed the testimony of those witnesses.[7] Because we do not believe that this issue deserves encouragement to proceed further, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to his claims as to Fitzpatrick.

B

The petitioner also claims that the habeas court erred in rejecting his claim that Visone rendered ineffective assistance when he represented him in his first habeas action. He also contends that the habeas court abused its discretion in denying his petition for certification to appeal to this court. We disagree.

"Our Supreme Court, in *Lozada* v. *Warden*, 223 Conn. 834, 843, 613 A.2d 818 (1992), established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas,

[7] Because we conclude that Fitzpatrick's representation of the petitioner was not deficient, we do not reach the issue of whether the petitioner was prejudiced by his assistance. See *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 13, 242 A.3d 107 ("a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition" (internal quotation marks omitted)), cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with *Strickland* [v. *Washington*, supra, 466 U.S. 687], both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Any new habeas trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement. . . .

"Simply put, a petitioner cannot succeed as a matter of law—and, thus, cannot show good cause to proceed to trial—on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." (Citations omitted; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 319–20, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

Like his claims concerning Fitzpatrick, the petitioner's claim as to Visone is also related to the transcripts from the trial of Rivera and Segarra. The petitioner claimed in this fourth habeas action, and reiterates in this appeal, that Visone rendered ineffective assistance when he failed to submit the transcripts to the court during the first habeas trial and to assert the claim that

"Fitzpatrick's failure to procure and utilize the transcripts greatly inhibited his ability to effectively impeach the credibility of the state's witnesses [and] prejudiced the petitioner during his criminal trial [and that] such failure of prior habeas counsel to effectively obtain and raise a claim related to trial counsel's failure also caused the petitioner prejudice at the respective habeas proceedings." Because we have concluded that the habeas court did not err in finding that Fitzpatrick did not render ineffective assistance in failing to obtain the transcripts, the petitioner cannot prevail on his claim that the habeas court erred in finding that Visone did not provide ineffective assistance in failing to pursue his claims as to Fitzpatrick. We further conclude that the habeas court did not abuse its discretion in denying the petitioner certification to appeal with respect to his ineffective assistance claims as to Visone.

C

The petitioner finally claims that the habeas court erred in rejecting his claim that Salvatore rendered ineffective assistance when she represented him in his second habeas action. Specifically, the petitioner argues that the habeas court erred when it dismissed his claim that Salvatore rendered ineffective assistance when she failed to file a petition for certification to appeal from the judgment of the second habeas court on the ground that the petitioner's claim against Salvatore was not justiciable. The petitioner also contends that the habeas court erred in denying his motion to open the judgment to consider events that occurred following the habeas court's dismissal of this claim.[8] We are not persuaded.

With respect to his claim that Salvatore rendered ineffective assistance, the habeas court set forth the

[8] As noted herein, the habeas court granted certification to appeal as to the petitioner's claims regarding Salvatore.

following relevant facts and procedural history: "Salvatore . . . filed a motion for summary judgment in which she argued that the then newly mandatory jury polling rule should have been applied retroactively. Subsequently, the respondent filed a motion for summary judgment. Thereafter, the habeas trial court, *Fuger*, *J.*, denied [Salvatore's] motion for summary judgment, granted the respondent's motion for summary judgment and dismissed the petitioner's second habeas petition.

"Regarding the petitioner's claim that [Salvatore] failed to file an appeal [from the dismissal of his second habeas petition], the court finds that [Salvatore] had no legal obligation to file an appeal on the petitioner's behalf. [Salvatore] testified that her representation of the petitioner as a special public defender was limited to habeas trial court matters and did not include appellate matters. The court finds that [Salvatore's] representation of the petitioner as his habeas trial counsel did not include filing an appeal on his behalf. Therefore, the petitioner cannot meet his burden of demonstrating that [Salvatore's] failure to file an appeal on his behalf constituted ineffective assistance of counsel.

"In support of his claims, the petitioner testified . . . that, after the motion for summary judgment was filed . . . he did not have further communication with [Salvatore]. The petitioner testified that she did not notify him of the court's denial of the motion for summary judgment, the [court's] granting [of] the respondent's motion for summary judgment or the court's dismissal of his habeas petition. He further testified that she did not discuss with him the petition for certification to appeal, the application for waiver [of] fees and costs on appeal, or the motion for the appointment of appellate counsel. Additionally, he testified that [Salvatore] did not file a petition for certification to appeal, did not file an application for a waiver of fees and costs on appeal, and did not file a motion for the appointment

of appellate counsel. He testified that he learned of the dismissal of his habeas petition in December, 2006, or January, 2007, when he contacted the [courthouse] clerk's office. The petitioner testified that, in his first [habeas] trial, his petition for certification to appeal was filed by the Office of the Chief Public Defender. Finally, he testified that he would have appealed [from] the [habeas] court's decision had he had the opportunity. On cross-examination, the petitioner testified that he knew of his appellate rights and how to file appellate paperwork since 1994 and he filed an application for [a] waiver of costs and fees in 1994.

"At the May, 2013 habeas trial, [Salvatore] testified that she did not recall discussing the denial of the motion for summary judgment with the petitioner, but it was her practice to communicate the result of a judicial action to the client, whether it occurred in person, by telephone, or by letter. . . . She testified that she was unable to complete a fee waiver for the petitioner because he had to complete it for himself before filing it. Additionally, she testified that the rules of practice prohibit attorneys from filing a frivolous petition for certification to appeal. In cases where she did not believe a petition for certification to appeal had merit, she left it to the client to file the petition for certification to appeal.

"On June 1, 2020, this court issued an order requesting the parties to submit supplemental briefing addressing whether the ineffective assistance of counsel claims as to [Salvatore] were justiciable despite the [petitioner's] never filing a motion for appointment of appellate counsel, a motion for costs and fees on appeal and a petition for certification to appeal, and the habeas [court's] never deciding whether the petition or motions should be rejected as untimely filed. . . . In the petitioner's response to the court's order, filed on July 10, 2020, the petitioner indicated that a motion for permission

[to file] a late petition for certification to appeal was filed in the petitioner's prior habeas matter on June 22, 2020. This motion was not filed, however, prior to the close of evidence in the present matter and, therefore, will not be considered by this court in its analysis of the claims at issue here.

"It is undisputed that a motion for appointment of appellate counsel, a motion for costs and fees on appeal and a petition for certification to appeal were not filed in the petitioner's prior habeas matter. Until the motions are filed by the petitioner and permission to file late is denied by the court, the petitioner cannot demonstrate that he has suffered any prejudice. See *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 107, 109 A.3d 510 (holding that, until motion for permission to file late petition for certification is filed and denied, petitioner cannot allege viable ineffective assistance of counsel claim as to counsel's prior failure to file petition for certification to appeal), cert. denied, 315 Conn. 931, 110 A.3d 432 (2015); see also *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 275, 77 A.3d 113 (2013) (finding petitioner's ineffective assistance of counsel claim for failure to file petition for certification to appeal to Supreme Court was not ripe for adjudication because 'petitioner's claim [was] contingent on [the Supreme Court's] denial of his motion to file a late petition for certification to appeal, an event that may never occur, thereby obviating any need for a resolution of the issues presented'). As a result, the petitioner's remaining ineffective assistance of counsel claims as to [Salvatore's] representation are not yet ripe for adjudication and must be dismissed." (Citation omitted.)

On September 10, 2020, the petitioner filed a motion to open the judgment on the ground that, on August 13, 2020, the second habeas court had denied his request for permission to file a late petition for certification to appeal from the judgment of that court. The habeas

court denied the motion to open, reasoning: "After consideration of the petitioner's arguments for opening the evidence to have this court consider pleadings and rulings made after the close of evidence, the court has found no legal authority that stands for the proposition that a court is under an ongoing duty to monitor cases of which the court has taken judicial notice for new pleadings and decisions after the close of evidence. The petitioner's motion to open [the] evidence subsequent to the [court's] rendering a memorandum of decision is hereby denied."

On appeal, the petitioner challenges the habeas court's dismissal of his ineffective assistance claims as to Salvatore on the ground that it was not justiciable and the habeas court's denial of his related motion to open that judgment.

We first address the petitioner's claim that the habeas court erred in dismissing his claim of ineffective assistance on the ground that it was not justiciable because the second habeas court had not yet denied his motion for permission to file a late petition for certification to appeal to this court. "[J]usticiability comprises several related doctrines, namely, standing, *ripeness*, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of a ripeness claim] is plenary. . . .

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical

injury or a claim contingent upon some event that has not and indeed may never transpire." (Emphasis in original; internal quotation marks omitted.) *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358–59, 258 A.3d 71 (2021).

As noted, the habeas court relied on *Janulawicz* v. *Commissioner of Correction*, supra, 310 Conn. 265, and *Tyson* v. *Commissioner of Correction*, supra, 155 Conn. App. 96, in concluding that the petitioner's claims as to Salvatore's representation in his second habeas action were not ripe for adjudication. *Janulawicz* involved a claim that the petitioner was prejudiced by his trial counsel's failure to file a petition for certification to appeal to the Supreme Court from a judgment of this court. Our Supreme Court held that the petitioner's habeas petition "is not ripe for adjudication in view of the fact that the petitioner's injury is contingent on this court's denial of a motion to file a late petition for certification, a motion that the petitioner has never filed, because he will not suffer such an injury if this court were to grant his request for permission to file an untimely petition for certification to appeal." *Janulawicz* v. *Commissioner of Correction*, supra, 271–72. The reasoning of *Janulawicz* was thereafter applied by this court in *Zillo* v. *Commissioner of Correction*, 195 Conn. App. 71, 223 A.3d 818 (2019), cert. denied, 334 Conn. 924, 223 A.3d 379 (2020), wherein the petitioner, like the petitioner in *Janulawicz*, alleged that his appellate counsel's deficient performance prevented him from filing a timely petition for certification to appeal to our Supreme Court from this court's affirmance of the judgment of conviction. Citing *Janulawicz*, this court held: "Notwithstanding that the petition for certification would have been late, because the petitioner never attempted to file a motion for permission to file a late petition for certification, the habeas court lacked jurisdiction to decide this claim." Id., 74 n.1.

Although *Janulawicz* and *Zillo* involved petitions for certification to appeal from this court to our Supreme Court, the pertinent reasoning of *Janulawicz* and *Zillo*, which is consistent with the fundamental principle of ripeness that we do not prematurely address hypothetical injuries that may never materialize, also applies to a claim that habeas counsel failed to file a petition for certification to appeal to this court from a judgment of the habeas court. As this court explained in *Tyson*, "[a] petition for certification to appeal from the judgment of the habeas court is filed in the habeas court. See General Statutes § 52-470 (g). The petitioner's failure to comply with the ten day limitation period of § 52-470 (g) does not necessarily deprive him of the right to file an untimely appeal. The decision to grant or deny a motion for permission to file late a petition for certification to appeal is left to the sound discretion of the habeas court. . . . In exercising that discretion, a habeas court should take into account the reasons for the delay. . . . A petitioner presenting a petition for a writ of habeas corpus due to the ineffective assistance of counsel must allege and prove both deficient performance of counsel and resulting harm or prejudice. . . . Until the petitioner files a motion for permission . . . to file late a petition for certification to appeal with the habeas court . . . and the [motion is] denied, the petitioner has suffered no prejudice. Until [the] motion for permission to file late is denied, the petitioner cannot allege a viable petition for a writ of habeas corpus on the ground of ineffective assistance of counsel [for failure to file a petition for certification to appeal to this court from the judgment of the habeas court]." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Tyson* v. *Commissioner of Correction*, supra, 155 Conn. App. 106–107.

In this case, the petitioner did not file a motion for permission to file a late petition for certification to

appeal from the judgment of the second habeas court until the habeas court in the present case ordered the parties to brief the issue of justiciability, which occurred after the close of evidence. That motion had not been adjudicated when the habeas court issued its decision in the present case, and the petitioner's injury was contingent on the second habeas court's denial of the motion. Because the motion had not yet been denied, the petitioner's right to seek appellate review of the judgment of the second habeas court had not yet been foreclosed. Accordingly, the habeas court properly concluded that the petitioner's claim of ineffective assistance as to Salvatore was not justiciable and properly dismissed it.[9]

The petitioner also claims that the habeas court erred in denying his motion to open the judgment to consider the denial by the second habeas court of his motion for permission to file a late petition for certification to appeal from the judgment of that court. "Habeas corpus is a civil proceeding. . . . The principles that govern motions to open or set aside a civil judgment are well established. A motion to open and vacate a judgment . . . is addressed to the [habeas] court's discretion, and the action of the [habeas] court will not be disturbed

[9] The petitioner argues that he was not required to prove prejudice because, pursuant to *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689, 699 A.2d 1003 (1997), prejudice is presumed when counsel fails to file a petition for certification to appeal to this court from the judgment of the habeas court. See id., 707. In *Iovieno*, the court held: "In the present case, as in the case where a direct appeal has been foreclosed, there are exceptional circumstances that require us to dispense with the prejudice analysis ordinarily required under *Strickland*. Here, the result of counsel's failure to file the petition for certification to appeal within the statutorily prescribed limitation period was to deprive the petitioner of the opportunity to seek appellate review of the dismissal of his first habeas petition." Id., 706. *Iovieno* is distinguishable from this case, as well as from *Janulawicz*, *Zillo* and *Tyson*, because the petitioner in *Iovieno* had filed a late petition for certification to appeal and that petition had been denied, rendering his claim ripe for adjudication.

on appeal unless it acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 77, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021). "One of the essential requirements for the granting of [a motion to open] is that the evidence which the party seeks to offer could not have been known and with reasonable diligence produced at trial." (Internal quotation marks omitted.) Id., 76.

Here, at any time since the date of the 2006 judgment of the second habeas court, the petitioner, either through counsel or on his own,[10] could have sought permission to file a late petition for certification to appeal from the judgment of the habeas court. Indeed, the petitioner challenged Salvatore's representation of him in the third habeas action that he filed in 2007, but he withdrew that petition prior to trial. If he had not done so, or if he had sought permission to file a late petition for certification to appeal from the judgment of the second habeas court at any time during the period of approximately fourteen years between the date of that judgment and the trial in this habeas action, he could have presented the habeas court in this action with the evidence that he sought to present if the habeas court granted his motion to open. On the basis of the record before us, we conclude that the petitioner is unable to demonstrate that the court's ruling on the motion to open reflects an abuse of discretion.

The judgment of the habeas court is affirmed with respect to the petitioner's claims as to his second habeas counsel; the appeal is dismissed as to the petitioner's remaining claims.

In this opinion the other judges concurred.

[10] In light of the voluminous motions filed by the petitioner himself since the date of his conviction, it cannot reasonably be argued that he was unfamiliar with motion practice in the habeas court. As noted herein, the petitioner testified that he knew of his appellate rights and how to file appellate paperwork since 1994, and he filed an application for waiver of costs and fees in 1994.

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE *v.* VICTOR K. N'GUESSAN ET AL.

(AC 44964)

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

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant N. N filed various special defenses, and subsequently filed a request for leave to amend his special defenses to add as an additional special defense that the foreclosure action was barred by the doctrines of res judicata and/or collateral estoppel, apparently referencing a 2011 foreclosure action against him involving the same mortgage and a prior assignee of the mortgage, which was dismissed for failure to prosecute with due diligence. The trial court granted a motion for summary judgment as to liability filed by the plaintiff, and rejected each of N's special defenses except that it failed to address the special defense regarding res judicata and collateral estoppel. Thereafter, while a motion for a judgment of strict foreclosure was pending, the court issued an order sustaining the plaintiff's objections to N's interrogatories and requests for production. The court rendered judgment of strict foreclosure, from which N appealed to this court. *Held*:

1. The trial court did not err in granting the plaintiff's motion for summary judgment without considering the applicability of the doctrines of res judicata and collateral estoppel as, based on this court's plenary review, neither doctrine precluded the court from concluding that there were no genuine issues of material fact as to N's liability: the doctrine of res judicata was inapplicable as the record indicated that the court in the 2011 foreclosure action dismissed that action and that it had not been adjudicated on the merits; moreover, the doctrine of collateral estoppel was inapplicable because, although the same note and mortgage that were at issue in the 2011 foreclosure action were at issue in this foreclosure action, there was no question that the court was faced with a different set of events as six years had passed between when the 2011 action was dismissed and the present action was instituted, N made no payments on the mortgage during those intervening years, submitted no evidence setting forth any equitable defense for his failure to make payments, and did not submit any other evidence that was sufficient to create a genuine issue of material fact as to his liability in the present action, and, in the absence of such evidence, the court was not obligated to rely on the trial court's conclusion, when denying summary judgment in the 2011 action, that there were sufficient factual questions to warrant a trial.

2. The trial court did not abuse its discretion by sustaining the plaintiff's objections to N's interrogatories and requests for production: the court sustained the objections more than one year after rendering summary judgment, and a review of the record revealed that the discovery sought by N was not connected to the plaintiff's motion for summary judgment and, instead, was related to the issue of determining the final debt that he owed the plaintiff; moreover, N did not articulate how he was harmed by the court's order on his discovery requests and failed to demonstrate how receiving responses would have assisted him in creating genuine issues of material fact as to liability.

Argued April 5—officially released August 2, 2022

Procedural History

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

Maria K. Tougas, for the appellant (named defendant).

Victoria L. Forcella, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The defendant Victor K. N'Guessan[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Wilmington Trust.[2] On appeal, the defendant claims that the court (1) erred in granting the plaintiff's motion for

[1] The other defendant named in the plaintiff's complaint, Mortgage Electronic Registration Systems, Inc., did not participate in this appeal. Accordingly, we refer to N'Guessan as the defendant.

[2] The plaintiff's full name is Wilmington Trust, National Association Not in Its Individual Capacity but Solely as Successor Trustee to Citibank, N.A. as Trustee to Lehmans XS Trust Mortgage Pass-Through Certificates, Series 2005-8.

summary judgment without considering the applicability of the doctrines of res judicata and collateral estoppel[3] and (2) abused its discretion by sustaining the plaintiff's objections to his interrogatories and requests for production. We disagree and, accordingly, affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. The defendant is the owner of real property in Manchester (property). The plaintiff commenced a foreclosure action against the defendant on May 4, 2017. In a complaint dated April 28, 2017, the plaintiff alleged that on October 13, 2005, the defendant had executed and delivered to Lehman Brothers Bank, FSB, a note in the principal amount of $124,000, secured by a mortgage on the property. The plaintiff further alleged that it became the holder of the note through a series of assignments and that the defendant was in default on the note. The plaintiff sought a judgment of foreclosure.

On December 12, 2017, the defendant filed his answer and asserted three special defenses. On the same date, the defendant filed a notice indicating that he had served upon the plaintiff "his first set of interrogatories and requests for production." On April 10, 2018, the plaintiff filed objections to these interrogatories and requests for production. On July 11, 2018, the defendant

[3] The defendant also sought to add a four count counterclaim when he filed his motion to amend his answer and special defenses. The four counts alleged vexatious litigation, abuse of process, negligence, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., on the part of the plaintiff. The plaintiff objected to the defendant's attempt to add this counterclaim. The court, *Dubay, J.*, did not rule on the plaintiff's objection prior to rendering summary judgment. Rather, in a subsequent order, the court, *M. Taylor, J.*, stated that Judge Dubay "ha[d] apparently ruled that there [were] no remaining, operable defenses or counterclaims." The defendant has not briefed any claims with respect to his counterclaim and, thus, we deem any issues related to the court's disposition of the counterclaim to be abandoned on appeal.

filed amended special defenses in which he added a fourth special defense that the plaintiff miscalculated the payoff of the mortgage and misapplied or failed to apply payments the defendant made.

On October 2, 2018, the plaintiff filed a motion for summary judgment as to liability. On December 14, 2018, the defendant filed an objection to the plaintiff's motion. On December 20, 2018, the defendant filed a request for leave to amend his amended special defenses. In his proposed second amended list of special defenses, he requested to add a fifth special defense, which stated: "The subject foreclosure action is barred by the doctrines of res judicata and/or collateral estoppel." The defendant apparently was referencing a previous foreclosure action against him involving the same mortgage, which was commenced in February, 2008, by Aurora Loan Services, LLC (Aurora), a prior assignee of the mortgage. Aurora filed a motion for summary judgment in that case, which the court, *Aurigemma, J.*, denied on July 19, 2011. On December 7, 2015, the court, *Scholl, J.*, dismissed Aurora's foreclosure action.[4]

In the present case, on March 29, 2019, the court, *Dubay, J.*, granted the plaintiff's motion for summary judgment and issued a memorandum of decision. Judge Dubay concluded that the affidavit of Trey Cook, an employee of the plaintiff's loan servicer, established that the plaintiff was the holder of the note executed by the defendant, the plaintiff was in possession of the note prior to the commencement of foreclosure, and the defendant was in default for failure to make payments in accordance with the terms of the note and the mortgage. Judge Dubay further concluded that "[t]he defendant ha[d] submitted no evidence to contradict this representation," and, accordingly, that "the plaintiff ha[d] established a prima facie case in this action." Judge Dubay

[4] Additional information about the foreclosure action commenced by Aurora will be provided in part I of this opinion.

rejected each of the defendant's four special defenses. He concluded that those special defenses "ha[d] not demonstrated the existence of any disputed material fact." Judge Dubay did not, however, address the fifth special defense regarding res judicata and collateral estoppel, which the defendant purported to raise in his proposed second amended special defenses after the plaintiff filed its motion for summary judgment. On April 9, 2019, the defendant filed a motion to reargue/reconsider, which Judge Dubay denied on April 22, 2019.

On April 29, 2019, the plaintiff filed a motion for a judgment of strict foreclosure and an affidavit of debt. On May 6, 2019, the defendant filed an objection to that motion and to the affidavit of debt. The defendant requested an evidentiary hearing "in accordance with Practice Book § 17-50 as genuine issues exist as to the damages in this case and there are outstanding discovery responses that the plaintiff has not complied with." Additionally, the defendant claimed "a right of setoff against the plaintiff's debt . . . ."

On November 12, 2020, while the plaintiff's motion for a judgment of strict foreclosure was pending, the court, *M. Taylor*, *J.*, issued an order sustaining the plaintiff's objections to the defendant's interrogatories and requests for production. That order stated: "Although the questions posed relate to previously filed pleadings, [Judge Dubay] has apparently ruled that there are no remaining, operable defenses or counterclaims. See motion for reconsideration of summary judgment . . . and other pleadings regarding discovery . . . and the resulting orders by [Judge Dubay]."

On September 7, 2021, a hearing was held before Judge Taylor on the plaintiff's motion for a judgment of strict foreclosure and the defendant's objections. On September 13, 2021, Judge Taylor rendered a judgment

of strict foreclosure in favor of the plaintiff. At the entry of judgment, Judge Taylor found that the fair market value of the property was $188,000 and that the debt owed to the plaintiff was $313,335.73. The law day was set for November 16, 2021. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court erred in granting the plaintiff's motion for summary judgment without considering the applicability of the doctrines of res judicata and collateral estoppel. Although the defendant unsuccessfully attempted to add a special defense asserting that these doctrines apply, his claim is not that the court abused its discretion in denying his request to amend his amended special defenses. Rather, he challenges the court's failure to specifically address his arguments of res judicata and collateral estoppel in his objection to the summary judgment motion. Although the court did not address these arguments, on the basis of our plenary review, we conclude as a matter of law that the defendant cannot prevail on his claims of res judicata and collateral estoppel.

The following procedural history is relevant to this claim. Aurora commenced a foreclosure action against the defendant in 2008 and subsequently moved for summary judgment as to liability. In 2011, the defendant filed an affidavit (2011 affidavit) and objection to Aurora's motion for summary judgment. The defendant claimed that while he was renovating the property, Aurora illegally gained access to the property, took possession of the property, and changed the locks so that he could not access the property. The defendant argued that Aurora's actions prevented him from completing his renovations and from renting the property to tenants. Judge Aurigemma's 2011 order denying

Aurora's motion for summary judgment indicated: "The defendant's affidavit has raised equitable issues concerning [Aurora's] conduct. Trial is appropriate to address these issues." The case never went to trial and the court later dismissed the action. Although the record before this court does not reveal why the action was dismissed, the defendant represents that the action "was dismissed because [Aurora] failed to prosecute the case with due diligence."

In the defendant's objection to the motion for summary judgment in the present case, he claimed that because Judge Aurigemma determined that issues of material fact existed that prevented the granting of summary judgment as to liability in the Aurora foreclosure action, the doctrine of collateral estoppel barred the plaintiff, as the "successor mortgagee," from "relitigating the same issue of summary judgment on liability in this case." In the alternative, he claimed that the doctrine of res judicata applied because Aurora elected not to go to trial for the remainder of the time it held the note "and the case was ultimately dismissed, which is considered a final judgment." In the present case, the defendant attached to his objection an affidavit dated December 13, 2018 (2018 affidavit), as well as a copy of the 2011 affidavit from the Aurora foreclosure action. The 2018 affidavit provided a brief history of the Aurora foreclosure action and repeats many of the facts alleged in his 2011 affidavit.

On appeal, the defendant claims that Judge Dubay erred in not addressing res judicata and collateral estoppel when rendering judgment. The defendant advances the same arguments that he made before the court in his objection to the plaintiff's motion for summary judgment. The defendant contends that there were genuine issues of material fact as to his liability, which the court had determined in the prior Aurora case, and that the court in the present case was precluded from reaching

the opposite conclusion when it rendered summary judgment in favor of the plaintiff. We disagree.

The following legal principles are relevant to this claim. "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 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. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . 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. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . Additionally, the applicability of res judicata and collateral estoppel presents a question of law over which we employ plenary review." (Citation omitted; internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010).

"Res judicata, or claim preclusion, express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. . . . Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Citation omitted; internal quotation marks

omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016).

"[C]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim." *Dowling* v. *Finley Associates, Inc.*, 248 Conn. 364, 373–74, 727 A.2d 1245 (1999). "For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . .

"Additionally, [a]pplication of the doctrine of collateral estoppel is neither statutorily nor constitutionally mandated. The doctrine, rather, is a judicially created rule of reason that is enforced on public policy grounds. . . . Accordingly, as we have observed in regard to the doctrine of res judicata, the decision whether to apply the doctrine of collateral estoppel in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . . We also have

explained that [c]ourts should be careful that the effect of the doctrine does not work an injustice. . . . Thus, [t]he doctrines of preclusion . . . should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Citations omitted; internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 344–45, 15 A.3d 601 (2011).

We first note that, although the defendant has argued that the doctrine of res judicata barred the plaintiff's foreclosure action, that doctrine is inapplicable. There is nothing in the record indicating that the court in Aurora's foreclosure action made a decision on the merits when it dismissed that action in 2015. In fact, in his brief to this court, the defendant represents that the Aurora foreclosure action "was dismissed because [Aurora] failed to prosecute the case with due diligence." The plaintiff does not dispute this assertion. Because Aurora's action was dismissed for failure to prosecute and was not adjudicated on the merits, res judicata did not bar the plaintiff from bringing the present action. See *Milgrim* v. *Deluca*, 195 Conn. 191, 194–95, 487 A.2d 522 (1985) (dismissal for failure to prosecute pursuant to predecessor to Practice Book § 14-3 "is not an adjudication on the merits that can be treated as res judicata").[5]

We next turn to the defendant's argument that the doctrine of collateral estoppel precluded the court from granting the plaintiff's motion for summary judgment. Although the defendant's liability was again at issue

[5] Additionally, at oral argument, this court inquired about which judgment served as the basis for the defendant's res judicata argument. The defendant did not directly answer the court's question. Rather, the defendant's counsel stated that his arguments regarding res judicata were "not as strong" as his arguments regarding collateral estoppel.

when the court considered the plaintiff's motion for summary judgment, we are not persuaded that the doctrine of collateral estoppel barred the court from rendering summary judgment in favor of the plaintiff. In denying Aurora's motion for summary judgment in the Aurora foreclosure action, the court concluded that there were genuine issues of material fact as to the defendant's equitable defenses that required a trial. When the court granted the plaintiff's motion for summary judgment in the present case, however, it necessarily determined that the defendant failed to present sufficient evidence to create a genuine issue of material fact as to his equitable defenses to the current action.

"A mortgagee that seeks summary judgment in a foreclosure action has the evidentiary burden of showing that there is no genuine issue of material fact as to any of the prima facie elements, including that it is the owner of the debt. Appellate courts in this state have held that the burden is satisfied when the mortgagee includes in its submissions to the court a sworn affidavit averring that the mortgagee is the holder of the promissory note in question at the time it commenced the action. . . . The evidentiary burden of showing the existence of a disputed material fact then shifts to the defendant. It is for the maker of the note to rebut the presumption that a holder of the note is also the owner of it." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

The court relied on Cook's affidavit to conclude that there were no genuine issues of material fact as to the defendant's liability. The court further concluded that the defendant submitted "no evidence" to contradict Cook's representations in his affidavit. Our plenary review of the record confirms the court's assessment of the evidence before it. The plaintiff commenced the present action in 2017, six years after the defendant

averred in his 2011 affidavit that Aurora's actions had impacted his ability to make mortgage payments. Consequently, the issue in the present case was not whether the defendant had a defense to the Aurora foreclosure action, but whether he had a defense to the action instituted six years later. In response to the plaintiff's motion for summary judgment, the defendant did not provide any information since 2011 linking his failure to make his mortgage payments to the plaintiff's conduct or the conduct of its predecessor.[6] For example, in his 2018 affidavit, the defendant repeats much of the information from his 2011 affidavit rather than providing updates about his continued inability to pay. The defendant did not submit any other evidence which was sufficient to create a genuine issue of material fact as to his liability. In the absence of such evidence, the court was not obligated to rely on the 2011 denial of summary judgment which found that there were sufficient factual questions to warrant a trial.

The United States Supreme Court addressed a similar issue in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948). In *Sunnen*, the court addressed whether a prior determination by the Board of Tax Appeals regarding the tax treatment of royalties paid in certain years precluded a different result as to the royalties paid during subsequent tax years. Id., 596–97. As the court explained: "[C]ollateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete

[6] A review of the record indicates that the defendant has not made any mortgage payments since filing the 2011 affidavit.

or erroneous, at least for future purposes. . . . [Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time . . . ." (Citation omitted.) Id., 599.

"Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. . . . And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. *But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. . . . Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.*" (Citations omitted; emphasis added; footnote omitted.) Id., 601–602.

In the present case, although the same note and mortgage that were at issue in the Aurora case are at issue in this case, there is no question that the court in the present case was faced with a different set of events. Six years passed between when the Aurora case was

dismissed and the present action was instituted. Nevertheless, it is undisputed that the defendant made no payments on the mortgage during those intervening years. At the same time, the defendant submitted no evidence with his objection to the plaintiff's motion for summary judgment setting forth any equitable defense for his failure to make payments during those six years. Consequently, he cannot rely solely on the Aurora court's conclusion that there was a genuine issue of material fact in 2011 as binding the court in the present action to conclude that such an issue of fact still exists.

On the basis of our plenary review of the defendant's claim, we conclude that neither the doctrine of res judicata nor the doctrine of collateral estoppel precluded the court from concluding that there were no genuine issues of material fact as to the defendant's liability.

II

The defendant next claims that the court abused its discretion by sustaining the plaintiff's objections to his interrogatories and requests for production. We disagree.

We begin by setting forth the standard of review and legal principles applicable to this claim. Our Supreme Court has "long recognized that the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion. . . . [I]t is only in rare instances that the trial court's decision will be disturbed. . . . Therefore, we must discern whether the court could [have] reasonably conclude[d] as it did." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 7, 826 A.2d 1088 (2003).

In the present case, Judge Dubay did not rule on the plaintiff's objections to the defendant's interrogatories

and requests for production prior to granting the plaintiff's motion for summary judgment. Rather, Judge Taylor sustained the plaintiff's objections on November 12, 2020, more than one year after Judge Dubay had rendered summary judgment. Our review of the record reveals that the discovery sought by the defendant was not connected to the plaintiff's motion for summary judgment. In his objection to the motion for summary judgment, the defendant did not claim any issues regarding discovery, nor did he raise any arguments related to the plaintiff's objections to his discovery requests. At no point did he request that the court postpone its decision on the plaintiff's motion for summary judgment so that he could conduct additional discovery. Instead, the defendant's discovery requests related to the issue of determining the final debt that he owed the plaintiff.

Furthermore, on appeal to this court, the defendant does not articulate how he was harmed by the court's order on his discovery requests. He has failed to demonstrate how receiving responses to these requests would have assisted him in creating genuine issues of material fact as to liability. See *Shaw* v. *Freeman*, 134 Conn. App. 76, 89, 38 A.3d 1231 (2012) (no abuse of discretion in sustaining objections to discovery requests where party failed to demonstrate how responses to requests would have assisted in prosecuting party's claims or that discovery sought would have created genuine issue of material fact). Instead, he broadly argues that the court's "denial . . . of the most basic of fundamental rights to engage in any discovery in a civil action prior to the entry of a final judgment" constituted an abuse of discretion. Simply put, the defendant has failed to demonstrate how these responses might have kept the court from rendering a judgment of strict foreclosure. See *Finan* v. *Finan*, 107 Conn. App. 369, 379, 945 A.2d 476 (2008) ("[i]n the absence of a showing that the

[excluded] evidence would have affected the final result, its exclusion is harmless" (internal quotation marks omitted)). Accordingly, we conclude that the defendant has failed to establish that the court abused its discretion in sustaining the plaintiff's objections to his discovery requests.

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

In this opinion the other judges concurred.

ERNEST FRANCIS *v.* CORRECTION OFFICER BRIATICO ET AL.*
(AC 44192)

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

Syllabus

The plaintiff, an inmate in a state correctional institution, sought, inter alia, to recover damages, pursuant to federal law (42 U.S.C. § 1983), from the defendants, three current or former employees of the Department of Correction, in their individual capacities, for the alleged violation of his constitutional rights in connection with injuries he allegedly sustained during a fire in his housing unit. An electrical fire occurred in a different cell in the plaintiff's housing unit, and the plaintiff, who was not evacuated from his cell during the three minutes between when the fire was reported and was declared extinguished, claimed that he suffered from smoke inhalation as well as labored breathing and mental trauma following the incident. The trial court granted the defendants' motion for summary judgment, finding that the facts alleged by the plaintiff were insufficient to demonstrate malevolent intent by the defendants as required for purposes of proving an eighth amendment violation pursuant to *Whitley* v. *Albers* (475 U.S. 312). The plaintiff appealed to this court, claiming that the trial court should have applied the deliberate indifference test adopted in *Estelle* v. *Gamble* (429 U.S. 97). *Held* that the trial court correctly concluded that the defendants were entitled to summary judgment, as the facts alleged by plaintiff did not give rise to a triable issue for determination by the fact finder under even the lesser

* In the summons and complaint, the three defendants are identified by title and last name only. Because the full names of two of the defendants are otherwise not apparent from the record, we refer to those defendants by title and last name only.

deliberate indifference standard: the defendants did not consciously disregard a substantial risk of serious harm to the plaintiff, as they responded immediately to the fire, which was confined to a single cell that the plaintiff was not occupying, the fire was extinguished within three minutes of being reported, and the plaintiff was afforded medical attention within minutes after the fire was extinguished and demonstrated no serious ill effects; moreover, the defendants were justified in not evacuating the plaintiff or other potentially affected inmates for safety and security reasons, as there were ninety-two inmates in the unit and the staff was beginning a shift change when the fire was discovered.

Argued February 15—officially released August 2, 2022

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wahla*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ernest Francis, self-represented, the appellant (plaintiff).

Zenobia Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (defendants).

Opinion

PALMER, J. The self-represented plaintiff, Ernest Francis, appeals from the summary judgment rendered by the trial court in favor of the defendants, Captain Bryan Viger,[1] Lieutenant Wilkens and Correction Officer Briatico, all current or former employees of the Department of Correction (department). The plaintiff brought

[1] Viger was promoted to deputy warden during the pendency of this case. Because, however, he was a captain at the time of the incident that is the subject of this appeal, we refer to him as such.

this action pursuant to 42 U.S.C. § 1983,[2] alleging that the defendants violated his rights under the eighth amendment to the United States constitution[3] by virtue of the manner in which they responded to an electrical fire in the plaintiff's housing unit at the Cheshire Correctional Institution (Cheshire), where he was incarcerated.[4] On appeal, he contends that the court applied an unduly exacting legal standard—one that required him to prove that the defendants had acted in bad faith and with the malicious intent to harm him—in holding that the defendants' conduct did not violate the eighth amendment as a matter of law. Because we conclude that the court correctly determined that the defendants are entitled to summary judgment, we affirm the judgment.

The record before the trial court reveals the following relevant facts and procedural history. On August 8, 2013, at 2:45 p.m., an electrical outlet in cell 142 of the housing unit at Cheshire known as North Block 1 malfunctioned and caught fire. Although the plaintiff's cell was located in North Block 1, the fire was not in his cell. As soon as they became aware of the fire, the two inmates assigned to that cell began banging on the cell door and yelling. Correction Officer Briatico responded immediately and called a "code red," thereby bringing the incident to the attention of other officers

[2] 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 . . . ."

[3] 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." U.S. Const., amend. VIII.

[4] The plaintiff is serving a fifty year term of imprisonment for a murder he committed in 1990. See *State* v. *Francis*, 228 Conn. 118, 635 A.2d 762 (1993).

and staff, including Captain Viger and Lieutenant Wilkens, who also responded. Fire extinguishers were used to put out the fire, which was limited to sparks and smoke coming out of an electrical outlet within one cell, and exhaust fans were deployed for ventilation purposes. The fire was quickly extinguished, and Viger cleared the code at approximately 2:48 p.m. The facility returned to normal operation at about 3 p.m.

Medical staff evaluated all inmates assigned to North Block 1, and the plaintiff was so assessed at 3:10 p.m. On the basis of that assessment, and because the plaintiff demonstrated no serious ill effects following a short period of observation, he returned to the unit.

At the time of the fire, there were ninety-two inmates in North Block 1. As occurs each day, there was a scheduled shift change of department staff at 2:45 p.m., marking the end of the first shift and the beginning of the second. In addition, a daily, facility wide headcount of inmates was scheduled to be conducted at 3 p.m. According to the sworn statement of Captain Viger, "[i]t would [have] compromise[d] safety and security to move [ninety-two] inmates outside of the facility in response to an electrical fire contained within one cell. . . . The decision to triage inmates within the unit was more controlled and allowed us to address every inmate given the limited number of staff. . . . The plaintiff was one of [fourteen] inmates [who] complained of some type of nonemergency issue during the incident.[5] . . . There was no indication that any of the inmates, even the two [who] were in the actual cell where the fire started, required transport outside the facility to the hospital. . . . The conduct of staff was in compliance with [d]epartment . . . policies and procedure.

[5] As the trial court observed, according to the incident report, which was signed by Lieutenant Wilkens, among others, "[t]he most common complaints were about the smell and some difficulty breathing properly."

. . . It is important to maintain safety and security at all time[s], even during a fire. . . . Given the limited number of staff, [and] the [ninety-two] inmates, coupled with the size of the fire and the speed with which the fire was contained it was not practical to evacuate the housing unit." (Footnote added.)

Finally, in its memorandum of decision, the court summarized the plaintiff's sworn statement as follows. "The affidavit of the plaintiff . . . states in pertinent part that, on August 8, 2013, he was incarcerated at . . . Cheshire . . . in the North One Unit. There was a fire in the unit and the officers involved did not evacuate the unit. As a result, he suffered from smoke inhalation and to date he suffers from labored breathing. During the time that he was incarcerated at the subject facility, it was locked down one day each week for officer training. To the best of his knowledge this training was teaching the officers how to evacuate a unit in case of fire, and . . . officers have been trained to . . . leave the inmates in their cell in case of a fire and in transportation vehicles in case of accident. The plaintiff goes on to state that he now . . . fear[s] being locked in a cell."

In June, 2016, the plaintiff initiated this action against the defendants in their individual capacities, alleging, in one count, negligence and negligent supervision in connection with their handling of the electrical fire in cell 142 of North Block 1. The plaintiff subsequently amended his complaint to include a claim under 42 U.S.C. § 1983 alleging that, under the circumstances, the defendants' failure to evacuate his unit constituted a violation of his eighth amendment rights.[6] In his prayer

[6] The trial court's memorandum of decision contains the following summary of the plaintiff's allegations. "The plaintiff alleges that, on or about August 8, 2013, he was incarcerated at . . . Cheshire . . . . While incarcerated [there], he was subjected to mental and physical injury by the defendants. The plaintiff claims that there was a fire incident in his block and the smoke and/or fumes were coming into his room through the wall ventilation. The plaintiff asserts that he was terrified in his cell and thought he

for relief, the plaintiff sought both compensatory and punitive damages for the physical and emotional injuries that, he asserts, he suffered as a result of the defendants' conduct. The defendants thereafter filed a motion for summary judgment, arguing, with respect to the plaintiff's § 1983 claim, that the facts surrounding the incident, even when viewed in the light most favorable to the plaintiff, did not establish an eighth amendment violation.

The court granted the defendants' motion for summary judgment with respect to both the plaintiff's state law negligence and § 1983 claims. Insofar as the latter is concerned,[7] the court determined that *Whitley* v. *Albers*, 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986), a case involving the alleged use of excessive force by prison officials seeking to quell a prison disturbance, sets forth the applicable standard, which, for purposes of proving an eighth amendment violation, requires evidence that prison authorities engaged in the allegedly culpable conduct "maliciously and sadistically for the very purpose of causing harm." (Internal quotation marks omitted.) Id., 320–21. The trial court reasoned

might die because of smoke and fumes. The plaintiff alleges that, during the incident, no fire alarm was activated, and officers seemed confused. Subsequently, a triage nurse saw the plaintiff, and he claims that he was suffering from labored breathing, a scratchy throat, burning eyes, lightheadedness, and [mental] trauma. The plaintiff was sent to a medical department and was seen by a doctor. The plaintiff contends he was not treated for his mental trauma.

"The [plaintiff further] alleges that the defendants have no regard for the safety or well-being of the inmates, [and] the defendants violated the agency regulations and have an unwritten policy not [to] rescue the inmates. The complaint further alleges that the injuries and losses suffered by the plaintiff were caused by the defendants' breach of statutory and regulatory duty." (Emphasis omitted.)

[7] The plaintiff has not appealed from the trial court's judgment in favor of the defendants with regard to his negligence and negligent supervision claims. Accordingly, we need not further discuss those claims or the trial court's disposition of them.

that this standard, rather than the less exacting "deliberate indifference" standard of *Estelle* v. *Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), which is applicable generally to claims seeking redress under the eighth amendment for alleged inhumane conditions of confinement, applied to the plaintiff's claim because the defendants were responding to an apparent emergency situation. Concluding that the facts were insufficient to demonstrate the kind of malevolent intent required under *Whitley*, the court rendered summary judgment for the defendants.

On appeal, the plaintiff maintains that the court incorrectly determined that the standard adopted in *Whitley* is applicable to the present case. Rather, the plaintiff contends, the court should have applied the test articulated in *Estelle* v. *Gamble*, supra, 429 U.S. 97, and its progeny, pursuant to which he would have been required to demonstrate that the prison officials acted with "deliberate indifference" to his health or safety in connection with their response to the electrical fire. Id., 104. We need not decide which test is applicable to the present case because, as we explain more fully hereinafter, the plaintiff cannot prevail on his eighth amendment claim even under the less demanding "deliberate indifference" standard.

Before addressing the merits of the plaintiff's claim, we set forth the legal principles governing the trial court's decision granting the defendants' motion for summary judgment and our standard of review. "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 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. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Dunn* v. *Northeast Helicopters Flight Services, L.L.C.*, 206 Conn. App. 412, 424, 261 A.3d 15, cert. granted, 338 Conn. 915, 259 A.3d 1180 (2021).

With respect to the plaintiff's claim of a constitutional violation, it is well established that the eighth amendment protects inmates from cruel and unusual punishment by prison officials; see, e.g., *Wilson* v. *Seiter*, 501 U.S. 294, 296–97, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991); because, "when the [s]tate takes a person into its custody and holds him there against his will, the [c]onstitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the [s]tate by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state

action set by the [e]ighth [a]mendment . . . .” (Citation omitted; footnote omitted.) *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U.S. 189, 199–200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). In this prison context, however, punishment will be deemed cruel and unusual only upon a showing of “the unnecessary and wanton infliction of pain.” (Internal quotation marks omitted.) *Estelle* v. *Gamble*, supra, 429 U.S. 103. To succeed on a claim founded on the eighth amendment, therefore, an inmate must allege and prove “two elements, one subjective and one objective”; *Crawford* v. *Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015); namely, (1) a deprivation that is “objectively, ‘sufficiently serious,’ ” and (2) “a ‘sufficiently culpable state of mind’ ” on the part of the defendant officials. *Farmer* v. *Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); see also *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338–39, 952 A.2d 764 (2008) (same).

As the United States Supreme Court has explained, “[w]hat is necessary to establish an ‘unnecessary and wanton infliction of pain’ . . . varies according to the nature of the alleged constitutional violation. . . . For example, the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited ‘deliberate indifference.’ See *Estelle* v. *Gamble*, [supra, 429 U.S 104]. This standard is appropriate because the [s]tate’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. *Whitley* [v. *Albers*, supra, 475 U.S. 320].

“By contrast, officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections

officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance.' [Id.] We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' [Id., 320–21]." (Citation omitted.) *Hudson* v. *McMillian*, 503 U.S. 1, 5–6, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); see also *Al-Jundi* v. *Mancusi*, 926 F.2d 235, 237–38 (2d Cir.) ("[t]his more exacting standard is imposed not to foster brutality that results from deliberate indifference but to lessen the risk of harm to both prisoners and prison personnel that might result if those responsible for restoring order in the context of prison riots became hesitant to act promptly and effectively in apprehension of liability too easily imposed"), cert. denied, 502 U.S. 861, 112 S. Ct. 182, 116 L. Ed. 2d 143 (1991).

As noted previously in this opinion, the court applied the heightened *Whitley* standard to the plaintiff's claim and concluded that he could not meet that exceedingly rigorous test under the circumstances presented because there is no evidence that, once the defendants learned of the electrical fire, they decided not to evacuate the plaintiff in bad faith and with the sole purpose of causing him harm. On appeal, the plaintiff contends that the court should have used the "deliberate indifference" standard, the application of which, he further maintains, would give rise to a triable issue for determination by the fact finder. Although the defendants make a strong argument that the court was correct in concluding that the *Whitley* standard, rather than the "deliberate indifference" standard set forth in *Estelle* v. *Gamble*, supra,

429 U.S. 104, is applicable under the emergent circumstances of this case, we need not decide which test applies because it is apparent that the plaintiff cannot surmount even the lesser hurdle erected under the "deliberate indifference" standard.

As the United States Supreme Court explained in *Farmer* v. *Brennan*, supra, 511 U.S. 835, for eighth amendment purposes, "deliberate indifference entails something more than mere negligence" but "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." In other words, "deliberate indifference [lies] somewhere between the poles of negligence at one end and purpose or knowledge at the other . . . ." Id., 836. Clarifying the meaning of "deliberate indifference," the court in *Farmer* equated it with "subjective recklessness as used in the criminal law"; id., 839; and explained that, pursuant to such a standard, "a prison official cannot be found liable under the [e]ighth [a]mendment for denying an inmate humane conditions of confinement unless the 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."[8] Id., 837. Thus, "an official's failure to alleviate a significant risk that he should have perceived but did not . . . [does not violate the eighth amendment]." Id., 838. Indeed, "[b]ecause . . . prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or

[8] "With respect to the objective component of the deliberate indifference standard, the term 'sufficiently serious' has been described as 'a condition of urgency, one that may produce death, degeneration, or extreme pain.' . . . *Hathaway* v. *Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996)." *Faraday* v. *Commissioner of Correction*, supra, 288 Conn. 339 n.12.

safety. . . . Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." Id., 844.

Moreover, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the [e]ighth [a]mendment is to ensure reasonable safety . . . a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions . . . . Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the [eighth amendment]." (Citations omitted; internal quotation marks omitted.) Id., 844–45. Finally, as is apparent from this explication of the "deliberate indifference" test, it is itself a "stringent standard of fault." (Internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, supra, 288 Conn. 339.

Applying this standard to the present case, we conclude that it is abundantly clear that the plaintiff cannot prevail because the facts, even viewed most favorably to the plaintiff, simply do not support a finding that the defendants acted with deliberate indifference merely because they did not evacuate him following the electrical fire. The defendants responded immediately to the fire, which did not occur in the plaintiff's cell and was confined to the one cell in which it did occur, and it was extinguished within three minutes of when the inmates occupying that cell saw and reported it. Even

though smoke from the fire spread throughout the plaintiff's unit and into his cell, the plaintiff was afforded medical attention minutes after the fire was brought under control. Although it is regrettable that the plaintiff and others suffered smoke inhalation, the plaintiff was evaluated by medical staff, and his cell block was returned to normal, very shortly after the fire was extinguished. Considering the extremely limited duration of the incident and the swift amelioration of any harm that possibly could have resulted from it, there simply was no need for the defendants to evacuate the plaintiff or any other inmates residing in his unit. The decision not to evacuate the affected or potentially affected inmates is all the more justifiable in light of the fact that there were ninety-two inmates in that unit, and staff was beginning a shift change at the very moment the fire was discovered. In such circumstances, we will not second-guess the reasoned judgment of the defendants that inmate security and safety would be best served by the approach they took. Cf. *Vandever* v. *Commissioner of Correction*, 315 Conn. 231, 248, 106 A.3d 266 (2014) ("The judgment of prison officials . . . like that of those making parole decisions, turns largely on purely subjective evaluations and on predictions of future behavior . . . . It therefore is not the role of this court to second-guess that decision, especially when, as in the present case, there is ample reason, based on the undisputed evidence, to support it." (Citation omitted; internal quotation marks omitted.)).

In sum, there is nothing in the record to suggest that the defendants, aware of a significant risk of harm to the plaintiff, ignored that risk in determining that evacuation was unnecessary. On the contrary, the facts establish the opposite: the defendants acted quickly, reasonably and with due regard for the health and welfare of the plaintiff and the other inmates in his unit. The fact that the plaintiff would have preferred to be evacuated

and purports to believe that such an evacuation was the only viable or appropriate option available to the defendants does not make it so. And even if it were, the plaintiff's claim fails in the absence of any evidence indicating that the defendants consciously disregarded a substantial risk that serious harm might befall him by virtue of their decision to address the incident as they did—a decision they had to make nearly instantaneously on learning of the fire. Consequently, the exceptionally prompt and efficient manner in which the defendants went about extinguishing the fire and providing medical assistance to the plaintiff does not make out a case of deliberate indifference by the defendants.[9] The plaintiff, therefore, has failed to demonstrate that the court incorrectly concluded that the defendants are entitled to summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

LEVCO TECH, INC. *v.* DOROTHY KELLY ET AL.
(AC 44417)
(AC 44597)

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

Syllabus

The defendants E and S, shareholders of the plaintiff, L Co., a family owned company, appealed to this court from the judgment of the trial court determining, inter alia, that the defendants R, J and D owned the majority of the outstanding shares of L Co.'s common stock. S had been the president, and M, her husband, had been the secretary of L Co. since its founding. M, S and their children, E, R, D, A and P, each owned ten of the seventy shares of the common stock issued by L Co. In 2012, when D had concerns about her marriage, she purportedly created a trust and transferred her ten shares to S, as trustee for D's children.

[9] Of course, because the plaintiff cannot prevail under the "deliberate indifference" standard, he also cannot succeed under the more demanding standard set forth in *Whitley*, and the plaintiff does not claim otherwise.

Neither D nor S consulted counsel regarding the making of the trust, and, within forty-eight hours, S agreed with D that the transfer was not a good idea and took steps to undo it. In 2015, R acquired D's ten shares and A's ten shares, thereby giving him ownership of thirty shares. After P's son, J, executed an option to purchase six of P's shares, R believed that he and J controlled thirty-six shares of L Co.'s stock and gave notice to the other board members of a meeting in which he proposed to elect himself to the new position of chairman of the board and chief executive officer. On November 20, 2015, in an effort to block R from having majority control of L Co., E drafted a stock purchase agreement under which L Co. would issue to E twelve new shares and provide a loan to help him pay for the stock. At 1:50 p.m. that day, notice was sent via e-mail to the other board members, stating that the board would conduct a meeting at 2:15 p.m. to effectuate the stock purchase agreement. R, J and D were out of state at that time and did not attend the meeting, at which a contested majority of the board, including E and S, approved the stock purchase agreement. The next day, J and P, who also had voted to approve the stock purchase agreement, signed documents to revoke their votes, and E, S and M signed a document approving the removal of all board members in December, 2015, and declaring invalid any action taken after November 21. R proceeded with a board meeting on November 21 and 22, which E and S did not attend. At that meeting, a resolution was adopted declaring that proper notice had not been given for the November 20 meeting and that all business conducted at that meeting was invalid, as the dispute between the family members by that time had coalesced into a faction that consisted of R, J and D, and a faction that consisted of E, S and M. The two factions thereafter continued to conduct their own board meetings at which, among other things, they executed documents, adopted resolutions and named their own officers. M's shares were transferred to S in 2017, after the present litigation commenced. L Co. brought a declaratory judgment action against D, E, J, M and S seeking a determination, inter alia, of the number of shares that E owned, and the defendants filed cross complaints against each other seeking to determine the ownership of L Co.'s stock. The court determined that D had not created an irrevocable trust and that she owned her ten shares in November, 2015, when they were acquired by R. The court also found that R had the right to vote his thirty shares and that J had the right to vote his six shares in November, 2015, and that the issuance of twelve shares to E was invalid. On appeal, S and E claimed, inter alia, that the trial court improperly concluded that, because the November 20, 2015 board meeting was invalid, L Co.'s issuance of twelve shares of stock to E was invalid. *Held*:

1. S and E could not prevail on their claim that the trial court improperly determined that any trust D may have created in 2012 was revocable: the court's conclusion that it would have been improvident for D to create an irrevocable trust and that she mistakenly omitted the power

of revocation from the document was legally and logically correct and supported by the evidence, as the court's finding that D's concern regarding her marriage was transitory was not clearly erroneous in that her husband did not file for divorce until 2013, which did not become final until 2014, and S's agreement with D within forty-eight hours to rescind the transfer was evidence of S's recognition that D's marital concerns were transitory; moreover, contrary to the assertion by S and E that the court did not consider the relationship between D as settlor and D's children as beneficiaries insofar as that relationship ordinarily belies the need to revoke such a trust, the trial court specifically noted that the relationship was not discussed at trial, but there did not appear to be anything unusual about the relationship, and it did not undermine the court's conclusion, on the basis of all of the factors it considered, that D omitted the power of revocation by mistake; furthermore; the court did not improperly rely on the fact that D did not have counsel at the time she executed the purported trust document, as the absence of counsel was among other factors the court considered, S and D both maintained that D retained ownership of her shares until several years after the present litigation was commenced, and it appeared that S and E did not develop their trust theory until after the parties were embroiled in litigation.

2. The trial court properly determined that the special board meeting on November 20 was invalid due to inadequate notice and, therefore, that the sale of twelve shares of L Co. stock to E at that meeting also was invalid: notwithstanding the assertion by E and S that L Co. had a practice of calling board meetings on short notice, it was readily apparent that, by calling the meeting with only twenty-five minutes notice, E thwarted the underlying purpose of the notice requirement in L Co.'s bylaws and, thus, prevented board members from attending the meeting and opposing the stock purchase agreement; moreover, the evidence supported the court's finding that twenty-five minutes notice was insufficient under both the bylaws and the circumstances under which the notice was issued, as at least three board members were aware that three other board members were out of town at the time the notice was sent, the court appeared to credit the testimony of another board member that the meeting was called with minimal notice to prevent R's faction from attending, and two board members who voted to approve the stock purchase agreement shortly thereafter rescinded their votes.

Argued February 8—officially released August 2, 2022

Procedural History

Action for a judgment to determine, inter alia, the number of shares of the plaintiff's common stock owned by the defendant Edward Levene, and for other relief, brought to the Superior Court in the judicial district of

Stamford-Norwalk, where the defendant Robert Levene et al. filed cross complaints; thereafter, the case was transferred to the Complex Litigation Docket; subsequently, the court, *Lee*, *J.*, in accordance with the stipulation of the parties, bifurcated the trial to address first the validity of the parties' claims of ownership of the plaintiff's common stock; thereafter, Sally Levene, as executrix of the estate of Martin Levene, was substituted for the defendant Martin Levene; subsequently, the case was tried to the court, *Lee*, *J.*; judgment for the defendant Robert Levene et al., from which the defendant Edward Levene et al. filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Jeffrey R. Babbin, with whom was *Matthew Brown*, for the appellants (defendant Edward Levene et al.).

David P. Friedman, with whom was *Kristen L. Zaehringer*, for the appellees (defendant Robert Levene et al.).

Gregory J. Williams, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. In this dispute among family members over control of the family business, the defendants, Sally Levene (Sally), both individually and as executrix of the estate of Martin Levene (Martin),[1] and Edward Levene (Edward), bring these consolidated appeals from the judgment of the trial court determining that the defendants Robert Levene (Robert), Jeffrey Levene (Jeffrey), and Dorothy Kelly (Dot) owned the majority of the outstanding shares of common stock of the plaintiff, Levco Tech, Inc. (Levco). On appeal, Sally and Edward claim that the court improperly determined

[1] After Martin died on February 18, 2018, the court granted the motion filed by the plaintiff, Levco Tech, Inc., to substitute Sally, as executrix of the estate of Martin, in place of Martin.

that (1) Dot had not placed her ten shares of Levco stock in an irrevocable trust and (2) the issuance of twelve shares of Levco stock to Edward was invalid. We disagree and, therefore, affirm the judgment of the trial court.

The following facts, as found by the court in its comprehensive memorandum of decision, and procedural history are relevant to our resolution of this appeal. Levco is a family owned energy supply company that sells heating oil, provides related mechanical services, and acts as a broker for electric suppliers in Connecticut. In 1980, Levco was incorporated in Connecticut and, by 1985, had issued a total of seventy shares of common stock to Sally and Martin and their five children, Edward, Robert, Dot, Susan Levene (Susan), and Philip Levene (Philip). Each person owned ten shares of common stock.

From its founding, "Sally was the president of Levco and responsible for developing the business and maintaining the records. Martin was the secretary and the visionary who helped grow the business and involve family members. As pater familias, he also was a peacemaker between various family members. Edward and Robert were vice presidents. Sally and Martin wanted their children to develop a family business and intended for their children's stake to be shared equally, even though Edward and Robert were performing most of the work while Dot and Susan were working part-time. Martin set a policy that was followed through 2015, that any family members working full-time for Levco should be compensated equally . . . . [S]ince the early 1990s . . . Philip, Robert and Edward would take an equal salary and, if there were funds left over at the end of the year, a bonus would be distributed equally between them. Sally would also receive a bonus when income permitted. Martin did not take a salary.

"In subsequent years, Sally and Martin's grandchildren started to work for Levco as the third generation. Two of these grandchildren were Philip and [his wife] Jane's children, Jeffrey . . . and Allison Prainito ('Allison'). The general rule for members of the Levene family was that a position would be found for any member who wanted to work at Levco."

Levco's corporate office was in the lower level of Sally and Martin's residence in Stamford (Stamford office). "Levco's corporate records were maintained up to 2015, in a Green Corporate Book ('Green Book'), which includes Levco's certificate, [bylaws], minutes, and transfer ledger. Up to 2015, Sally was responsible for maintaining the Green Book and making entries therein. . . . The Green Book also includes the 'share records' of Levco's stockholders, which document the current issued and outstanding shares of Levco stock, along with shares that have been cancelled. Currently, many of the original certificates for shares of Levco stock ('certificates') are contained within the Green Book, but previously the original certificates were kept in a locked file cabinet in the Stamford office or in the possession of certain individual stockholders. . . . The Green Book was traditionally located in Sally's office (which subsequently became Edward's office) in the Stamford office. The office was unlocked, with the Green Book available for inspection by the stockholders up until at least November, 2015."

"Pursuant to the [bylaws], Levco stockholders elect members to Levco's Board of Directors ('board') at annual meetings of the stockholders. Levco stockholders also, from time to time, elected members to the board at a special meeting of the stockholders." Until 1991, the board was comprised of Martin, Sally, Edward, and Robert. "In 1991, Levco's stockholders increased the number of directors by electing Philip as the fifth member of the board along with Sally, Martin, Edward

and Robert. From 1991 through 1996, the board was comprised of these five members. During this time, Sally was president, Martin was secretary, and Edward, Robert and Philip were vice presidents.

"Since at least 1997, Robert voiced his displeasure with certain aspects of Levco management. Robert often complained about the equal compensation with his brothers, expressing a view that he was more valuable to Levco's success and should be paid more than his brothers. Sally, Edward, and Philip, accepting Martin's advice for the company, all believed that for the good of the company and family harmony, equal compensation for full-time employment should be maintained.

"In 1997, Levco's stockholders voted to amend the [bylaws] to permit up to ten directors and four vice presidents, and elected Dot and Susan to the board for a total of seven members. [The] board elected Sally as president, Martin as secretary, and Edward, Robert, Philip and Dot as vice presidents. . . . From September 26, 2009, to December 6, 2013, the board was comprised of seven members: Martin, Sally, Edward, Robert, Philip, Dot, and Susan. During this time, Sally was president, Martin was secretary, and Edward, Robert, and Philip were vice presidents."

"On July 15, 2012, Dot went to her parents' house to celebrate their anniversary. After dinner, Dot told her parents that she had been unable to reach her husband that day and that she feared that he might have gone looking for an apartment as a result of their marital difficulties. Dot said that it might be good to transfer her shares to Sally because she was concerned that her husband might interfere with Levco's business.

"During this conversation, Sally retrieved Dot's stock certificate no. 5 from an envelope. . . . Dot testified that Sally was in charge of arrangements for this transfer and that she did most of the writing.

"There are two entries on certificate no. 5 in Sally's handwriting that reflect the transaction. They were covered by [white correction fluid] at an unclear time by an unknown person, all witnesses having denied responsibility. . . . The stock transfer record for certificate no. 5 has a column entitled 'new certificate issued to' and, within that column, the words 'Sally Levene' are discernible, without reference to a 'trust' or the words 'Sally Levene, Trustee.' . . . The entry on the right side of the stock ledger corresponding to the column entitled 'to whom shares are transferred,' although also whited out, refers to 'Sally Levene,' without reference to a trust or trustee.

"The reverse side of certificate no. 5 contains a preprinted legend, as on all certificates of Levco stock, which provides for the transfer of the shares represented by the certificate irrevocably to an agent or attorney. Sally altered the legend so that it reads, 'For value received, the undersigned hereby sells, assigns and transfers unto Sally Levene, Stamford, CT, [please print or type name and address of assignee] 10 shares represented by the within [c]ertificate, and hereby irrevocably constitutes and appoints . . . [followed by a blank line] . . . Attorney to transfer the said shares on the books of the within-named [c]orporation with full power of substitution in the premises, Dated [blank].'

"Toward the end of their conversation on July 15, and after the bulk of the entries had been placed in the ledger and stock book, Sally told Dot that she did not want to benefit personally from the stock and that she wanted to hold the stock for the benefit of Dot's three sons. Dot testified that there was no other discussion about a trust, although Sally testified that Dot told her she wanted Sally to hold the stock in trust for her three sons. Dot and Sally did not discuss any terms of a trust, any aspects of trust administration, the trust duration (i.e., whether it was intended to last in perpetuity or

whether it would be terminated once the concerns that had given rise to the brief discussion about the trust had ceased), or any dispositive trust provisions. They did not discuss a 'backup' or successor trustee to take over fiduciary responsibilities in the event that Sally could no longer perform her duties as trustee. Nor did they make any effort to consult legal counsel to ensure the proper format of a trust.

"Sally then filled out a new certificate (i.e., certificate no. 9) relating to Dot's shares, which identified a transfer to Sally as trustee for Dot's three sons. Dot testified that, after she left her parents' house and went home, she changed her mind and decided that the transfer was not a good solution and decided that she should not go through with it. Whether on July 16 or 17, Dot returned to her parents' house and told Sally that she did not think the stock transfer was a good idea. Dot testified that Sally agreed with her. They then took steps to undo or void the transfer, making a new stock ledger entry identifying Dot as the owner of her ten shares, and voiding stock certificate no. 9. In addition . . . certificate no. 9 was cut in half. The stock transfer record for certificate no. 9 has the word 'VOID' written on it in capital letters. Dot and Sally both agreed that the transfer had been undone. Dot testified: 'we undid it the next day.' Sally agreed: 'She [Dot] said she changed her mind and so . . . I voided certificate no. 9.'

"Between 2012 [and] 2015, Dot voted her shares several times without objection. Dot also listed her Levco stock as an asset on her 2014 financial affidavit in marital proceedings. Sally testified that, from 2012 until this action was commenced on or about May 11, 2016, she believed that Dot owned her ten shares and testified that she did not believe that a trust was in effect over those years, although subsequent contradictory evidence was introduced at trial. Sally and Edward listed Dot as the owner of ten shares of Levco stock entitled

to vote on the voting lists created by them as late as February, 2016. Sally testified that it was 'only after the commencement of the lawsuit, at some point, I believed that Dot did not own her shares; that they were in trust.'

"After the commencement of this litigation, certificate no. 10 was issued at the request of Sally for the lost [or] destroyed certificate no. 9 on June 15, 2018. Edward recorded the issuance of these shares of Levco stock to Sally on the transfer ledger. At trial, a document entitled 'The Sally Levene 2012 Irrevocable Trust' was introduced. It was executed on March 26, 2018, and states: 'the grantor contemporaneously with execution hereof, assigns transfers and/or contributes to the trustee, and the trustee by execution of this trust agreement acknowledges receipt of the cash and/or property described on the Schedule A.' Schedule A identifies Dot's ten shares as the property to be transferred. Dot claims never to have seen this document until produced in discovery and asserts she would not have consented to Edward as a successor trustee, as provided in the document. The language of this document purports to establish a transfer of Dot's shares from Sally individually to a trust on March 26, 2018. The consequence of this purported transfer by Sally in her individual capacity in 2018 is that the stock was not held in a trust from 2012 until 2018. Sally, when asked at her deposition about the document, referred to it as a 'mistake.' "

"As of 2015, the company's business consisted mainly of fuel oil distribution, managed and operated largely by Robert, and an electric sales business, managed and operated largely by Edward. Edward was responsible for the marketing and sales in both the oil and electric businesses. Philip and Sally managed the financial operations and administrative aspects of the business, including for oil, at [the Stamford office]. . . . The business was stable and working well.

"Martin suffered a stroke in January, 2015. Sally was still president of Levco at this time but came under increasing time pressures from the business and the declining health of her husband. . . . These factors and Sally's age prompted members of the Levene family to increasingly consider Levco's future. Robert coordinated numerous ad hoc meetings and family gatherings in which Robert expressed his opinion that he should lead Levco. Robert also pressed Sally to resign as president.

"On June 5, 2015, Sally resigned as president after more than [twenty-five] years, effective June 7, 2015, with the understanding that Philip would become the next president. On June 7, 2015, the board elected the following slate of officers: Philip as president, Sally as secretary/treasurer, and Edward and Robert as vice presidents. . . .

"On July 18, 2015, Levco stockholders elected a board comprised of seven members: Edward, Robert, Philip, Jane, Allison, Jeffrey, and Dot. Also on July 18, 2015, the board elected the following slate of officers: Philip as president, Allison as secretary, and Edward and Robert as vice presidents. These were the officers as of November 17, 2015.

"In mid-2015, Robert wanted to lead Levco and to obtain majority control of Levco through ownership of a majority of Levco stock by purchasing various stockholders' shares. Robert coordinated a valuation of Levco and its stock and also sought to obtain employee compensation assessments. Robert convinced Philip to hire Nardozzi & Associates ('Nardozzi') to perform the valuation and to retain Oil Heat Associates to perform employee compensation assessments. Robert also enlisted Dot and Allison in his efforts to obtain a valuation and provide information to Nardozzi.

"On November 6, 2015, Robert sent an e-mail to Philip and copied Sally, Edward, Dot, Susan, Jane, and Doris (Robert's wife). The e-mail set forth three options: [1] that enough shareholders sell him their shares at a purchase price of $1,125,000 for ten shares so that he would be able to obtain at least a 51 percent or larger ownership percentage; [2] that he sell his shares at the price of $1,125,000 for ten shares; or [3] that the company correct its leadership problems.

"On November 9, 2015, Edward directed Allison to notice a special meeting of the stockholders for November 17, 2015, for the purpose of voting Sally back on the board. Dot signed a proxy for her ten shares to Robert on November 11, 2015. The effective dates listed on this proxy extended from November 12, 2015, to January 1, 2021. As part of this proxy, Robert agreed to purchase Dot's shares of Levco stock on January 1, 2021, but Dot retained the right to cancel the sale upon ninety days' notice. Two assurances were also listed in the proxy agreement: Robert would support the continued use of [the Stamford office] as an office for Sally and support Dot as the leader of the board's compensation committee. . . .

"Susan also signed a proxy for her ten shares to Robert on November 12, 2015, which Robert signed on November 12, 2015. The effective dates listed on this purported proxy extended from November 12, 2015, to January 1, 2016. As part of this proxy, Robert agreed to purchase and Susan agreed to sell Susan's shares on January 1, 2016, with payments of $800,000 due on December 1, 2015, and $325,000 due on January 1, 2016. As a result of these transactions, Robert had acquired voting rights to thirty shares of Levco stock. This included his original ten shares, an irrevocable proxy for Dot's ten shares, and an irrevocable proxy for Susan's ten shares.

"Jeffrey and Philip signed an option on November 11, 2015, for Jeffrey to purchase six of Philip's shares of Levco stock. . . . Jeffrey paid Philip $1000 for the option to purchase six shares of Levco stock. On November 12, 2015, Jeffrey signed a notice of execution of the option but apparently did not pay the full purchase price for these shares. . . .

"On November 12, 2015, Robert sent an e-mail to Philip, Jane, Sally, Edward, Dot, Susan, Jeffrey, Doris, and Allison providing documentation regarding these changes in ownership and voting rights of Levco. Robert believed that the voting right proportions were as follows: Philip—4 shares (5.7 percent); Jeffrey—6 shares (8.6 percent); Edward—10 shares (14.3 percent); Sally and Martin Levene—20 shares (28.6 percent); Robert Levene—30 shares (42.9 percent). As a result, Robert claimed that he and Jeffrey controlled 36 of the company's 70 issued shares. Robert attached the notice of exercise of Jeffrey's option, the option, and the two proxy agreements. Allison, then the secretary of the corporation, received copies of Susan and Dot's proxies to Robert, and Jeffrey's option documents with Philip. . . .

"On November 17, 2015, Philip signed a proxy to Jeffrey, and he and Jeffrey each brought a copy of the proxy to the . . . meeting. Also on November 17, 2015, the noticed meeting of Levco's stockholders was held for the purpose of voting Sally back on the board. Edward, Jeffrey, Martin, Philip, Robert, and Sally attended the meeting, which constituted a quorum pursuant to the [bylaws]. Sally was the only candidate to receive any votes. Edward, Martin, Philip and Sally voted for Sally's election to the board, for a total of 34 shares. Robert and Jeffrey voted against the motion, for a total of 36 shares, counting the proxies from Susan, Dot and Philip. Nevertheless, Edward declared that Sally was elected by a plurality of shares, apparently

citing to General Statutes § 33-712. This caused the board to have eight members, i.e., Sally, Edward, Robert, Philip, Jane, Jeffrey, Allison and Dot. Allison prepared and signed the meeting minutes, which minutes were placed in the Green Book.

"On November 18, 2015, Edward created a voting list based on the information that he had at the time, which listed Dot as a shareholder. Also on November 18, 2015, Philip sent an e-mail to Robert, Edward, Dot, Allison, Jane, Jeffrey and Dot stating his resignation as president of Levco . . . . On the same date, Robert sent an e-mail to Philip, Jane, Jeffrey, Sally, Edward, Allison and Dot, giving notice of a meeting of the board to be held on November 21, 2015. Robert included an agenda for this meeting in which he proposed electing himself to a new position of chairman of the board and chief executive officer. Robert also proposed separation of the Levco oil business from the Levco electric business and potentially selling the electric business, which Edward was running at the time. Edward and Sally opposed Robert's proposal.

"Two days later, on November 20, 2015, in an effort to block Robert's majority control, Edward drafted a proposed stock purchase agreement and loan agreement [stock purchase agreement], which he, Philip, Allison, Jane and Sally discussed and revised. The [stock purchase agreement] called for the issuance of twelve new shares to Edward with a loan of $1,350,000 from Levco to him at 4 percent interest due on November 14, 2030, to help him pay for the stock. After these discussions, the [stock purchase agreement] was signed by Philip, Edward, Allison, Jane, and Sally in the morning of November 20, 2015, around noon.

"Thereafter, Edward, Philip, Sally, Allison and Jane determined that a board meeting was necessary to effectuate this document. Pursuant to the [bylaws]: 'Special

meetings [of the board] may be called by or at the direction of the [c]hairman of the [b]oard, if any, of the President, or of a majority of the directors in office.' 'Written, oral, or any other mode of notice of the time and place shall be given for special meetings in sufficient time for the convenient assembly of the directors thereat.' 'A majority of the entire [b]oard shall constitute a quorum except when a vacancy or vacancies prevent such majority, whereupon a majority of the directors in office shall constitute a quorum, provided such majority shall constitute not less than the greater of at least two persons or at least one-third of the entire [b]oard. . . . Except as herein otherwise provided, the act of the [b]oard shall be the act, at a meeting duly assembled, by vote of a majority of the directors present at the time of the vote, a quorum being present at such time.'

"At approximately 1:50 p.m., Allison sent out an e-mail notice of the meeting on behalf of the majority of the board as represented by five of the eight members, i.e., Edward, Philip, Sally, Jane, and Allison. The signed version of the [stock purchase agreement] was attached to the notice for a board meeting. The meeting was scheduled for 2:15 p.m., which time was chosen to accommodate a doctor's appointment for Allison that afternoon. Philip and Jane wished to leave relatively early, and the members agreed that 2:15 p.m. was the time when they were all available.

"Robert and Jeffrey were driving back from Maine on this day, leaving about 11 a.m., after having driven there to pay Susan the first installment payment for her stock. Robert was driving, and Jeffrey was in the passenger seat. Jeffrey was checking his phone and read the notice from Allison around 2:30 p.m. Robert pulled over and also read the notice from Allison. Robert and Jeffrey decided to call attorneys. Robert and Jeffrey arrived back in Norwalk between 4 and 4:30 p.m., after the conclusion of the meeting, which lasted

about fifteen minutes. Philip, Jane and Allison knew that Jeffrey and Robert were in Maine but did not call them about the meeting after Allison sent the e-mail notice.

"Dot was in a meeting in New York City, having recently returned from a trip abroad. She acknowledged seeing the e-mail notice before 2:15 p.m. She believes that she called . . . but was unable to get through to the meeting. Dot then returned to Stamford and met with Philip and Jane. On the way back, Dot called Robert and Jeffrey.

"At the November 20, 2015 meeting of the board, a contested majority of the board (i.e., Edward, Philip, Allison, Jane, and Sally) voted in favor of the [agreement] for the sale of twelve shares of Levco stock. . . . Thereafter, Levco issued a check signed by Sally to Edward representing the loan of $1,350,000 to pay for the stock, and Edward endorsed the check to Levco for the purchase of the twelve additional shares. . . . Twelve shares of Levco stock were issued to Edward as reflected on certificate no. 11 and recorded by Edward in the Green Book. The [stock purchase agreement] is also included in the Green Book.

"Robert spoke with Dot, Philip, Jane, Jeffrey and Allison on the night of November 20, 2015, and into the morning of November 21, 2015. Following these discussions, Jane and Philip signed identical documents purporting to revoke their board votes for the [stock purchase agreement].

"On November 21, 2015, Edward, Sally, and Martin signed a stockholder action without meeting recorded in the Green Book approving the removal of all members of the board effective as of December 16, 2015, and declaring invalid any action, resolution, or vote taken on or after November 21, 2015. The notice of this action was given to all shareholders. Edward and Sally

claim that the action without meeting was signed by stockholders who were holding at least 42 of 82 shares of Levco.

"Robert proceeded with a board meeting in Norwalk on November 21 and 22, 2015, which was attended by Philip, Jane, Jeffrey, Robert and Dot. Robert refused to move the meeting to Stamford despite requests by Sally, who did not want to leave Martin alone. Edward did not attend because he believed it was not a valid board meeting. Robert's board minutes indicate, among other things, that the group revised the minutes of the November 17 stockholder meeting to reverse Sally's election to the board. The minutes also indicate that the group adopted a resolution finding that the meeting of November 20, 2015, lacked proper notice and that all business conducted at the meeting was invalid. The minutes noted that the 'corporate stock certificate book showing the recorded shares is missing' (i.e., the Green Book) and that Jane would create a new one (subsequently referred to as the 'Black Book'). The minutes indicated that Sally, Martin, Edward and Dot had ten shares, with Dot having given a proxy for her shares to Robert, and that Robert had twenty shares, Jeffrey six shares and Philip four shares. The group elected Robert as [chief executive officer (CEO)]/president, Philip as vice president, Jeffrey as vice president/treasurer, and Jane as secretary. At this time, both Robert and Dot had asked for the Green Book. Edward provided copies of the Green Book to Dot and Jane but moved the Green Book to another location in the corporate office and then later off-site in early 2016.

"A purported stockholder action without meeting dated November 27, 2015, was executed by Edward, Sally and Martin, which attempted to limit the size of the board to three, effective December 23, 2015. On November 28, 2015, a board meeting attended by Philip, Jane, Jeffrey, Robert, Dot, and Edward was held. The

minutes refer to an amendment to the [bylaws] providing that the board may only authorize the issuance of shares with approval of a majority of the voting power of the shareholders.

"On December 4, 2015, Philip sent an e-mail to his siblings and Sally, stating that neither he nor Jane wanted to be in the midst of a shareholder dispute and that neither were going to attend any further board or shareholder meetings until the dispute was resolved. Apparently, Robert took this message as a resignation from the board, which was accepted later that day at a board meeting attended by Jeffrey, Robert and Dot. The minutes stated that the board consisted of Edward, Dorothy, Robert, Jeffrey and Jane.

"On December 7, 2015, a shareholders meeting was held with Robert, Dot, Philip, Sally, Edward and Jeffrey in attendance, according to minutes taken by Jane as secretary. Attorneys Gregory Williams and Edward Lerner attended for Levco and Edward, respectively. Robert and Edward presented competing eligible shareholder voting lists. Neither was adopted. Discussion included resolving the factions' differences by arbitration or court proceedings. The location of the Green Book was questioned. The continued operation of the two divisions of the company was also proposed. The meeting broke up after half an hour with no resolutions or votes taken.

"By now, the dispute within the Levene family had coalesced into two factions, which continued as of the time of trial, i.e., Robert's faction, consisting of Robert, Jeffrey and Dot, which operated the fuel oil business, and Edward's faction, consisting of Edward, Sally and Martin, prior to his decease, which operated the electricity business.

"On December 15, 2015, Allison and Philip executed a separation agreement between Levco and Allison. Dot

had executed the separation agreement the previous day as the '[Board's] Compensation Committee Chair.' [The separation] agreement called for the payment to Allison of $60,000 in exchange for her release and agreement not to sue. It also called for Allison's agreement to revoke her consent to the [stock purchase agreement].

"On February 12, 2016, a continued shareholders meeting took place, with Dot, Edward, Jeffrey, Robert and Sally in attendance. Neither side accepted the other's voting list, and Robert's faction left the meeting. In their absence, Edward's faction adopted eight resolutions, including a limitation of the board to three members and specifying them to be Edward, Philip and Sally; invalidating actions of the board taken after November 21, 2015; providing that there would be only one official corporate record book, e.g., the Green Book; requiring a two-thirds vote of the voting power to authorize future actions of the shareholders or directors; and adopting a voting list dated November 17, 2015, as follows: Dot—ten shares, Edward—twenty-two shares, Martin—ten shares, Philip—ten shares, Sally—ten shares, and Susan—ten shares.

"Edward's faction also held a board meeting on February 12, 2016, at which Sally was named president, Philip, vice president, and Edward, vice president and secretary. Various other motions were passed consolidating the right of Edward's faction to act on behalf of Levco.

"On February 16, 2016, a shareholders meeting was held, which Robert, Edward, and Jeffrey attended with Attorneys Gregory Williams and Michael Leventhal. The meeting broke down when Attorney Leventhal refused to leave and Edward sought to chair the meeting instead of Robert. Eventually, Edward and Attorney Leventhal left the meeting. The meeting continued and, among other things, [the shareholders] voted to replace the

existing board with Robert, Jeffrey and Dot. Edward's faction purported to continue the meeting sine die.

"On February 17, 2016, Philip entered into a severance agreement with Levco signed by Robert, pursuant to which Philip sold his remaining four shares to Levco and received a severance payment and several other benefits. Philip's share certificate no. 8 remains recorded on the share record in the Green Book with no signature evidencing transfer. The Black Book contains an affidavit attested by Philip that certificate no. 8 was lost and replaced by certificate no. 12 transferring four shares to Philip and certificate no. 13 transferring six shares to Jeffrey. A voting list prepared for a shareholder meeting in October, 2017, implies that Philip's shares were retired. Also on February 17, 2016, Jane entered into a severance agreement with Levco signed by Robert.

"On February 18, 2016, Robert's faction held a board meeting at which Robert was appointed CEO, president, and treasurer, and Jeffrey [was appointed] vice president and secretary. [The board] also approved the severance agreements with Philip and Jane. On February 21, [2016], Edward's faction held a board meeting at which Robert and Jeffrey were suspended as employees of Levco, barred from its premises in Stamford and Norwalk, and otherwise deprived of authority to use or remove any corporate assets. Robert and Jeffrey continued to operate the fuel oil business from Norwalk. Edward agreed to hire back Philip at [the Stamford office] almost immediately after the severance. Philip returned as a half-time independent contractor consultant and has continued to work for Levco at [the Stamford office].

"On July 8, 2016, Dot resigned from the board. Robert and Dot subsequently executed an irrevocable proxy agreement that replaced Dot's option and put into effect

her requirement to sell in May, 2019. Sally provided Edward a proxy for her shares as of September 4, 2016. The shares originally issued to Martin were transferred to Sally on June 15, 2017. Sally recorded the issuance of these shares of Levco stock on the transfer ledger in the Green Book. The shares originally issued to Sally and Martin, held by Sally as of June 15, 2017, were subsequently transferred to the Sally Levene Levco Stock Administrative Trust. A certificate was issued to Sally Levene, Trustee of the Sally Levene Levco Stock Administrative Trust on June 15, 2018. Edward recorded the issuance of these shares of Levco stock on the transfer ledger in the Green Book. . . . Both factions have continued to hold contested shareholders and directors meetings." (Footnotes omitted.)

In May, 2016, Levco commenced the underlying action against Dot, Edward, Jeffrey, Martin, and Sally, seeking a declaratory judgment stating the number of shares of Levco owned by Edward. Robert and Jeffrey jointly filed a cross complaint against Edward, Sally, and Martin, seeking, inter alia, a judgment declaring that (1) there are sixty-six shares of Levco stock and that, with respect to the right to vote those shares, Sally, Martin, and Edward each control ten shares, Jeffrey controls six shares, and Robert, as the holder of Dot's proxy, controls thirty shares; (2) Jeffrey's purchase of six shares from Philip and Levco's redemption of Philip's four shares are valid and effective; (3) Dot's proxy agreement to Robert is valid; (4) Robert's purchase of Susan's ten shares is valid; (5) the stock purchase agreement is invalid and ineffective; and (6) all actions taken by Edward on or after November 18, 2015, are invalid. Dot also filed a cross complaint against Edward and Sally seeking a declaratory judgment stating the number of shares Dot owns.[2]

[2] The revised cross complaint included six counts against Edward, six counts against Sally, and two counts against Martin. Counts one, four, seven, nine, eleven, and thirteen were directed against Edward and sought a declara-

Edward and Sally each filed a cross complaint against Robert and Jeffrey seeking, inter alia, a judgment declaring that (1) there are eighty-two outstanding shares of Levco stock because the stock purchase agreement is valid and effective; (2) Dot transferred ten shares to Sally as trustee for her three children on July 15, 2012, and, therefore, her proxy agreement with Robert is invalid and ineffective; (3) Jeffrey does not own any shares because Philip has not transferred any of his ten shares; (4) Susan has not transferred any of her ten shares; (5) Sally was elected to the board on November 17, 2015; and (6) all actions taken by Robert and Jeffrey on behalf of Levco since November 20, 2015, are invalid and ineffective.[3]

On November 16, 2018, the parties stipulated that the trial of the case would be bifurcated and that, in the first phase of the trial, the court would determine the validity of the claims of ownership of Levco stock and, therefore, who controls Levco. The parties submitted various questions to be answered by the court, which the court distilled to three primary issues: (1) whether Dot owned her shares when she sold a proxy to Robert in 2015; (2) whether Philip's sale of six of his ten shares

tory judgment; a determination as to the validity of Edward's alternative board; the removal of Edward's alternative board; inspection of corporate records; a writ of mandamus to inspect books and records; and to enjoin ultra vires acts. Counts two, five, eight, ten, twelve, and fourteen sought the same relief against Sally. Counts three and six were directed against Martin and also sought a declaratory judgment and a determination as to the validity of Edward's alternative board.

[3] Edward's cross complaint included four counts against Robert and Jeffrey. In the first three counts, Edward sought a declaratory judgment, the removal of Robert and Jeffrey from the board, and to enjoin ultra vires acts. In count four, he asserted a breach of fiduciary duty claim.

Sally's cross complaint included nine counts against Robert and Jeffrey. Counts one through four mirrored the four counts of Edward's cross complaint. In counts five through nine, Sally asserted derivative claims for fraud, a violation of the Connecticut Uniform Securities Act, General Statutes § 36b-2 et seq., statutory theft under General Statutes § 52-564, conversion, and unjust enrichment.

to Jeffrey was valid; and (3) whether the issuance of twelve shares to Edward pursuant to the stock purchase agreement was valid.

At trial, Edward and Sally claimed that (1) Dot created an irrevocable trust for the benefit of her three children when she transferred her shares to Sally and, therefore, did not own the shares when she gave Robert a proxy in 2015, (2) Philip's sale of six shares to Jeffrey was invalid because the shares were issued to Philip and his wife, Jane, jointly, and Jane did not sign the documents effecting the transfer to Jeffrey, and (3) the stock purchase agreement was valid. For their part, Robert, Jeffrey, and Dot claimed that (1) Dot's proxy was valid because she never created a trust or, alternatively, because the trust was revoked within forty-eight hours after its creation; (2) Philip individually owned the ten shares; and (3) the November 20, 2015 special meeting of the board, during which the board approved Edward's stock purchase agreement, was invalid due to insufficient notice of the meeting.

After a trial, which spanned nine days, the court issued a memorandum of decision resolving the three principal issues in favor of Robert, Jeffrey, and Dot. First, the court rejected Edward and Sally's claim that Dot had created an irrevocable trust and found that Dot owned her shares in November, 2015, when she issued a proxy to Robert. Second, the court found that Philip owned the ten shares individually and, therefore, that Robert had the right to vote thirty shares and Jeffrey had the right to vote six shares as of November 17, 2015.[4] Consequently, the court determined that Sally was not elected to the board on November 17, 2015, because Robert and Jeffrey's thirty-six votes against Sally's election constituted the majority of the seventy outstanding shares of Levco.[5] Last, the court determined

[4] Edward and Sally have not challenged this finding on appeal.

[5] On appeal, Edward and Sally claim that the court improperly determined that Sally was not elected to the board at the November 17, 2015 meeting.

that the issuance of twelve shares of stock to Edward on November 20, 2015, was invalid because (1) twenty-five minutes notice of the special meeting of the board was insufficient, (2) Edward was not a disinterested director qualified to vote on the resolution, and (3) Philip and Jane rescinded their support of the resolution several hours after voting for it. These appeals followed.[6] Additional facts will be set forth as necessary.

I

Edward and Sally first claim that the court misapplied the doctrine of mistake in finding that Dot created a

They argue that, pursuant to § 33-712 (a), because Levco's certificate of incorporation was silent as to the method of electing directors to the board, the plurality rule applied and, therefore, Sally was elected to the board by a plurality of the votes.

At oral argument before this court, however, counsel for Edward and Sally acknowledged that if this court determines that the court properly concluded that (1) Dot revoked the trust and (2) the issuance of twelve additional shares to Edward was invalid, the issue regarding whether Sally was elected to the board on November 17, 2015, would be moot because Robert and Jeffrey would control the board, as they would have the right to vote the majority of the outstanding shares of Levco.

[6] In Docket No. AC 44417, Edward and Sally, both individually and as executrix of Martin's estate, appealed, challenging the judgments on Levco's complaint, Dot's cross complaint against Edward and Sally, and the two counts of Robert and Jeffrey's revised cross complaint against Martin. See Practice Book § 61-3 ("judgment disposing of only a part of a complaint, counterclaim or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim or cross complaint brought by or against a particular party or parties").

Because the court's decision did not dispose of all of the counts in the cross complaints brought by or against Edward, Sally, Robert, and Jeffrey, Edward and Sally filed a motion pursuant to Practice Book § 61-4, requesting that the trial court make a written determination that the issues resolved by the judgment are so integral to the outcome of the case that the delay incident to the appeal would be justified. The trial court granted the motion, and this court subsequently granted Edward and Sally's motion for permission to file an appeal challenging the judgments on (1) counts one, two, four and five of Robert and Jeffrey's revised cross complaint; (2) count one of Edward's cross complaint against Robert and Jeffrey; and (3) count one of Sally's cross complaint against Robert and Jeffrey. This resulted in Edward and Sally filing a separate appeal, docketed as AC 44597. This court later ordered that AC 44597 be consolidated with AC 44417.

revocable trust in July, 2012. For their part, Robert, Jeffrey, and Dot claim that the court found that Dot transferred her shares to Sally individually and not to a trust and that, assuming arguendo a trust was created, the court properly found that it was revoked. We note that the parties dispute whether the court found that Dot created a trust when she transferred her Levco stock to Sally. Although the court's decision is ambiguous in this respect, because we conclude that the court properly found that any trust that may have been created was revoked, we need not resolve the ambiguity.

The following additional facts are relevant to this claim. In its memorandum of decision, the court cited *Goytizolo* v. *Moore*, 27 Conn. App. 22, 604 A.2d 362 (1992), for the relevant legal principles regarding the revocability of trusts: "General principles of trust construction require an express reservation of the right to modify, amend, or revoke a trust. . . . One exception to this rule is in cases where the settlor mistakenly omitted the power to revoke the trust. . . . Certain factors are relevant in determining whether the settlor intended to reserve the power to revoke a trust and by mistake omitted such a power in the trust instrument. Some of these factors are: (1) the fact that the creation of the trust without reserving power of revocation would be an improvident act of the settlor; (2) the fact that the settlor when he created the trust did not have independent legal advice; (3) the relationship between the settlor and the beneficiaries; (4) the reasons which induced the settlor to create the trust . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 27.

After setting forth the relevant law, the court addressed the issue as follows: "[T]he essential facts are clear. Dot transferred her ten shares of stock to Sally. It appears that Sally told Dot she would hold the shares for the benefit of Dot's children. The word 'irrevocable' was not mentioned. One or two days later,

Dot and Sally agreed to rescind the transfer and consistently maintained that Dot retained ownership of her shares until several years after the litigation was commenced.

"The initial conversation was brief and without the benefit of counsel. However, applicable authority holds that a trust can be created orally and without formal discussion of a trust. Given Dot's interest in keeping her stock out of her husband's hands, the court concludes that it was likely that Dot intended to create a trust. However, there is no satisfactory or credible evidence of their intent to make the trust irrevocable or that the topic was even discussed.

"Regardless of whether Dot and Sally actually established a trust on [July] 15, 2012, the court concludes that they revoked it one or two days later. In keeping with the relevant factors discussed [previously], the court finds that (1) the creation of a trust without a power of revocation was improvident because the cause was transitory (i.e., marital instability), but the importance of voting stock in a successful, closely held family company was not, (2) Dot did not have independent legal advice when she transferred her stock to her mother, (3) the relationship between Dot and her children was not addressed at trial, but there is no reason to believe that it was in any way unusual, and (4) the reasons that induced Dot to transfer the stock, as mentioned previously, were transitory, and it appears that the marital tension lessened for a time thereafter. Further, the court concludes that there was no meeting of the minds as to the irrevocability of the transfer because it was not discussed.

"The law of trusts is not meant to be a trap for the unwary; *Loomis* v. *Marshall*, 12 Conn. 69, 77 (1837); but, rather, to protect the intent of the settlor. In this case, the interests of Dot, the purported settlor, are

best served by holding that any trust created in 2012 was revoked in 2012, and that Dot retained her shares, as acknowledged by Dot and Sally and by the parties' course of dealing in recognizing the validity of her voting her shares for several years in the future.

"As a result, Dot owned her shares when she granted a proxy to Robert in November, 2015."

We begin our analysis with the applicable standard of review. Edward and Sally argue that the court misapplied the relevant legal standard to the facts found, which presents a mixed question of law and fact. "[S]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. . . . [Such questions require] plenary review by this court unfettered by the clearly erroneous standard. . . . When legal conclusions of the trial court are challenged on appeal, we must decide whether [those] . . . conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Crews* v. *Crews*, 295 Conn. 153, 162–63, 989 A.2d 1060 (2010). Accordingly, "we review the subsidiary findings of historical fact, which constitute a recital of external events and the credibility of their narrators, for clear error, and engage in plenary review of the trial court's application of . . . legal standards . . . to the underlying historical facts." (Internal quotation marks omitted.) *ASPIC, LLC* v. *Poitier*, 208 Conn. App. 731, 742, 267 A.3d 197 (2021).

We now turn to this court's decision in *Goytizolo* v. *Moore*, supra, 27 Conn. App. 22, on which the trial court relied and which Edward and Sally agree illustrates the proper application of the doctrine of mistake. In *Goytizolo*, in August, 1955, after purchasing a parcel of real estate, the defendant conveyed the property by quitclaim deed to her mother in trust for the plaintiff, the

defendant's daughter. Id., 23. In 1973, the defendant's mother conveyed the same property by quitclaim deed to the defendant in trust for the plaintiff. Id. In 1987, the defendant, both individually and as trustee for the plaintiff, conveyed the property by quitclaim deed to her husband without mentioning the trust, and her husband then conveyed the property by quitclaim deed back to the defendant, also without mentioning the trust. Id., 24. The plaintiff sought to have the 1987 conveyances between the defendant and her husband declared null and void. Id. The trial court found that the defendant had created an enforceable trust in favor of the plaintiff and ordered the defendant to convey the property to the plaintiff. Id.

On appeal, this court affirmed the trial court's finding that a trust was created and proceeded to consider whether the trust was revocable. See id., 26. The defendant argued that "she established a trust in order to shelter her real estate property only until such time as she had automobile insurance coverage, and that once that purpose no longer existed, she would be able to regain title." Id. Relying on the factors set forth in the Restatement (Second) of Trusts, this court determined that the trust was irrevocable.[7] See id., 27–28. The court reasoned that "there was no reservation of the right to revoke the trust. Nor was there anything to indicate that the defendant mistakenly omitted the right to revoke. Nothing suggests that the creation of the trust without a power of revocation was an improvident act. The defendant-settlor consulted an attorney who drafted the August 1955 deed. The relationship between the settlor and the beneficiary as mother and daughter is a factor in favor of the creation of a trust, and the

[7] Although the relevant section of the Restatement (Third) of Trusts was published in 2003, before Dot transferred her shares to Sally in 2012, the trial court relied on the Restatement (Second) of Trusts, which was published in 1959. The parties likewise rely on the Restatement (Second) of Trusts and do not address the applicability of the Restatement (Third) of Trusts.

enduring nature of that relationship ordinarily belies the need to revoke a trust for the benefit of either. Even if the defendant's testimony regarding her reasons for creating the trust were true, many years elapsed after the defendant became insured during which period nothing was recorded on the land records that attempted to revoke the trust." Id., 28. As this court's decision in *Goytizolo* demonstrates, the question of whether the settlor of the trust mistakenly failed to state that the trust was revocable is fact intensive.

The facts involved in *Goytizolo* are markedly different from those in the present case. In *Goytizolo*, the settlor had consulted an attorney who prepared the deed creating the trust, whereas Dot spontaneously decided to give her Levco shares to Sally without consulting an attorney regarding the transfer or the creation of a trust. In addition, in *Goytizolo*, despite her claim regarding the transitory nature of the concerns that prompted her to create the trust, the settlor did not seek to revoke the trust for "many years" after those concerns had dissipated. In the present case, by contrast, within a day or two after Dot transferred her shares to Sally, they both "agreed to rescind the transfer and consistently maintained that Dot retained ownership of her shares until several years after the [present] litigation was commenced."[8] In fact, it appears that Sally

[8] Edward and Sally highlight comment (c) to § 332 of the Restatement (Second) of Trusts, which provides: "The statement or testimony of the settlor made or given after the creation of the trust that at the time he created the trust he believed that he had power to revoke it is not of itself a sufficient ground for reforming the instrument and permitting him to revoke the trust. His statement or testimony, however, may be sufficient if corroborated by other evidence, or the other evidence may be sufficient without his statement or testimony. The reason is that such statement or testimony is unreliable since the settlor may easily be mistaken as to his former state of mind or may misrepresent it." 2 Restatement (Second), Trusts § 332, comment (c), pp. 146–47 (1959).

In the present case, Dot's testimony regarding her state of mind at the time she created the trust was corroborated by Sally's testimony that she agreed to rescind the transfer a day or two afterward.

and Edward did not develop their trust theory until after the parties were already embroiled in litigation. Given these distinctions, we find no inconsistency between the application of the Restatement factors in *Goytizolo* and the court's analysis in the present case.

Edward and Sally contend that the court failed to consider the relationship between the settlor and beneficiaries. They highlight this court's reasoning in *Goytizolo* that the mother-child relationship between the settlor and beneficiary "ordinarily belie[d] the need to revoke a trust for the benefit of either." *Goytizolo* v. *Moore*, supra, 27 Conn. App. 28. They argue that the court failed to consider this factor and that, because the beneficiaries were Dot's children, this factor supports a finding of irrevocability. The court, however, did not omit this factor from its analysis. Indeed, the court specifically noted that the relationship between Dot and her children was not discussed during the trial, but there did not appear to be anything unusual about the relationship. Moreover, there is no requirement that the court give greater weight to any particular factor under the analysis. Therefore, even if this factor weighs in favor of irrevocability, it does not undermine the court's conclusion, on the basis of all of the factors it considered, that Dot omitted the power of revocation by mistake.

Edward and Sally next argue that the court erred in finding that it would have been improvident for Dot to create an irrevocable trust because "the undisputed purpose of Dot's trust was to shield Dot's assets from her husband, underscoring that irrevocability was key to effectuating Dot's intent." In support of this argument, they direct our attention to comment (h) to § 332 of the Restatement (Second) of Trusts, which provides in relevant part: "The reasons for which the trust was created may indicate that the settlor intended to reserve a power of revocation, although no such power was

reserved in the trust instrument. Thus, if it is shown that the reason of the settlor for creating the trust was to meet a temporary emergency, this is evidence that he did not intend to make the trust irrevocable.

"On the other hand, the reason for which the trust was created may indicate that he did not intend to reserve a power of revocation. Thus, where the reason of the settlor for creating the trust was to prevent her husband from reaching the property or to prevent her children from bringing pressure to bear upon her to convey the property to them, these circumstances tend to support the inference that the settlor did not intend to reserve a power of revocation." 2 Restatement (Second), Trusts § 332, comment (c), p. 148 (1959).

They argue that "Dot's scenario is literally hornbook law. . . . She sought to place assets beyond the reach of her soon-to-be ex-husband, and Dot made sure of it by creating an irrevocable trust, which could not be invaded." To be sure, the general factual scenario described in the Restatement (Second) of Trusts could be seen as describing Dot's situation in 2012, if Dot's concern was firmly held. The court, however, found, based on the evidence before it, that that was not the case.

Specifically, the court found that Dot's concern regarding her marriage was transitory and that "the marital tension lessened for a time" after the transfer to Sally. Edward and Sally contend that the marital instability was not transitory because her husband filed for a divorce in 2013. Notwithstanding the ultimate breakdown of Dot's marriage, which Edward and Sally maintain underscores that the marital instability was not transitory, the court heard evidence to the contrary. With regard to the events in July, 2012, Dot testified that she thought her husband had looked for an apartment, but she explained: "I wasn't getting a divorce. My husband didn't move out [until] many months later

and didn't file for divorce until the next year. And then we didn't get divorced until September 25, 2014." In addition, the fact that Sally, Dot's mother and the person who suggested holding the shares for the benefit of Dot's children, readily agreed within forty-eight hours to rescind the transfer is evidence that she, too, recognized Dot's marital concerns at the time of the transfer were transitory. Although the court's ultimate conclusion as to whether Dot made a mistake when she failed to state that the trust was revocable is a mixed question of law and fact subject to plenary review, the court's subsidiary factual finding that Dot's concern was transitory is subject to the clearly erroneous standard of review. See, e.g., *ASPIC, LLC* v. *Poitier*, supra, 208 Conn. App. 742. Further, it is well established that "the trier of fact is not required to draw only those inferences consistent with one view of the evidence, but may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *Palozie* v. *Palozie*, 283 Conn. 538, 552, 927 A.2d 903 (2007). On the basis of the evidence before the court, including Dot's and Sally's testimony, we cannot say that the court's finding is clearly erroneous.

Last, Edward and Sally claim that the court improperly relied on the absence of counsel to overcome the presumption of irrevocability. They rely on comment (b) to § 332 of the Restatement (Second) of Trusts, which provides in relevant part: "[T]he mere fact that the settlor did not have independent legal advice before he executed the trust instrument is not of itself sufficient evidence that the power of revocation was omitted by mistake." 2 Restatement (Second), supra, § 332, comment (b), p. 146. Notably, however, the court considered the absence of counsel among other factors, including the improvidence under the circumstances of making the trust irrevocable. Accordingly, the court did not

rely on the "mere" absence of counsel to support its conclusion, and we are not persuaded that the court's reliance on this factor, among others, was improper.

In sum, the court's conclusion, on the basis of its consideration of the relevant factors, that Dot had omitted the power to revoke the trust by mistake is legally and logically correct and is supported by the evidence in the record.[9]

II

Edward and Sally next claim that the court erred in concluding that the issuance of twelve additional shares of Levco stock to Edward was invalid. We are not persuaded.

The following additional facts are relevant to this claim. The court concluded that the issuance of twelve shares to Edward was invalid for three distinct reasons. "First, twenty-five minutes' notice of the special meeting of the board on November 20, 2015, was insufficient. Article II, § 5, of Levco's [bylaws] states that 'written, oral, or any other mode of notice of the time and place

[9] Shortly before oral argument, Robert, Jeffrey, and Dot, pursuant to Practice Book § 67-10, filed a notice of supplemental authority regarding Connecticut's adoption of the Uniform Trust Code, General Statutes § 45a-499a et seq., effective as of January 1, 2020. At oral argument before this court, they argued that General Statutes § 45a-499oo, which provides that a settlor may revoke a trust unless the terms of the trust expressly provide that it is irrevocable, applies retroactively to the present case. Although § 45a-499oo (a) provides that this provision "shall not apply to . . . a trust created under an instrument executed before January 1, 2020," they claim that the statute nevertheless applies to oral trusts because General Statutes § 45a-499c (30) defines "trust instrument" as "any instrument executed by the settlor . . . that contains terms of the trust, including any amendments thereto." Accordingly, they argued that the statute applies in the present case because there is no trust instrument, as Edward and Sally claimed that Dot created an oral trust. We question the soundness of this proffered construction of the statute. Nevertheless, because we find no error in the court's conclusion that Dot's trust was revocable, we do not address whether the new statutory presumption of revocability applies retroactively to oral trusts created prior to January 1, 2020.

shall be given for special meetings in sufficient time for the convenient assembly of the directors thereat.' Robert and Jeffrey were returning from Maine, and Dot was at a function in New York City, while the other board members agreed on the plan to issue twelve additional shares to Edward. Their absence from Fairfield County was known to at least three of the other board members, i.e., Philip, Jane and Allison. Allison testified that the notice seemed calculated to avoid their participation. The excuses of a doctor's appointment for Allison and Philip's desire to leave work early are insufficient to justify the minimal notice given, especially when the meeting only lasted a few minutes.

"Second, Edward was not a disinterested director qualified to vote on the resolution. He was plainly benefited by the issuance of valuable stock to be paid for with proceeds of a long-term loan from the company and so had a conflicting interest in the transaction. As a result, the only directors at the meeting qualified to vote for the resolution were Philip, Jane and Allison, which is neither a quorum nor a majority of the qualified directors (counting Robert, Jeffrey and Dot, and not counting Sally). . . . As a result, the vote was insufficient to authorize the issuance of the twelve shares to Edward.

"Third, several hours after voting for the resolution, Philip and Jane signed a rescission of their support of the resolution. A meeting of the directors had been scheduled for the next day, November 21. Edward sought to prohibit the board from adopting a formal rescission by initiating an action of stockholders without meeting that fired all the directors. However, this stratagem failed because Edward's newly issued twelve shares were invalid and, as a result, a majority of the shareholders did not support the action. As a result, the board's meeting on November 21, at which, among other things, the actions of November 20 were rescinded,

was valid. Another purported stockholder action without meeting to limit the number of board members to no more than three was also invalid because it was not supported by a majority of the stockholders." (Citation omitted.)

On appeal, Edward and Sally claim that the court improperly concluded that (1) the November 20, 2015 board meeting was invalid due to inadequate notice of the meeting, (2) Sally's election to the board was invalid and, consequently, that she was not qualified to vote to approve the stock purchase agreement at the November 20, 2015 board meeting, and (3) Philip, Jane, and Allison properly rescinded their votes to issue the twelve additional shares to Edward. Because we conclude that the court properly determined that the November 20, 2015 board meeting was invalid due to insufficient notice of the meeting, we do not address the remaining claims regarding Sally's election to the Board and the rescission of the votes. See footnote 5 of this opinion.

Whether the court properly determined that the notice of the special meeting was insufficient under Levco's bylaws also presents a mixed question of law and fact. Thus, as previously noted in part I of this opinion, "we review the subsidiary findings of historical fact . . . for clear error, and engage in plenary review of the trial court's application of . . . legal standards . . . to the underlying historical facts." (Internal quotation marks omitted.) *ASPIC, LLC* v. *Poitier*, supra, 208 Conn. App. 742.

As a general rule, "notice of a special meeting must be given to every director unless there is some express provision in the charter or bylaws or established usage to the contrary, or unless it is impossible or impracticable to do so. . . . Notice to all directors is required because when a number of directors are elected to manage the affairs of the corporation, it is contemplated

that the corporation shall have the benefit of the judgment, counsel and influence of all of those directors. Thus it is only right to hold that, in the absence of special circumstances or express provision to the contrary, every one of them should have an opportunity to be present at meetings of the board.

"A special meeting held in the absence of some of the directors, and without any notice to them, is illegal except in those cases where the articles of incorporation, bylaws, or established custom so provide, or where it is impossible or impractical to give notice. The action at such a meeting, even if made by a majority of the directors, is invalid." (Footnote omitted.) 2 C. Jones, Fletcher Cyclopedia of the Law of Private Corporations (2006 Rev.) § 406, pp. 254–55.

As the Delaware Chancery Court has explained: "The reason and principle underlying [the rule] is this: Each member of a corporate body has the right to consultation with the others and has the right to be heard upon all questions considered, and it is presumed that if the absent members had been present they might have dissented and their arguments might have convinced the majority of the unwisdom of their proposed action, and thus have produced a different result." (Internal quotation marks omitted.) *Lippman* v. *Kehoe Stenograph Co.*, 11 Del. Ch. 80, 88, 95 A. 895 (1915).[10]

Edward and Sally argue that because Levco often called meetings of the board on short notice and because each board member has access to e-mail and the ability to attend meetings by phone while travelling, the court "committed reversible error when it focused solely on the timing of notice . . . notwithstanding that such timing violated no law or bylaw and was

[10] Although the Delaware Chancery Court's decisions are not binding on this court, we find the court's statement of the rationale for the notice rule to be accurate and persuasive.

consistent with past practice in this family run business." (Citation omitted.) In response, Robert, Jeffrey, and Dot claim that the minimal notice provided was insufficient under Levco's bylaws and argue that "[e]-mail notice and remote participation are of no help if the notice is received . . . after the meeting is over." We agree with Robert, Jeffrey, and Dot.

The court considered Levco's bylaws and found that twenty-five minutes was insufficient notice for "the convenient assembly of the directors . . . ." Although Edward and Sally emphasize that such short notice was consistent with Levco's past practice, the court's conclusion that the minimal notice was insufficient under the circumstances is supported by its findings. Specifically, the court found that at least three members of the board were aware that Dot, Robert, and Jeffrey were out of town at the time the notice was sent, and it appears to have credited Allison's testimony that the meeting was called with minimal notice in order to prevent Robert's faction from attending. Furthermore, given that Philip, Jane, and Allison rescinded their votes in favor of the stock purchase agreement after conferring with Robert and Jeffrey, it is readily apparent that the underlying purpose of the notice requirement was thwarted. That is, by calling the special meeting with only twenty-five minutes notice to the board, Edward prevented Robert and Jeffrey from attending the meeting and attempting to persuade the rest of the board to oppose the stock purchase agreement. Consequently, we conclude that the court properly determined that, under the specific circumstances leading up to the November 20, 2015 board meeting, twenty-five minutes notice was insufficient under Levco's bylaws.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RODNEY WATERS (AC 44342)

Prescott, Alexander and Clark, Js.

Syllabus

Convicted, after a jury trial, of the crime of operating a motor vehicle while under the influence of intoxicating liquor, and, under a part B information, on a plea of guilty, of being a second time offender pursuant to statute (§ 14-227a (g) (2)), the defendant appealed to this court. The defendant had attempted to make a U-turn when the car he was driving twice struck a car being driven by A. The defendant drove away from the accident scene and went home, where he claimed to have consumed a significant amount of alcohol and smoked a "spliff." When the defendant reappeared at the scene on foot about twenty minutes later, A identified him as the driver of the other car. Police officers noticed that he was acting aggressively, slurring his speech and moving unsteadily. The defendant thereafter failed three sobriety tests the police administered to him and was taken to the police station where he was questioned after being advised of his rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436). The defendant was charged under subdivision (1) of § 14-227a (a), the behavioral subdivision, pursuant to which blood alcohol levels generally are excluded from evidence without a defendant's consent, in accordance with § 14-227a (c). The defendant testified on his own behalf, including testifying that he had not begun to consume alcohol until after he returned home after the incident with A. The state offered as rebuttal evidence the testimony of its expert witness, L, a forensic toxicologist. L testified in response to a set of hypothetical facts about the amount of time it typically takes for alcohol to have observable effects on an individual's motor functions and typical behavior associated with certain blood alcohol levels. The court overruled the defendant's objection to L's testimony. On appeal, the defendant claimed, inter alia, that L's testimony was tantamount to testimony about the defendant's blood alcohol content and, thus, violated the prohibition of such testimony under § 14-227a (c) in a prosecution under the behavioral subdivision. *Held*:

1. The evidence was sufficient to support the defendant's conviction of operating a motor vehicle while under the influence of intoxicating liquor: the defendant's reckless driving, the fact that he drove away from the accident scene, and his slurred speech and belligerent behavior toward the police when he returned to the scene permitted the jury reasonably to infer that he was intoxicated when his car struck A's car; moreover, the defendant admitted that he had been driving, he was substantially unable to follow the police officers' instructions when he failed the sobriety tests, and his refusal to take a breath analysis or

urine test at the police station permitted an inference that a test would have revealed that he had an elevated blood alcohol content; furthermore, the jury reasonably could have inferred that the defendant's intoxication when he reappeared at the accident scene was not reasonably attributable to his drinking when he arrived home after leaving the scene, which was supported by L's testimony, and, although the defendant claimed that A's testimony was suspect and that the jury was obligated to credit his testimony that he consumed a significant amount of alcohol when he returned home, it was within the jury's province to determine whose testimony to credit.

2. The defendant could not prevail under *State* v. *Golding* (213 Conn. 233) or the plain error doctrine on his unpreserved claim that the trial court improperly permitted L to testify, in violation of § 14-227a (c), about the likely blood alcohol content of a person who was slurring his speech:

   a. Because the defendant objected to L's testimony on the ground that it was irrelevant and that L could not provide any definite conclusions about the defendant's blood alcohol content, the defendant's claim on appeal was unpreserved, as he did not cite to § 14-227a (c) or otherwise inform the trial court that the admission of L's testimony without the defendant's consent would violate § 14-227a (c).

   b. The defendant's claim that he was denied his right to due process as a result of L's testimony was unavailing; the defendant failed to demonstrate that the testimony was so crucial, critical and highly significant that he was denied a fair trial, as his claim did not implicate anything more than an evidentiary or statutory claim and, thus, could not be reviewed because it was not constitutional in nature, as required by *Golding*.

   c. Although the state violated the spirit if not the letter of § 14-227a (c) by seeking to admit opinion testimony in a behavioral case under § 14-227a (a) (1) that implicitly related to the defendant's blood alcohol content, the defendant nevertheless failed to demonstrate the existence of plain error.

3. The trial court did not abuse its discretion in determining that the defendant failed to establish a proper foundation to cross-examine L about whether other substances could have affected the rate at which an individual can become visibly intoxicated from alcohol: although the defendant had the opportunity to lay a factual foundation as to what substances he ingested, he did not define what a spliff was or what substances it contained, and, without that evidentiary foundation, any opinion by L regarding the effect of other substances in combination with alcohol on the rate of intoxication lacked relevance; accordingly, the court's decision to preclude L's testimony on that basis did not violate the defendant's sixth amendment right to confrontation.

4. The record was inadequate to review the defendant's claim that the trial court improperly denied his motion to suppress statements he made at the accident scene and at the police station, as he failed to seek a proper

memorandum of decision from the court addressing all of the arguments he raised in his motion or to seek an articulation of the court's decision, which was made without having conducted an evidentiary hearing prior to ruling on the motion.

Argued April 11—officially released August 2, 2022

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of operating a motor vehicle while under the influence of intoxicating liquor, and, in the second part, with having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the first part of the information was tried to the jury before *B. Fischer*, *J.*; verdict of guilty; subsequently, the defendant was presented to the court on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and the plea, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom was *Juan Carlos Leal*, certified legal intern, for the appellant (defendant).

Nathan J. Buchok, deputy assistant state's attorney, with whom were *Kathleen E. Morgan*, deputy assistant state's attorney, and, on the brief, *Patrick J. Griffin*, former state's attorney, *Timothy F. Costello*, senior assistant state's attorney, and *Kevin M. Black*, *Jr.*, former special deputy assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Rodney Waters, appeals from the judgment of conviction, rendered after a jury

trial, of operating a motor vehicle while under the influence of alcohol in violation of General Statutes § 14-227a (a) (1), and, following a plea of guilty to a part B information, of being a second time offender pursuant to § 14-227a (g) (2). On appeal, the defendant claims that his conviction under § 14-227a (a) (1) is not supported by sufficient evidence. He also claims that the trial court improperly admitted expert testimony related to the defendant's blood alcohol content (BAC) in contravention of § 14-227a (c), restricted his cross-examination of the state's expert witness, and denied his motion to suppress inculpatory statements he made to the police. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. At approximately 8:45 p.m. on May 18, 2019, Tion Adlam was driving on Dixwell Avenue in New Haven with her mother, daughter, and stepfather when she observed the car ahead of her being driven recklessly and attempting a U-turn. Adlam stopped her car, but the other driver, later identified as the defendant, drove his car into the left side of her car, causing it to "jerk . . . ." After the initial impact, the defendant's car struck her car at least once more. Adlam was forced to reverse her car to get out of the way. Before the defendant fled from the scene, Adlam saw him and took a photograph of his car's license plate.

Adlam called 911 to report the incident. Officers Christopher Troche, Marco Correa, and Robert Stratton of the New Haven Police Department arrived on the scene at approximately 9 p.m. and spoke with Adlam. At approximately 9:05 p.m., twenty minutes after the accident occurred, the defendant appeared at the scene on foot, and Adlam identified him as the driver of the other car involved in the accident.

The officers then approached the defendant. Upon speaking with him, they observed him acting aggres-

sively, slurring his speech, and moving unsteadily. After this initial interaction with the police, the defendant walked away from the scene but returned about ten minutes later. Upon his return, the police placed the defendant in handcuffs while Stratton confirmed that the defendant's address matched the registered address of the suspect's vehicle.[1] After receiving confirmation, Stratton and Troche had the defendant perform three field sobriety tests:[2] (1) the horizontal gaze nystagmus test,[3] (2) the walk and turn test,[4] and (3) the one leg stand test.[5] The defendant failed all three field sobriety tests.

[1] Stratton testified that the registration to the license plate number Adlam provided "came back to 44 Admiral Street, and it was registered to [R]DW Works" and that the defendant lived at that same address. The record is unclear as to how Stratton obtained the defendant's address in order to make that connection.

[2] The officers testified that they started the field sobriety tests approximately ten minutes after the defendant returned to the scene for the second time.

[3] "Nystagmus is the inability of the eyes to maintain visual fixation on a stimulus when the eyes are turned to the side, often resulting in a lateral jerking of the eyeball. . . . The premise of the horizontal gaze nystagmus test is that as alcohol consumption increases, the closer to the midline of the nose the onset of nystagmus occurs. To administer the test, the officer positions a stimulus approximately twelve to eighteen inches away from and slightly above the subject's eyes. The stimulus, usually a pen or the officer's finger, is then moved slowly from the midline of the nose to maximum deviation, the farthest lateral point to which the eyes can move to either side. The officer observes the subject's eyes as he tracks the stimulus and looks for six clues, three for each eye, to determine whether the subject passes or fails the test." (Citations omitted.) *State* v. *Commins*, 83 Conn. App. 496, 499, 850 A.2d 1074 (2004), aff'd, 276 Conn. 503, 886 A.2d 824 (2005), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014). The defendant failed the test and also failed to follow instructions to refrain from moving his head.

[4] The walk and turn test requires the subject to take nine heel-to-toe steps in a straight line, pivot, and take nine heel-to-toe steps back while counting aloud. The defendant failed to keep his hands by his side, fell off the line, and had unsteady balance.

[5] The one leg stand test requires the subject to pick a leg and balance on that leg with the raised leg's toes pointing upward; this must be done while keeping their hands to their sides. The defendant was unable to balance and kept stumbling.

As a result of failing the field sobriety tests and being identified as the driver of the other car involved in the accident, the defendant was transported to the police station and brought to the "intoxilyzer room."[6] Shortly after arriving at the station, Correa read the defendant his *Miranda* rights.[7] The defendant declined a breath analysis test, despite Stratton's warning that it would be deemed a refusal. Although the defendant initially agreed to submit to a urine test, he proceeded to get angry, raise his voice, and tell the officers to "unshackle" him because he was a "linebacker." Stratton asked him if he would be "alright" if he removed the defendant's handcuffs. The defendant replied, "yes," but remained aggressive, once again stating that he was a linebacker. Stratton deemed this behavior as a refusal to do the urine test.

Correa then proceeded to ask the defendant questions from an A-44 form,[8] including whether he was injured, suffered from any medical conditions, and if he had taken any drugs. The defendant answered most of the questions, despite a reminder from Correa that he could refuse to answer. The defendant subsequently was charged with operating a motor vehicle while under the influence in violation of § 14-227a (1). The state also charged the defendant, by way of a part B information,

[6] According to Troche, "[t]he [i]ntoxilyzer room has a state calibrated [i]ntoxilyzer machine which calibrates the blood alcohol . . . content and, in that room, [officers] conduct the A-44s. [Officers] look up the person's record, check with [the police] center system, [officers] read [detained individuals] their rights, and [officers] would perform either the blood alcohol test with the breath test or . . . do the urine test all within that room." See footnote 8 of this opinion.

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

[8] "The A-44 form is used by the police to report an arrest related to operating a motor vehicle under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." (Internal quotation marks omitted.) *Winsor* v. *Commissioner of Motor Vehicles*, 101 Conn. App. 674, 678 n.4, 922 A.2d 330 (2007).

with operating a motor vehicle while under the influence of intoxicating liquor or drugs as a second offender pursuant to § 14-227a (g) (2).

On February 6, 2020, a jury trial commenced. The state called three witnesses to testify: Adlam, Stratton, and Troche. After the state rested its case, the defendant testified on his own behalf. According to the defendant, he had not begun to consume alcohol on May 18, 2019, until after he returned home following the incident with Adlam. Specifically, the defendant testified that he returned home immediately after the accident and quickly consumed a "Jamaican splash," a mixed drink that consisted of about ten to twelve ounces of high-proof rum, wine, and cranberry juice. After finishing the mixed drink, he testified that he smoked a "spliff" and sipped from a half pint bottle of vodka.

In response to the defendant's testimony, the state offered, and the court admitted, rebuttal evidence from Robert Lockwood, a forensic toxicologist employed at the state's forensics laboratory. Lockwood testified about the amount of time after the consumption of alcohol that it typically takes for the alcohol to have observable effects on an individual's motor functions and typical behaviors associated with certain BAC levels.

The jury found the defendant guilty of operating a motor vehicle while under the influence of alcohol in violation of § 14-227a (a) (1). The defendant then pleaded guilty to being a second time offender under § 14-227a (g) (2). The court, *B. Fischer*, *J.*, later sentenced the defendant to two years of incarceration, execution suspended after nine months, 120 days of which was the mandatory minimum sentence, followed by two years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support his conviction of operating a motor vehicle while under the influence of intoxicating liquor in violation of § 14-227a (a) (1). With respect to this claim, the defendant makes three related arguments. First, the defendant asserts that the only evidence of his intoxication while driving was Adlam's testimony and that her testimony was insufficient and lacked credibility. Second, the defendant argues that the officers' observations and the defendant's performance on field sobriety tests were not sufficient to establish that the defendant was intoxicated while driving because they did not take place until one-half hour after the defendant had stopped driving. Third, the defendant argues that Lockwood's testimony did not establish that the defendant was intoxicated due to drinking that occurred before, rather than after, the defendant stopped driving. We are not persuaded that the evidence in the present case was insufficient to prove beyond a reasonable doubt that the defendant operated a motor vehicle while under the influence of intoxicating liquor.

We begin our analysis by setting forth the well established legal principles for assessing an insufficiency of the evidence claim. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Petersen*, 196 Conn. App. 646, 655, 230 A.3d 696, cert. denied, 335 Conn. 921, 232 A.3d 1104 (2020).

"In particular, before this court may overturn a jury verdict for insufficient evidence, it must conclude that

no reasonable jury could arrive at the conclusion the jury did. . . . Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 233, 249 A.3d 683 (2020).

"If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Petersen*, supra, 196 Conn. App. 655.

"[E]stablished case law commands us to review claims of evidentiary insufficiency in light of all of the evidence [adduced at trial]." (Emphasis omitted; internal quotation marks omitted.) Id., 656. "Moreover, even improperly admitted evidence may be considered . . . since [c]laims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 153, 976 A.2d 678 (2009).

Turning to our evaluation of the sufficiency of the evidence, we begin with the elements of the offense for which the defendant was convicted. Section 14-227a (a) provides in relevant part: "A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor (1) if such person operates a motor vehicle . . . while under the influence of intoxicating liquor . . . ."

The defendant's insufficiency of the evidence claim focuses only on the state's obligation to demonstrate beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor *at the time he was operating his motor vehicle*. We conclude that the evidence admitted at trial, including the reasonable inferences that the jury was permitted to draw from that evidence, was sufficient to establish that the defendant operated a motor vehicle while under the influence of intoxicating liquor.

In construing the evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found that the defendant drove recklessly and struck Adlam's car with his vehicle not only once but a second time as well. From his reckless operation of his motor vehicle, the jury was permitted, in conjunction with the evidence that he was visibly intoxicated twenty minutes later, to infer that he was already under the influence of intoxicating liquor when he struck Adlam's vehicle.

The defendant then immediately fled the scene after the accident. See, e.g., *State* v. *Holley*, 90 Conn. App. 350, 361, 877 A.2d 872 ("[f]light, when unexplained, tends to prove a consciousness of guilt" (internal quotation marks omitted)), cert. denied, 275 Conn. 929, 883 A.2d 1249 (2005). The jury was, of course, free to infer that the defendant fled the scene so that the police would not arrive to find him intoxicated.

Additionally, the defendant returned to the scene less than twenty minutes after the accident and was visibly intoxicated. He slurred his speech, behaved belligerently, and engaged in drunken behaviors such as stumbling and challenging officers to a push-up contest.

The defendant also failed three field sobriety tests administered within one-half hour after the defendant

admittedly had been driving and during which he demonstrated a substantial inability to follow the officers' instructions. From these facts alone, the jury reasonably could have inferred that the defendant was under the influence of alcohol while driving and that his erratic operation of his vehicle and behavior at the scene was the result of his intoxication.

The defendant further refused to take a breath analysis or urine test. Pursuant to § 14-227a (e), the defendant's refusal of a breath or urine test is admissible evidence from which an adverse inference may be drawn that the test would have revealed an elevated BAC.

Even without the state's expert testimony, the jury reasonably could have inferred, based on the short period of time between the accident and when the defendant reappeared at the scene intoxicated, that his intoxication was not reasonably attributable to drinking that occurred within the short period of time after he ceased driving and when he arrived on foot at the scene of the accident. See, e.g., *State* v. *McShea*, 11 Conn. App. 338, 340–41, 527 A.2d 1 (1987) (jury reasonably could have inferred defendant was intoxicated while driving from "the time and location of the accident . . . the defendant's admission that he was driving the car; the evidence regarding the time sequence and its relationship to the defendant's degree of intoxication"); see also *State* v. *Morelli*, supra, 293 Conn. 160 (despite defendant's alternative explanation for his behavior, his failure of field sobriety tests, belligerent attitude, questionable driving practices, and refusal of Breathalyzer test were sufficient to prove beyond reasonable doubt that defendant had operated motor vehicle while under influence of intoxicating liquor). With Lockwood's testimony, the jury had additional evidence to support the conclusion that, even if the defendant had quickly consumed eight or nine drinks when he arrived

home, he could not have reached the level of intoxication he exhibited only thirteen to fifteen minutes later.

In large measure, the defendant's insufficiency of the evidence claim is premised on his assertion that the jury was obligated to credit his testimony that he had consumed a significant amount of alcohol after arriving home and before returning to the scene of the incident, and that this explained his subsequent behavior, including the results of the field sobriety tests. It is the province of the jury, however, to weigh conflicting evidence and determine whose testimony to credit. Thus, the jury was under no obligation to credit any of the defendant's testimony. See, e.g., *State* v. *Allen*, 289 Conn. 550, 559, 958 A.2d 1214 (2008). Similarly, the defendant argues that "Adlam's testimony is suspect" because she was angry with the defendant for hitting her car and endangering her family. As with the defendant's testimony, it was within the province of the jury to credit Adlam's testimony and to accept or reject any claim of bias she may have had against the defendant.

In support of his assertion that the state failed to prove that he was under the influence of intoxicating liquor while operating his motor vehicle, the defendant relies largely on *State* v. *DeCoster*, 147 Conn. 502, 162 A.2d 704 (1960). *DeCoster*, however, is readily distinguishable from the present case.

In *DeCoster*, a police officer found the defendant's car stopped on a street in New Haven with the key in the ignition but the engine turned off. Id., 504. The defendant was slumped at the steering wheel of the car. Id. There was visible damage to the defendant's car, and four nearby road signs were knocked over. Id. On the basis of these facts, the defendant was arrested and later found guilty of operating a motor vehicle while under the influence of intoxicating liquor. Id., 503–504. On appeal, however, our Supreme Court reversed the

judgment of conviction on insufficiency grounds, concluding that the state had failed to prove that the defendant was under the influence of liquor at the time he was driving. See id., 505. The court found that "[n]o one had seen him operating the car, and there was no evidence to show how long it had been standing in the place where it was found. Even though [a fact finder] might infer that the defendant's car had struck the signs at the traffic circle, there was no evidence whatever to show when or how the collision occurred. Id., 504–505. The court concluded that, "[i]n the absence of any evidence as to the time when the defendant last operated his car, the conclusion of the trial court that he violated the statute was unwarranted and invaded the realm of speculation and conjecture." Id., 505.

In the present case, and unlike *DeCoster*, Adlam testified about how and when the collision between her and the defendant occurred. As established through Adlam, Troche, and Stratton's testimony, the defendant was admittedly driving at 8:47 p.m. and visibly intoxicated less than twenty minutes later at 9:05 p.m. The defendant failed field sobriety tests approximately thirty minutes after the accident. Furthermore, Lockwood testified that it would be unlikely for an individual to engage in the behavior the defendant exhibited within only thirteen to fifteen minutes after beginning to consume alcohol, even if that individual had quickly drank eight to nine drinks.

In sum, we are not persuaded that the evidence in the present case was insufficient to prove that the defendant operated a motor vehicle while under the influence of intoxicating liquor. We therefore conclude that the jury reasonably could have found the defendant guilty beyond a reasonable doubt of violating § 14-227a (a) (1).

II

The defendant next claims that the trial court improperly admitted expert testimony regarding the likely BAC

of an individual who is slurring his or her speech. The defendant asserts that this testimony was tantamount to testimony on the defendant's BAC and, thus, violated § 14-227a (c), which prohibits the admission of such testimony without the defendant's consent in a case in which the defendant is charged with violating § 14-227a (a) (1).[9] The defendant, in seeking to prevail on this claim, argues that the claim is preserved. The defendant argues in the alternative that, if the claim is not preserved, he is entitled to prevail under *State* v. *Golding*,

[9] The defendant claims that, "[d]uring the state's rebuttal case, it elicited evidence from its expert, who testified to the defendant's BAC. . . . Lockwood gave his opinion that he believed the defendant's BAC to be somewhere around 0.16 and 0.17 at the time the police officers started questioning him. . . . This testimony was improper, as it was unscientific, and was a direct violation of . . . § 14-227a (b), which only permits evidence from chemical testing of the defendant's blood alcohol level at the time of the offense if offered by the defendant. . . . The evidence in this case rises to the level of *extreme unreliability*. In consequence, it violated the defendant's due process rights . . . ." (Citations omitted; emphasis added.) The state responds to the defendant's claim by arguing that "[a] reliability objection is specifically tied to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) [cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)] . . . ."

In his reply brief, the defendant attempted to clarify his claim, stating, "[t]his claim is not based upon an objection to the underlying science but, rather, an objection to a statutory violation. The defendant has not asserted that . . . Lockwood's opinion is not scientifically possible. He has asserted it violated . . . § 14-227a, as it injected a blood alcohol content measurement into a behavioral prosecution."

We observe the following regarding the defendant's characterization of his claim on appeal. First, the defendant inaccurately describes Lockwood's testimony. Lockwood testified about the BAC of a hypothetical individual exhibiting certain behaviors and did not opine directly about the BAC of the defendant. Second, the defendant misidentifies subsection (b) of § 14-227a as containing the prohibition on the admissibility of the defendant's BAC in this case. It is subsection (c) of § 14-227a that limits the admission of a defendant's BAC in a behavioral case only to those instances when the defendant consents to its admission. We read the defendant's reliance on § 14-227a (b), which sets forth requirements regarding the manner in which BAC testing must be performed to ensure the reliability of BAC evidence, as another way of asserting his claim that the testimony was scientifically unreliable. Because the defendant expressly disavows any claim concerning the scientific reliability of the evidence, we review only the defendant's claim that the testimony violated § 14-227a (c).

213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or pursuant to the plain error doctrine. We disagree with the defendant that his claim was preserved at trial. We also conclude that his claim is not entitled to review under *Golding* because it fails to satisfy *Golding*'s second prong. Finally, we are unpersuaded that he is entitled to prevail under the plain error doctrine.

Before turning to the relevant facts and procedural history, it is necessary to set forth the following legal principles. Section 14-227a (a) establishes two different ways an individual can commit the offense of operating a motor vehicle while under the influence of intoxicating liquor: "[a] person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content." "We previously have described . . . § 14-227a (a) (1) as the 'behavioral' subdivision and § [14-227a] (a) (2) as the 'per se' subdivision." *State* v. *Longo*, 106 Conn. App. 701, 705 n.5, 943 A.2d 488 (2008).

Section 14-227a (c) provides: "In any prosecution for a violation of subdivision (1) of subsection (a) of this section, reliable evidence respecting the amount of alcohol in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's blood, breath or urine, otherwise admissible under subsection (b) of this section, shall be admissible only at the request of the defendant." Thus, under § 14-227a (c), when an individual is prosecuted under the behavioral subdivision of the statute, the defendant's BAC is admissible "only at the request of the defendant."

The following additional facts and procedural history, which are undisputed in the record, are relevant to our

resolution of the defendant's claim. After the defense rested, the state called Lockwood, a forensic toxicologist, as a rebuttal witness to testify as to the time it takes for an individual to exhibit effects on their motor functions after drinking alcohol and the typical BAC of an individual exhibiting slurred speech. Prior to the state's offer of proof, defense counsel made a general objection to this testimony. Specifically, defense counsel stated: "I do have a general objection to the testimony, and my argument is that it's not relevant on this rebuttal. This—this expert can't testify to any definite conclusions . . . ."[10]

In response, the court stated, "[a]ll right. There has been evidence from the defendant that he did—that he just testified . . . that he consumed large amounts of alcoholic beverages in a very short period of time. I will allow the doctor to come up here . . . ."

The court then permitted the state to make an offer of proof outside the presence of the jury. During the state's offer of proof, Lockwood was presented a hypothetical and asked: "Given those facts, do you have an opinion regarding—at the rate of consumption, the rate of absorption of alcohol into the body given the facts I've asked you to assume, and the effects one could expect from the—on the human body of that much alcohol in that time period?" Lockwood then testified that the average time for an individual to begin to exhibit the effects of alcohol is between thirty and forty minutes after consumption. The expert was also asked, "when one is stumbling and slurring their words, do you have an opinion as to what BAC would be associated with that?" The expert replied, "[b]ased on my training and

[10] The defendant has not briefed on appeal any claim based on the relevancy of the evidence or the "lack of definite conclusions." Accordingly, we deem these claims abandoned. See, e.g., *State* v. *Nieves*, 65 Conn. App. 212, 215–16 n.4, 782 A.2d 203 (2001).

experience, when you have an individual with slurred speech, you are around a BAC of 0.16 or 0.17."

Following the state's offer of proof, the defendant maintained his original objection to the general relevancy of the evidence and "lack of definite conclusions." He did not otherwise explain the grounds for his objection. Specifically, the court asked the defendant whether he maintained his objection based on what he heard. The defendant responded, "yes." The court then stated, "[y]ou still do? Okay. I'm going to overrule the objection."

Lockwood then proceeded to testify in front of the jury as to his opinion on the amount of time it would take an individual who quickly drank eight or nine drinks to reach a level of intoxication that would visibly effect their motor functions.[11] Lockwood also opined

[11] The relevant colloquy between the prosecutor and Lockwood during direct examination was as follows:

"Q. Okay. So . . . assume that the following—assume that the following facts are in evidence. Assume that there was a motor vehicle accident at 8:47 p.m. Assume that the defendant is sober at that time, no alcohol in the body. Assume fifteen seconds to get home, get out of the car, go upstairs, sit down in a chair, take a bottle out, and that bottle is—assume that—in evidence—the bottle is approximately twenty-four ounces, it is filled approximately half with rum, and then leaving one inch, it is approximately—assume that it is a mixture of port wine and some other alcohol and then one inch remaining for cranberry juice. Assume that the defendant then sips from a bottle—a pint of vodka and assume this drink is—it's drank quickly, and that the defendant walks four minutes, and at—assume at approximately 9:05, the defendant has slurred words and is stumbling. Do you, based on your opinion, your training and experience, do you have an opinion on the rate of absorption?

"A. Yes.

"Q. And what is that opinion?

"A. So, the drinking scenario described is a large volume of alcohol in a very short amount of time. The absorption is, again, the process by getting a drug into the blood system. So, we have to think about how are we getting the alcohol from the stomach into the small intestine, and, in this scenario, studies have shown that it takes about thirty to forty minutes for an individual to absorb to the peak—peak alcohol concentration of the drinks they've had.

"Q. Okay, and let's assume again, assume that . . . the defendant in these set of facts are—was approximately five feet, ten inches, let's say 190. Does that have an effect on your opinion on the rate of the absorption?

on the typical BAC of an individual with slurred speech. Finally, Lockwood testified that it is not reasonably probable that an individual would be displaying signs of intoxication within thirteen to fifteen minutes from beginning to consume alcohol even if that individual had quickly drank eight or nine drinks.

A

We begin by reviewing whether the defendant's claim that the admission of Lockwood's testimony violated § 14-227a (c) was preserved. It plainly was not.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled.

"A. On the rate of my absorption—just on the rate of absorption, no.

"Q. Okay, and do you have an opinion on how much time it would take to absorb the alcohol?

"A. Yes, as I mentioned it—I would estimate between thirty and forty minutes.

"Q. Okay. Does that change—does that opinion change if the person has a full stomach or an empty stomach?

"A. If the person has a full stomach, we have to push back the absorption time; so, it actually would take a little bit more—more time to reach the peak.

"Q. Okay, and now, based on your training and experience, if somebody has—assume that somebody has slurred words. Do you have a BAC that you associate with slurred words based on your training and experience?

"A. Yes.

"Q. Okay, and what is that?

"A. So, slurred speech, when we talk about slurred speech, we're actually talking about the musculature around the mouth being affected, and this means that we have a significant amount of alcohol. When we see slurred speech, we usually think of a BAC around 0.16, 0.17 or higher.

"Q. Okay, and do you have an opinion on how many drinks you would have to drink in order to get to that level of a BAC?

"A. Yes.

"Q. And what is that?

"A. Given the parameters—

"Q. Hm-hmm.

"A. —of the previous question?

"Q. Yes.

"A. Okay. So, for an individual that weighs around 190 pounds, each drink would raise the BAC about 0.02 parts per deciliter or percent. So, if we give—if we take the BAC of 0.16, that would be about eight drinks. As I mentioned to you, this process of metabolism or breaking down is always occurring, so we'll give eight or nine drinks.

This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . . We have explained that these requirements are not simply formalities. [A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 464–65, 174 A.3d 770 (2018).

The defendant simply objected on the grounds of relevancy and on the ability of the witness to testify about "definite conclusions." He did not alert the court or opposing party to the basis of the objection now raised on appeal. The defendant did not cite to § 14-227a (c) or otherwise inform the trial court of his claim that admitting the proffered evidence without his consent would violate a statutory provision. See *State* v. *Forrest*, 216 Conn. 139, 146, 578 A.2d 1066 (1990) ("the defendant, by objecting to the state's questions on relevancy grounds, failed to preserve properly [the statutory violation claim] he has raised on appeal").[12]

"Q. Okay, and let's assume that somebody that—there's somebody stumbling, slurring words, at approximately 9:05. What time would they have to stop drinking in order to show those—have slurred words at 9:05? How long—how long ago prior would they have to start showing those symptoms?

"A. I'm looking—estimating, not given the time of absorption, somewhere around 8:30—I'm sorry 8:35."

[12] The defendant relies on *Rowe* v. *Superior Court*, 289 Conn. 649, 663, 960 A.2d 256 (2008), and *State* v. *Fernando A.*, 294 Conn. 1, 31 n.26, 981

In sum, the defendant never articulated to the trial court the claim he now raises on appeal. Accordingly, we agree with the state that the claim is unpreserved.

B

We next turn to the defendant's argument that, even if his claim is not preserved, he is entitled to prevail pursuant to *Golding*. The defendant, likely recognizing that *Golding* review is limited to claims of a constitutional magnitude, argues that the admission of the evidence violated the defendant's due process rights because it violated the statutory prohibition contained in § 14-227a (c). We are not persuaded that a trial court's admission of evidence implicates anything more than an evidentiary or statutory claim. Thus, the claim fails under the second prong of *Golding* because it is not constitutional in nature.

Pursuant to *Golding*, as modified by *In re Yasiel R.*, supra, 317 Conn. 781, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond

A.2d 427 (2009), to support his argument that his claim is preserved. In those cases, our Supreme Court found that a claim was preserved when the objection raised at trial and those raised on appeal were related, meaning "there [was] substantial overlap between [the] theories under the case law." (Internal quotation marks omitted.) *State* v. *Fernando A.*, supra, 31 n.26. In the present case, the general relevance and "definite conclusions" objections raise completely different legal grounds than an assertion that the testimony violated a prohibition on admissibility contained in § 14-227a (c). If the defendant had raised § 14-227a (c) during his objection at trial, the trial court would have been alerted to the need to consider the nature and application of the statutory prohibition.

a reasonable doubt." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Police*, 343 Conn. 274, 288, 273 A.3d 211 (2022).

"The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail [on the merits]. . . . Thus, *Golding* review of an unpreserved constitutional claim is available provided that the defendant can present a record that is [adequate] for review and affirmatively [demonstrate] that his claim is indeed a violation of a fundamental constitutional right." (Citation omitted; internal quotation marks omitted.) *State* v. *Grant*, 154 Conn. App. 293, 307, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015).

"[T]he defendant can not raise a constitutional claim by attaching a constitutional label to a purely evidentiary claim or by asserting merely that a strained connection exists between the evidentiary claim and a fundamental constitutional right. . . . Thus, [o]nce identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily [rejected]. . . . We previously have stated that the admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved." (Internal quotation marks omitted.) *State* v. *Gilbert I.*, 106 Conn. App. 793, 796, 944 A.2d 353, cert. denied, 287 Conn. 913, 950 A.2d 1289 (2008).

Though the defendant asserts that the admission of evidence violated his due process rights, he fails to brief or otherwise demonstrate that this alleged error was so crucial, critical, and highly significant that he was

denied a fair trial.[13] See, e.g., *State* v. *Turner*, 334 Conn. 660, 674, 224 A.3d 129 (2020) (evidentiary error must be crucial, critical, and highly significant to degree that defendant was denied a fair trial in order to rise to constitutional error). The defendant has failed to cite to a single case from Connecticut, or elsewhere, that holds that the admission of BAC testing in a behavioral case violates the defendant's right to due process. Moreover, the defendant has not argued that, if the legislature had chosen not to include in § 14-227a (c) the prohibition on admissibility of the defendant's BAC, then the due process clause itself would have barred the admission of a defendant's BAC level in a behavioral case.

Because we conclude that the defendant's claim is not constitutional in nature, it fails under the second prong of *Golding*. Accordingly, we decline to review it.

C

Finally, we address whether the defendant is entitled to prevail on his statutory claim under the plain error doctrine. See Practice Book § 60-5. We do not agree that Lockwood's testimony regarding the expected BAC of an individual exhibiting slurred speech, which the defendant exhibited, was plain error under the circumstances of this case.

We begin by setting forth the relevant legal principles. "[I]f a claim is unpreserved . . . an appellate court may

[13] In an attempt to demonstrate that the admission of Lockwood's testimony violated his due process rights, the defendant cites *State* v. *Johnson*, 312 Conn. 687, 94 A.3d 1173 (2014), as authority that his claim is constitutional in nature. The claim in *Johnson* concerned the admission of an out-of-court identification of the defendant that was tainted by unnecessarily suggestive identification procedures. It is well established that the admission of an out-of-court identification that is unreliable and based on unduly suggestive identification procedures violates due process. See, e.g., *Neil* v. *Biggers*, 409 U.S. 188, 196, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The defendant does not explain how the jurisprudence relating to the admission of an unreliable out-of-court identification is applicable to the present case.

in the interests of justice notice plain error not brought to the attention of the trial court. . . . Application of the plain error doctrine is nevertheless reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [Thus, a] defendant cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *Brett B.*, 186 Conn. App. 563, 603, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019).

There is a two step framework for evaluating claims under the plain error doctrine. "First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 373, 33 A.3d 239 (2012).

In the present case, the trial court did not admit direct evidence of the defendant's BAC. Lockwood testified only about the BAC of a hypothetical individual who exhibited the same behaviors that the defendant had exhibited. On cross-examination, defense counsel made clear through his questioning of Lockwood that he was not testifying about the defendant's BAC and that the

state's scenarios were purely hypothetical.[14] Although Lockwood's testimony may have implicitly suggested what the defendant's BAC level may have been, if it had been tested, we cannot say that the alleged error constituted "impropriety . . . so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) Id.

In reaching this conclusion, we do not mean to suggest that the defendant could not have prevailed on this claim if it had been preserved properly and brought to the attention of the trial court. Although we do not conclude that the admission of this evidence is such a clear and obvious error that it results in a manifest injustice to the defendant, we are nevertheless troubled by the state's introduction of Lockwood's testimony regarding blood alcohol content. In *State* v. *Lopez*, 177 Conn. App. 651, 669–70, 173 A.3d 485, cert. denied, 327 Conn. 989, 175 A.3d 563 (2017), we made it clear that evidence pertaining to the expected BAC of a hypothetical individual exhibiting the same behavior as the defendant is problematic at best.

In *State* v. *Lopez*, supra, 177 Conn. App. 669, the state elicited testimony of the blood alcohol level of a hypothetical individual based on behaviors that the defendant had exhibited, such as his performance on

[14] The following exchange occurred between defense counsel and Lockwood during cross-examination:

"[Defense Counsel]: All of those estimates you gave [to the prosecutor] are just estimates, correct?

"[Lockwood]: Yes.

* * *

"[Defense Counsel]: Okay. Also, you don't actually know [the defendant], correct?

"[Lockwood]: I do not.

"[Defense Counsel]: You've never met him and—right?—before this?

"[Lockwood]: I have not.

"[Defense Counsel]: And you've never tested him?

"[Lockwood]: I have not."

the field sobriety tests. We stated: "Although we recognize that the language of the statute refers to blood alcohol content as shown by a chemical analysis of the defendant's blood, breath or urine . . . and that the blood alcohol content evidence in this case was not derived from such a chemical analysis, we do not believe that, at the time the legislature passed the statute, it contemplated that there would be any other way to demonstrate the concentration of alcohol in someone's blood except by chemical analysis. Thus, as a matter of statutory interpretation, it would lead to absurd and unworkable results to interpret the statute to permit evidence of the defendant's blood alcohol content derived from a less reliable, extrapolated analysis, such as the one made here, while prohibiting blood alcohol content evidence derived from a more reliable procedure, i.e., chemical testing of the defendant's blood, breath, or urine . . . . Permitting evidence in this behavioral prosecution case of a blood alcohol content derived from a subjective interpretation of the defendant's performance on standard field sobriety tests, without using any of the approved methods and procedures, does great violence to the intent of the statute. . . . Given the potential unreliability of blood alcohol content evidence that is based on this method, and given that [w]e cannot ignore the heightened credence juries tend to give scientific evidence . . . the risk that this type of evidence might have had an improper impact on the jury and on the result of the trial, without the defendant's being permitted to engage in the scope of unfettered cross-examination to which he was entitled, is too great." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 669–73.

We maintain this view and caution the state against seeking to admit opinion testimony concerning an individual's BAC, whether it be hypothetical or otherwise, in

behavioral cases under § 14-227a (a) (1). Such evidence implicitly relating to the defendant's BAC in behavioral cases violates the spirit if not the letter of § 14-227a (c). Nevertheless, we conclude that the defendant failed to demonstrate the existence of plain error.

III

The defendant next claims that the trial court violated his sixth amendment right to confrontation by unduly restricting his cross-examination of Lockwood regarding the effects that additional ingested substances may have on the rate at which alcohol will begin to cause observable effects on an individual's behavior. The state responds that the defendant failed to lay an adequate foundation to permit him to cross-examine Lockwood regarding the effects of additional substances because there was no evidence of what additional substances, if any, he had ingested. We agree with the state.

The following facts are relevant to this claim. At trial, Lockwood was permitted to testify as an expert about the amount of time after the consumption of alcohol that it typically takes for the alcohol to have observable effects on an individual's motor functions and the typical BAC associated with slurred speech. The state asked Lockwood several hypothetical questions comprised of facts mirroring those in the present case. The first hypothetical described a man who had consumed a large volume of alcohol in a very short amount of time. The state asked Lockwood if he had an opinion on the speed at which an individual would exhibit the effects of intoxication after alcohol consumption commenced. Lockwood responded that it would take the individual in the hypothetical scenario thirty to forty minutes to become observably intoxicated. The second hypothetical assumed that an individual had slurred speech, and the state asked whether there is a BAC that is associated with that behavior. Lockwood responded that slurred

speech usually suggests a BAC of 0.16 or 0.17. Next, the state asked how many alcoholic beverages (drinks) an individual would have to consume to reach a BAC of 0.16 or higher, assuming that the individual weighed 190 pounds. Lockwood responded that the individual would need to consume eight or nine drinks. The state next posed a hypothetical in which an individual was stumbling and slurring words at approximately 9:05 p.m. The state asked what time the individual likely began drinking to have reached a BAC of 0.16 at 9:05 p.m. Lockwood estimated they likely would have needed to start drinking at about 8:35 p.m. The state's final question was whether it was reasonably probable that an individual who quickly drank eight or nine drinks would exhibit slurred speech within thirteen to fifteen minutes of consuming those drinks. Lockwood responded that it was not reasonably probable for this to occur.

The defendant sought to cross-examine Lockwood on whether additional ingested substances could affect how quickly an individual would become visibly intoxicated from alcohol. The following colloquy took place between Lockwood, defense counsel, the prosecutor, and the court:

"[Defense Counsel]: Okay. What about adding other substances to that alcohol?

"[Lockwood]: Could you be more specific?

"[Defense Counsel]: Like, if [the defendant] said he smoked a spliff while he was drinking, would that enhance the effects?

"[Lockwood]: Pardon me, when you say a spliff, you mean marijuana?

"[Defense Counsel]: Marijuana, yes.

"[Lockwood]: Okay.

"[Defense Counsel]: Would that enhance it?

"[The Prosecutor]: I'm going to object at this point, Your Honor. There's been no evidence what a spliff is before this jury or this court as to what that is.

"The Court: Yeah, there hasn't been any evidence of what a . . .

"[Defense Counsel]: A spliff. He smoked—he smoked something. He said he was smoking something at the—[15]

"The Court: Yeah, but there's no evidence, counsel, that that was any—you know—illegal substance or marijuana. Unless I missed it, I didn't hear that. Do you agree with that or disagree with that?

"[Defense Counsel]: I disagree. I think a spliff in general is a substance and that he could enhance—

"The Court: Well, there was no evidence of what the substance was. My question is . . . I'm not aware that that was ever—a question was ever asked of [the defendant] of—you know . . . what [a spliff] . . . contains. I'm not aware of that. Tell me if I'm wrong.

"[Defense Counsel]: Right, I didn't ask him what it contains.

"The Court: All right, all right. So, I'm not gonna . . . it's not in evidence . . . what is in a spliff.

[15] The following exchange occurred between defense counsel and the defendant on direct examination:

"[Defense Counsel]: . . . Okay. Mr. Waters, then, after drinking the Jamaican splash, what did you do?

"[The Defendant]: So, after I drunk the Jamaican splash, I had the half-pint of vodka, and then I also had a spliff—half a spliff left on my coffee table; so, I just started smoking that and sipping on—on the half-pint of vodka."

Later, during defense counsel's direct examination of the defendant, the following colloquy occurred:

"[Defense Counsel]: Okay, and you said that you were also smoking a spliff that was on your coffee table?

"[The Defendant]: Yes."

"[Defense Counsel]: But he did smoke something, so I would like to ask this expert if that could enhance the effects.

"The Court: Well, I mean, it could've been a Camel cigarette, I don't know. It could've been an Ashton cigar, you know. Do you follow me? In other words, there's no evidence that it was an illegal substance, is what I'm trying to say . . . so, I'm not going to allow that—

"[Defense Counsel]: Anything about smoking?

"The Court: Not with this—I mean, if you want to argue this, you could do that in closing argument . . . ." (Footnote added.)

We begin our analysis by setting forth the applicable standard of review and the relevant legal principles for assessing a confrontation clause claim. "The right of an accused to effectively cross-examine an adverse witness is embodied in the confrontation clause of the sixth amendment. . . . The general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . Indeed, if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony. The defendant's right to cross-examine a witness, however, is not absolute. . . . Therefore, a claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met, and,

if so, whether the court nonetheless abused its discretion . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Clark*, 260 Conn. 813, 826–27, 801 A.2d 718 (2002).

''In order to comport with the constitutional standards embodied in the confrontation clause, the trial court must allow a defendant to expose to the jury facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . We have emphasized in numerous decisions, however, that the confrontation clause does not give the defendant the right to engage in unrestricted cross-examination. . . . A defendant may elicit only relevant evidence through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Crespo*, 303 Conn. 589, 610–11, 35 A.3d 243 (2012).

''The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010).

''To be admissible, [expert] testimony must comply with the requirements for reliability and relevance established in *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058, 118

S. Ct. 1384, 140 L. Ed. 2d 645 (1998)." *Kairon* v. *Burnham*, 120 Conn. App. 291, 292, 991 A.2d 675, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010). "To be helpful, an expert's opinion testimony must aid the fact finder in resolving an issue in the case and have some basis in fact." *Weaver* v. *McKnight*, 313 Conn. 393, 410, 97 A.3d 920 (2014).

In the present case, we conclude that the trial court did not abuse its discretion in determining that the defendant failed to establish a proper foundation to cross-examine Lockwood regarding whether other substances could have affected the rate at which an individual can become visibly intoxicated from alcohol. See, e.g., *State* v. *Davis*, supra, 298 Conn. 24–25 (because defendant's evidentiary foundation was insufficient, preclusion of irrelevant evidence did not violate defendant's right to confrontation). The defendant testified that he smoked a "spliff," but the defendant did not define what a "spliff" was or what substances it contained. Because the defendant did not testify what a "spliff" contained, the defendant could have been referencing marijuana, other psychotropic drugs, a combination of the two, or some other substance. Without this evidentiary foundation, any opinion regarding the effect of those substances in combination with alcohol on the rate of intoxication simply lacks any relevance or "fit" in the case. See *State* v. *Porter*, supra, 241 Conn. 65 ("fit" means the "proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract" (internal quotation marks omitted)). The defendant had the opportunity when he testified to lay the factual foundation as to what substances he ingested, but he failed to do so.

Accordingly, the trial court did not abuse its discretion in determining that Lockwood's testimony lacked relevance to the case. Accordingly, the court's decision

to preclude it on that basis did not violate the defendant's sixth amendment right to confrontation.

IV

The defendant's final claim is that the court improperly denied the defendant's motion to suppress certain statements that he made to the police (1) at the scene of the accident and (2) in the intoxilyzer room. In regard to the statements he made at the scene of the accident, the defendant claims that, after he was placed in handcuffs, he was in custody for purposes of *Miranda* and had not been advised of his *Miranda* rights at that time. As for the statements made in the intoxilyzer room, the defendant claims that, although he had been advised of his *Miranda* rights prior to giving these statements, the court should have suppressed the statements because he never expressly or impliedly waived his *Miranda* rights. The state responds that the defendant's claims are unreviewable because the record is inadequate for review.[16] Alternatively, the state argues that the defendant was not subjected to custodial interrogation at the scene of the accident and that the defendant's conduct in the intoxilyzer room "evinced a knowing and intelligent waiver of his right to remain silent . . . ." We agree that the record is inadequate to review whether the defendant (1) was subjected to custodial interrogation at the scene of the accident and (2) waived his *Miranda* rights in the intoxilyzer room.

[16] Specifically, the state claims that the record is inadequate to review the defendant's statements at the police station because "[t]he trial court did not make any factual findings or legal conclusions regarding [those statements]," and the defendant failed to seek an articulation from the trial court. The state also argues that the entirety of his suppression claim is inadequately briefed. Although we agree with the state that the record is inadequate to review the defendant's claim, we do not agree that the defendant's claim is inadequately briefed. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)).

The following additional procedural history and facts are relevant to our resolution of this claim. On January 10, 2020, the defendant filed a motion to suppress. The motion to suppress asserted that the defendant, while in custody, made inculpatory statements to law enforcement officers, the statements were made without a valid *Miranda* waiver, the statements were involuntary, and that the statements were tainted by a prior illegality.

On February 4, 2020, the defendant filed an addendum to his motion to suppress, requesting the suppression of certain statements that were made by the defendant after he was handcuffed. The addendum specified which statements the defendant was moving to suppress but did not reference facts in support of his claim. The statements specified in the addendum were limited to (1) "[the] defendant's responses to police asking him if he was driving," (2) "[the] defendant's responses to police asking him where his car was," (3) "[the] defendant's responses to police asking him what "RDW Works" is," and (4) "[the] defendant's answer of '13' to the postarrest questions . . . ."

It is important to note that the record is extremely opaque with respect to the manner in which the motion to suppress was adjudicated. The court did not hold an evidentiary hearing prior to ruling on the motion. No witnesses testified in support of or in opposition to the motion to suppress. The record also does not memorialize an agreement between the parties on the procedure to be followed for litigating the motion to suppress. From our review of the record, it appears that the court and the parties agreed that the court would review the police body camera footage and base its decision solely on what it could determine from these videos.

On February 5, 2020, the court, *B. Fischer J.*, asked the parties to address the defendant's motion to suppress. In support of the motion, defense counsel argued:

"I am specifically asking for these statements after he was handcuffed because, at that point, he was in custody, and these are questions from the police, so this is interrogation. He did not waive his *Miranda* rights, did not sign the form at the station." The prosecutor responded: "[T]he defendant was not in custody at that point. It was a *Terry* stop,[17] and it was based on reasonable and interpretable facts. The defendant had already walked away once, and, based on his behavior, using handcuffs was the least restrictive means in order to keep him on the scene. Therefore, the state would request to have those statements be admissible." (Footnote added.)

Immediately after this exchange, the court stated the following, which comprises its entire decision with respect to the motion to suppress: "I'm going to deny the defendant's motion to suppress . . . and I'll just recite some of our case law on this issue. General, on-the-scene questioning of citizens in the fact-finding process is not affected by *Miranda* holdings. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. An officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions, but the detainee is not obliged to respond, and, unless the detainee's answers provide the officer with probable cause to arrest him—so forth. . . .

"[A]nd this is the case of *State* v. *Mucha*, [137 Conn. App. 173, 189, 47 A.3d 931, cert. denied, 307 Conn. 912, 53 A.3d 998 (2012)] . . . that the routine investigatory stage of a motor vehicle accident is a noncustodial

[17] See *Terry* v. *Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

situation and, thus—that statements made by a defendant to a police officer in such circumstances are admissible regardless of whether the police officer gave the defendant his *Miranda* warning. The court, moreover, has concluded that conducting a field sobriety test does not place a suspect in custody for the purposes of *Miranda*. So, the questions the police asked, *Miranda* warning was not required based on what I observed in the body cam . . . .''

The court made no factual findings beyond its assertion that ''the questions the police asked, *Miranda* warning was not required based on what I observed in the body cam . . . .'' Although the court's statement suggests that the trial court relied primarily on the body camera footage in deciding to deny the motion to suppress, the record is unclear as to when and how the body camera footage[18] was admitted into evidence and reviewed in relation to the motion to suppress.[19] More importantly, the court did not make any explicit findings regarding the content of the video. The court later signed the transcript of its brief oral ruling.

Practice Book § 61-10 (a) provides: ''It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal.'' Practice Book § 64-1 (a) provides in relevant part: ''The trial court shall

[18] The body camera footage consists of approximately three hours of film from Correa's, Stratton's, and Troche's body cameras on the night of the accident. The footage shows the officers' interaction with the defendant both at the scene of the accident and in the intoxilyzer room. Some of the facts in the recordings are undisputed by the parties, such as the fact that the defendant was handcuffed, asked questions by the police, and failed three field sobriety tests. Other facts are disputed by the parties, including the defendant's statements at the scene of the accident relating to whether he believed he was being detained or whether he knew he was not under arrest.

[19] We note that, after issuing its oral decision on the motion to suppress, the court marked the DVDs containing the body camera footage as court exhibits two, three, and four.

state its decision either orally or in writing . . . in ruling on motions to suppress . . . . The court's decision *shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor*. . . ." (Emphasis added.) Subsection (b) of § 64-1 further provides that, if the trial court fails to comply with these requirements, "the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a)."

Additionally, it is axiomatic that "[t]he proper procedure by which an appellant may ask the trial court to provide the factual and legal basis for a ruling, or to address a matter that it has overlooked in its decision, is to file a motion for articulation. See Practice Book § 66-5.[20] A motion seeking articulation is appropriate in cases in which the trial court has failed to state the basis of a decision . . . [or] to clarify the legal basis of a ruling . . . [and it is the proper procedural vehicle] to ask the trial judge to rule on an overlooked matter." (Footnote added; internal quotation marks omitted.) *State* v. *Bennett*, 101 Conn. App. 76, 81, 920 A.2d 312 (2007).

In the present case, the defendant filed a motion to suppress statements that the defendant made to the police both at the scene of the incident and while in the intoxilyzer room. The trial court's brief oral ruling, however, addressed only the admissibility of the statements made at the scene of the incident. The oral ruling did not set forth the facts the court found established in making the ultimate determination that *Miranda* warnings were not required at the scene of the accident

[20] Practice Book § 66-5 provides in relevant part: "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. . . ."

before the officers questioned the defendant. Although the trial court determined that a "*Miranda* warning was not required based on what [was] observed in the body cam," the trial court did not specify whether the defendant was in custody or subject to police interrogation.[21] Furthermore, the court altogether did not address, either factually or legally, the statements made by the defendant in the intoxilyzer room, including whether the defendant had waived his *Miranda* rights.

Despite the court's failure to include in its oral decision a "conclusion as to each claim of law raised by the parties and the factual basis therefor"; Practice Book § 64-1 (a); the defendant did not file a notice of noncompliance with the appellate clerk. In addition, the defendant failed to seek an articulation pursuant to Practice Book § 66-5.

The defendant argues that, if we find the record to be inadequate for review of his claim, we "should remand the matter to the trial court for further articulation." In doing so, the defendant relies on Practice Book § 61-10 (b), which provides: "The failure of any party on appeal to seek articulation pursuant to Section 66-5 shall not be *the sole ground* upon which the court declines to review any issue or claim on appeal. If the court determines that articulation of the trial court decision is appropriate, it *may*, pursuant to Section 60-5, order articulation by the trial court within a specified time period." (Emphasis added.)

We decline the defendant's invitation to order an articulation in this case because his failure to seek an

[21] "Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 294, 25 A.3d 648 (2011). The court may have concluded that, even if the defendant was in custody, he had not been subjected to police interrogation and, thus, *Miranda* warnings were not required.

articulation is not the sole ground on which we decline to review this claim. The defendant failed to exercise at least two avenues to meet his obligation to provide an adequate record for appellate review of his claim. Furthermore, we note that this appeal was filed on October 26, 2020, and it has been more than two years since the court issued its oral ruling on the motion to suppress. This lengthy passage of time would undoubtedly frustrate its ability to remedy the legal and factual lacunas relating to its decision on the motion. Additionally, because there was no evidentiary hearing, the court would not have the benefit of any transcripts to review when attempting to comply with an articulation order.

"Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court, either on its own or in response to a proper motion for articulation, any decision made by us respecting [a] claim would be entirely speculative." (Internal quotation marks omitted.) *Shobeiri* v. *Richards*, 104 Conn. App. 293, 296, 933 A.2d 728 (2007). Because the defendant failed to seek a proper memorandum of decision addressing all the legal arguments he raised in his motion to suppress or to file a motion for articulation, the record is inadequate to review the defendant's claim that he was subjected to custodial interrogation at the scene of the accident and that he did not expressly or impliedly waive his *Miranda* rights after they were read to him in the intoxilyzer room.

The judgment is affirmed.

In this opinion the other judges concurred.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of a Completed Application for a Moratorium in the Town of New Canaan

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (July 21, 2022) for a Certificate of Affordable Housing Project Completion (aka, a Moratorium) for the Town of New Canaan. As per Connecticut General Statutes Section 8-30g(1)(4)(B), upon publication in the Connecticut Law Journal, a thirty (30) day public comment period will begin on August 2, 2022 and end on September 1, 2022. Under the statute, DOH has ninety (90) days to review the completed application, along with any public comments submitted during the thirty (30) day comment period. DOH will accept electronic input/comment on the completed application at CT.HOUSING.PLANS@ct.gov. DOH will not act as intermediary but shall take into consideration all input and comments received. A copy of this completed application, along with all comments received will be available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please e-mail Laura Watson, Economic and Community Development Agent, at laura.watson@ct.gov