CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXIV No. 9 August 30, 2022 307 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
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Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DEVONTE DALEY *v.* ZACHARY KASHMANIAN ET AL. (SC 20498)

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

Syllabus

Pursuant to statute (§ 52-557n (a) (2) (B)) and the common law of this state, respectively, municipalities and their employees enjoy qualified immunity from liability for their negligent acts or omissions in the performance of duties that require the exercise of judgment or discretion.

The plaintiff sought to recover damages from the defendants, the city of Hartford and one of its police officers, K, in connection with injuries the plaintiff sustained when a motorcycle on which he was riding was struck from behind by K's unmarked police vehicle. K's vehicle, known as a "soft car," lacked flashing or revolving lights and was indiscernible from an ordinary civilian vehicle. While driving his vehicle, K was instructed to surveil a group of motorcycles and quads riding through the city streets. K, who was traveling between forty and fifty miles per hour in a twenty-five mile per hour zone, crossed the street's center line and proceeded to travel north in the southbound lane, where the front of his vehicle struck the back tire of the plaintiff's motorcycle, causing the plaintiff to crash and sustain serious injuries. The plaintiff

alleged, inter alia, that K's negligence had caused his injuries and that the city was liable pursuant to § 52-557n (a) (1) (A) for the negligent acts of K and was required to indemnify K pursuant to the municipal indemnification statute (§ 7-465). Specifically, the plaintiff claimed that K had violated a ministerial duty imposed by the motor vehicle statutes ((Rev. to 2013) §§ 14-218a and 14-240) that govern speed on local roadways and following distances, respectively, and the statute ((Rev. to 2013) § 14-230) that requires vehicles to be driven on the right. The defendants asserted various special defenses, including governmental immunity pursuant to the common law and § 52-557n (a) (2) (B). After a trial, the jury returned a verdict for the plaintiff on his negligence claim, and the court then heard argument on the issue of governmental immunity, which had been reserved for the court's decision. The court ultimately set aside the verdict on the negligence count, concluding that governmental immunity was applicable to K's conduct because his surveillance while driving involved a discretionary, rather than a ministerial, police activity. Accordingly, the court also concluded that there was no cognizable claim against the city for indemnification under § 7-465, and it rendered judgment for the defendants. On appeal, the Appellate Court upheld the trial court's decision to set aside the verdict with respect to the negligence claim, concluding that it was barred by governmental immunity because K was engaged in discretionary conduct while surveilling the plaintiff. The Appellate Court also rejected the plaintiff's argument that K had a ministerial duty to comply with the motor vehicle statutes while operating his vehicle, insofar as the statute (§ 14-283) governing the operation of emergency vehicles allows the police to disregard motor vehicle statutes only when responding to an emergency call or during pursuits but not during surveillance operations. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court incorrectly concluded that the defendants were entitled to governmental immunity pursuant to the common law and § 52-557n (a) (2) (B) in connection with the plaintiff's negligence claim, as the motor vehicle statutes setting forth the rules of the road imposed numerous ministerial duties that K violated in the operation of his vehicle, and, accordingly, this court reversed in part the Appellate Court's judgment and remanded the case with direction to reverse that part of the trial court's judgment setting aside the verdict and to remand the case to the trial court with direction to, inter alia, reinstate the jury's verdict and to render judgment for the plaintiff on the count of his complaint seeking indemnification from the city: because the statute was silent and was, therefore, ambiguous with respect to whether, or the extent to which, a municipal employee's manner of driving is considered a discretionary act for purposes of governmental immunity under § 52-557n (a) (2) (B), this court reviewed extratextual sources, particularly the statute's legislative history, which demonstrated the legislature's understanding that negligence in the operation of motor vehicles

was not intended to be shielded by governmental immunity, either before or after the passage of § 52-557n, and that understanding was implicitly confirmed by a nearly contemporaneous decision of this court holding that a municipality is liable for its employee's negligent operation of an emergency vehicle engaged in a high-speed police pursuit and rejecting a claim of blanket immunity under § 14-283; moreover, in the absence of any indication in the text or legislative history of § 52-557n that the legislature intended to alter or abolish the existing liability regime under the common law and related indemnification statutes, this court concluded that the legislature understood the operation of a motor vehicle in a nonemergency situation to be a ministerial act, and that conclusion was consistent with the fact that the operation of a motor vehicle is a highly regulated activity governed by a panoply of state motor vehicle statutes; furthermore, a review of the pertinent motor vehicle statutes, namely, §§ 14-218a, 14-230 and 14-240, established that those statutes impose ministerial duties on municipal employees who are operating a motor vehicle, outside of the limited shelter provided by § 14-283 for the operators of emergency vehicles in certain discrete circumstances, as the former statutes contain mandatory language that limits discretion in the performance of the mandatory act and does not call for the kind of open-ended good professional judgment that is the hallmark of discretionary act immunity; in the present case, although the decision to use the soft car to surveil the plaintiff was discretionary, once that decision was made, K had a ministerial duty and was legally bound to comply with the rules of the road, unless he was operating his vehicle as an emergency vehicle within the meaning of § 14-283, which the defendants conceded that he was not.

Argued December 15, 2021—officially released August 30, 2022

Procedural History

Action to, inter alia, recover damages for the alleged negligence and recklessness of the named defendant, and for other relief, brought in the Superior Court in the judicial district of Hartford and tried to the jury before *Scholl*, *J.*; thereafter, the court, *Scholl*, *J.*, which granted the named defendant's motion for a directed verdict on the recklessness claim, and the jury returned a verdict for the plaintiff on his negligence claim; subsequently, the court, *Scholl*, *J.*, set aside the verdict and rendered judgment for the defendants, from which the plaintiff appealed to the Appellate Court, *Keller*, *Bright* and *Harper*, *Js.*, which reversed in part the judgment of the trial court and remanded the case for a new trial

on the recklessness count, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Martin McQuillan, for the appellant (plaintiff).

William J. Melley III, for the appellee (named defendant).

Nathalie Feola-Guerrieri, senior assistant corporation counsel, for the appellee (defendant city of Hartford).

Sarah Steinfeld and *Erica Ryan Moskowitz* filed a brief for Moral Monday CT et al. as amici curiae.

Julianne Lombardo Klaassen and *James J. Healy* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

ROBINSON, C. J. The sole issue in this certified appeal is whether a police officer who was involved in a crash while using an automobile to perform surveillance during an investigation of possible criminal activity was engaged in a discretionary act for purposes of governmental immunity under the common law or General Statutes § 52-557n (a) (2) (B).[1] The plaintiff, Devonte Daley,

[1] General Statutes § 52-557n (a) provides: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) *The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties*; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) *negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law*." (Emphasis added.)

appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court reversing in part the judgment of the trial court, rendered in favor of the plaintiff after a jury trial, in this personal injury action against the defendants, Zachary Kashmanian, a police officer, and his employer, the city of Hartford (city). See *Daley* v. *Kashmanian*, 193 Conn. App. 171, 190, 219 A.3d 499 (2019). On appeal, the plaintiff contends that the Appellate Court incorrectly concluded that Kashmanian's actions during his surveillance of the plaintiff using a "soft car," which is an unmarked vehicle lacking police equipment, were discretionary acts for purposes of governmental immunity. We conclude that Kashmanian's operation of the soft car, including following the statutory rules of the road; see General Statutes § 14-212 et seq.; was a ministerial function and that the defendants, therefore, were not entitled to discretionary act immunity for Kashmanian's negligent operation of the soft car during the surveillance operation. Accordingly, we reverse in part the judgment of the Appellate Court.

The Appellate Court's opinion aptly sets forth the facts and procedural history in this case. "On June 1,

[2] We granted the plaintiff's petition for certification, limited to the following issue: "Did the Appellate Court correctly determine that . . . § 52-557n confers governmental immunity from liability for damages arising from personal injuries caused by a police officer's negligent operation of a motor vehicle when the negligent conduct occurs in the course of the officer's [on-duty] surveillance activities?" *Daley* v. *Kashmanian*, 335 Conn. 939, 237 A.3d 1 (2020).

Upon review of the briefs and record in this certified appeal, we observe that the immunity issues decided by the Appellate Court concern both an individual employee and his municipal employer. Accordingly, we rephrase the certified question to reflect that the discretionary act immunity at issue in this case has its doctrinal origins both at common law, for the employee, and under § 52-557n (a) (2) (B), for the municipality. See, e.g., *State* v. *Raynor*, 334 Conn. 264, 266 n.1, 221 A.3d 401 (2019) (this court may "rephrase" certified question that "does not properly frame the issues presented in the appeal because it inaccurately reflects the holding of the Appellate Court" (internal quotation marks omitted)); see also *Cole* v. *New Haven*, 337 Conn. 326, 336–37, 253 A.3d 476 (2020) (explaining doctrinal sources of discretionary act immunity).

2013, at approximately 12 a.m., the plaintiff was riding his yellow Suzuki motorcycle on Asylum Avenue in Hartford with a group of eight to ten other people who were riding 'dirt bikes' and 'quads.' The plaintiff's motorcycle was neither 'street legal' nor 'roadworthy' because it did not have headlights and was equipped with off-road tires: a black tire on the front and a yellow tire on the back. Also at that time, Kashmanian was operating an unmarked gray Acura TL, which the police characterize as a 'soft car.' A soft car is a vehicle that is not equipped with flashing or revolving lights, sirens, or police markings so that it is indiscernible from ordinary civilian cars.

"At or around that same time, a confidential informant provided an anonymous tip to the police that a man riding a yellow motorcycle with a yellow tire had a gun. Kashmanian was instructed by other officers to perform surveillance[3] [of] the group of motorcycles and quads, including the yellow motorcycle, which was operated by the plaintiff. When Kashmanian arrived at Asylum Avenue, he observed the yellow motorcycle and the group of motorcycles and quads, and proceeded to follow them westbound on Asylum Avenue. All of the motorcycles and quads then turned right and proceeded northbound on Sumner Street, which is a two lane road with a speed limit of twenty-five miles per hour. At the intersection of Asylum and Sumner, Kashmanian's vehicle 'sideswip[ed]' another motor vehicle . . . [that] had been proceeding in the same direction. Kashmanian paused for a brief second, but he was directed by the police on the radio to 'just keep going' and that they would 'take care of the accident; just keep going.'

[3] "Kashmanian testified that his understanding of surveillance is 'you're following someone at a distance, trying to keep an eye on them, where they're going; what their actions are. It could be in a car; it can be walking. It could be anywhere. It could be through a camera.' " *Daley* v. *Kashmanian*, supra, 193 Conn. App. 174 n.1.

"Kashmanian then proceeded north in the northbound lane of Sumner Street, to continue to surveil the plaintiff. Kashmanian was traveling between forty and fifty miles per hour, well over the twenty-five miles per hour speed limit. Kashmanian then crossed the center line to travel north in the southbound lane in an effort to avoid two quads in the group that fishtailed and sideswiped his vehicle. Although he could have returned to the northbound lane of traffic after passing the two quads, Kashmanian continued to travel north in the southbound lane, closing the distance between his car and the plaintiff's motorcycle until he struck the back tire of the plaintiff's motorcycle with the front left panel of his vehicle, which caused the plaintiff to crash his motorcycle into a parked car in the southbound lane of Sumner Street. The plaintiff was ejected from his motorcycle and landed approximately ninety-five feet down Sumner Street, causing him [to sustain serious] injuries. As evinced by the lack of skid marks on Sumner Street, Kashmanian neither suddenly slowed his vehicle nor applied his brakes before striking the plaintiff's motorcycle.

"On February 26, 2015, the plaintiff filed this personal injury action against the defendants. The plaintiff's operative fifth amended complaint contains two relevant counts.[4] In count one, the plaintiff asserted a com-

[4] "The complaint contains two additional counts . . . . In count three, the plaintiff alleged a statutory recklessness claim pursuant to General Statutes § 14-295 against Kashmanian in his individual capacity. The plaintiff withdrew this count at the conclusion of the presentation of evidence at trial. In count four, the plaintiff alleged an indemnification claim against the city pursuant to General Statutes § 7-465 (providing indemnification by municipalities of municipal officers, agents or employees who incur liability for negligent official conduct). Count four was not submitted to the jury because resolution of that claim was dependent on the court's analysis of the defendants' governmental immunity special defense. Specifically, in the absence of a common-law negligence claim against Kashmanian, there would be no basis for a statutory indemnification claim against the city pursuant to § 7-465. See *Wu* v. *Fairfield*, 204 Conn. 435, 438, 528 A.2d 364 (1987) ('in a suit under § 7-465, any municipal liability [that] may attach is predicated

mon-law negligence claim against Kashmanian in his official capacity and the city, alleging that Kashmanian negligently caused the plaintiff's injuries. In count two, the plaintiff asserted a common-law recklessness claim against Kashmanian, alleging that he recklessly, wilfully, and wantonly caused the plaintiff's injuries.

"In response, the defendants filed answers denying the essential allegations of the plaintiff's complaint and alleging two relevant special defenses. The defendants alleged that the plaintiff's injuries were caused by his own comparative negligence, and that the plaintiff's claims are barred by common-law and statutory governmental immunity, pursuant to . . . § 52-557n, because Kashmanian was engaged in discretionary acts.[5] Prior to the submission of the case to the jury, the parties stipulated that the issue of whether the defendants were entitled to governmental immunity would be decided by the court if the jury returned a verdict in favor of the plaintiff on his negligence claim.

"The case was tried to a jury over the course of five days. At the close of evidence, [counsel for] Kashmanian made an oral motion for a directed verdict as to count two, the common-law recklessness count. In particular, [he] argued that count two should not be submitted to the jury because there was no evidence that Kashmanian engaged in reckless conduct. After hearing the plaintiff's counterargument, the court orally granted Kashmanian's motion for a directed verdict as to count two. Accordingly, the jury was charged, and the case was submitted to the jury only as to count one, the

on prior findings of individual negligence on the part of the employee and the municipality's employment relationship with that individual')." *Daley* v. *Kashmanian*, supra, 193 Conn. App. 175 n.2.

[5] "The defendants pleaded governmental immunity as a special defense generally to all of the plaintiff's claims, yet Kashmanian [did] not argue that governmental immunity would apply to his alleged[ly] wilful, wanton, or reckless conduct." *Daley* v. *Kashmanian*, supra, 193 Conn. App. 176 n.4.

negligence count, and the defendants' comparative negligence special defense. On that same day, the jury returned a verdict for the plaintiff in the total amount of $416,214, reduced on the basis of the jury's finding that the plaintiff comparatively was 25 percent negligent, for a net award of $312,160.50." (Footnote omitted; footnotes in original.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 173–77.

Following the submission of memoranda of law and oral arguments on the reserved issue of governmental immunity, the trial court "set aside the jury's verdict in favor of the plaintiff on count one, the negligence claim. In particular, the [trial] court concluded that governmental immunity was applicable to Kashmanian's conduct because his driving surveillance involved discretionary police activity, which is protected under § 52-557n (a) (2) (B). Because of its determination on governmental immunity, the court also reasoned that no cognizable claim existed against the city for indemnification under [General Statutes] § 7-465.[6] See [footnote

[6] General Statutes § 7-465 provides in relevant part: "(a) Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, except firemen covered under the provisions of section 7-308 . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty. . . . Such municipality may arrange for and maintain appropriate insurance or may elect to act as a self-insurer to maintain such protection. . . . Governmental immunity shall not be a defense in any action brought under this section. . . ."

Although the legislature has amended § 7-465 since the events underlying the present case; see, e.g., Public Acts 2013, No. 13-247, § 273; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

4] of this opinion. The court then rendered judgment in favor of the defendants on counts one and four of the plaintiff's complaint." (Footnote added.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 177–78.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. After first agreeing with the plaintiff's claim that the trial court had improperly granted the defendants' motion for a directed verdict on count two of the complaint alleging recklessness; see id., 181–82; the Appellate Court then concluded that the trial court had properly granted the defendants' motion to set aside the verdict on the ground that the plaintiff's negligence claims were barred by governmental immunity. See id., 185–86. The Appellate Court reasoned that Kashmanian was engaged in discretionary conduct while surveilling the plaintiff, which is one of the "typical functions of a police officer." (Internal quotation marks omitted.) Id., 186. The court emphasized that "Kashmanian's surveillance, performed in the course of his employment as a police officer, necessarily required him to exercise his judgment, under the circumstances; for example, as to how fast to travel, the distance to maintain between his car and the [plaintiff's motorcycle], and whether to change lanes." Id., 187.

In so concluding, the Appellate Court rejected the plaintiff's argument that "Kashmanian had a ministerial duty to comply with the motor vehicle statutes" while "operating a soft car with no lights or sirens" insofar as "the legislature has identified specific circumstances in [General Statutes] § 14-283[7] in which [the] police may

[7] General Statutes § 14-283 provides in relevant part: "(a) As used in this section, 'emergency vehicle' means . . . (3) any state or local police vehicle operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators . . . .

"(b) (1) The operator of any emergency vehicle may (A) park or stand such vehicle, irrespective of the provisions of this chapter, (B) except as provided in subdivision (2) of this subsection, proceed past any red light, stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the

disregard certain motor vehicle statutes," which means that, "absent those circumstances, police have a ministerial duty to obey all traffic laws." (Footnote added; internal quotation marks omitted.) Id. The Appellate Court reasoned that "[§] 14-283 addresses only two situations: responses to emergency calls and pursuit of fleeing law violators. It does not purport to set a standard of conduct for other police endeavors, including surveillance. Furthermore, the plaintiff's argument would make effective police surveillance impossible in many instances." (Footnote omitted.) Id., 187–88. Thus, the Appellate Court concluded that "the discretionary police activity of surveilling the plaintiff" afforded Kashmanian discretion that "extend[ed] to whether to violate the motor vehicle statutes."[8] Id., 189. Accordingly, the

posted speed limits or other speed limits imposed by or pursuant to section 14-218a 14-219, or section 7 of public act 21-28 as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.

"(2) The operator of any emergency vehicle shall immediately bring such vehicle to a stop not less than ten feet from the front when approaching and not less than ten feet from the rear when overtaking or following any registered school bus on any highway or private road or in any parking area or on any school property when such school bus is displaying flashing red signal lights and such operator may then proceed as long as he or she does not endanger life or property by so doing.

"(c) The exemptions granted in this section shall apply only when an emergency vehicle is making use of an audible warning signal device, including but not limited to a siren, whistle or bell which meets the requirements of subsection (f) of section 14-80, and visible flashing or revolving lights which meet the requirements of sections 14-96p and 14-96q, and to any state or local police vehicle properly and lawfully making use of an audible warning signal device only.

"(d) The provisions of this section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property. . . ."

Although § 14-283 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2014, No. 14-221, § 1; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[8] The Appellate Court, however, "decline[d] to hold that, *under all circumstances*, a municipal police officer operating a motor vehicle is engaged in

Appellate Court rendered judgment affirming the trial court's "judgment setting aside the jury's verdict on the negligence count" and reversing "the judgment directing a verdict in favor of Kashmanian on the common-law recklessness count," and remanded the case to the trial court "for a new trial as to [the recklessness] count." Id., 190. This certified appeal followed.[9] See footnote 2 of this opinion.

On appeal, the plaintiff, supported by the amici curiae, claims that the Appellate Court incorrectly concluded that the defendants were entitled to discretionary act immunity. Relying heavily on our recent decisions in *Cole* v. *New Haven*, 337 Conn. 326, 253 A.3d 476 (2020), and *Borelli* v. *Renaldi*, 336 Conn. 1, 243 A.3d 1064 (2020), the plaintiff argues that Kashmanian's "manner of driving" the soft car violated his ministerial duties as prescribed by the motor vehicle statutes, in particular General Statutes (Rev. to 2013) § 14-230,[10]

discretionary conduct, thereby immunizing the officer and municipality from damages arising from all violations of motor vehicle statutes. Although it may be true that some motor vehicle statutes implicitly require drivers to exercise some degree of judgment when operating a motor vehicle, some statutes do not. Furthermore, although some circumstances may permit an officer, in the exercise of discretion, to violate a motor vehicle statute, that is not always the case. Affording governmental immunity in *every* instance [in which] an officer violates a motor vehicle statute is far too expansive a rule. For example, a police officer who fails to stop at a stop sign because he is distracted by a personal phone call and, as a result, causes an accident can hardly be said to be engaging in discretionary conduct. In such a circumstance, the officer likely has a ministerial duty to obey the law and [to] stop at the stop sign. Ultimately, the determination of whether a police officer who violates a motor vehicle statute is engaged in ministerial or discretionary conduct must be made in view of the language of the statute at issue and the circumstances presented." (Emphasis in original.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 188–89.

[9] We note that Kashmanian filed a cross petition for certification to appeal from the judgment of the Appellate Court reversing the judgment of the trial court, which had directed a verdict in favor of Kashmanian on the common-law recklessness count. We denied Kashmanian's cross petition for certification. See *Daley* v. *Kashmanian*, 335 Conn. 940, 237 A.3d 1 (2020).

[10] General Statutes (Rev. to 2013) § 14-230 provides in relevant part: "(a) Upon all highways, each vehicle . . . shall be driven upon the right, except

which requires drivers to drive on the right side of the road, and without benefit of the exceptions provided by the emergency vehicle statute, § 14-283, which is limited to emergency responses and pursuits. Citing sister state cases and the "great weight of decisions in the Superior Court [concluding] that a police officer driving a motor vehicle is [engaged in a] ministerial activity," the plaintiff contends, inter alia, that adopting a "broader exception for police activities," such as that embraced by the Appellate Court in this case, "would render this carefully crafted [emergency vehicle] statute a nullity and usurp the General Assembly's authority to balance the important public values of effective policing and traffic safety."

In response, the defendants cite *Cole* v. *New Haven*, supra, 337 Conn. 326, *Ventura* v. *East Haven*, 330 Conn. 613, 199 A.3d 1 (2019), and *Edgerton* v. *Clinton*, 311 Conn. 217, 86 A.3d 437 (2014), among other cases, and contend that the Appellate Court correctly concluded that discretionary act immunity extends to surveillance, which they claim is a "typical on-duty law enforcement activ-it[y]" not amenable to judicial second-guessing. Kashmanian in particular relies on several federal court

(1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked vehicles, animals or obstructions on the right side of the highway, (3) when the right side of a highway is closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic.

"(b) Except as provided in subsection (c) of this section, any vehicle proceeding at less than the normal speed of traffic shall be driven in the right-hand lane available for traffic, or as close as practicable to the right-hand curb or edge of the highway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

* * *

"(d) Violation of any provision of this section shall be an infraction."

Hereinafter, unless otherwise indicated, all references to § 14-230 in this opinion are to the 2013 revision of the statute.

decisions for the proposition that surveillance is a discretionary activity, with the exigencies of law enforcement reasonably taking precedence at times over compliance with traffic laws. See *State Farm Mutual Automobile Ins. Co.* v. *United States*, Docket No. 16-CV-897 (JNE/BRT), 2017 U.S. Dist. LEXIS 62132 (D. Minn. April 6, 2017); *Priah* v. *United States*, 590 F. Supp. 2d 920 (N.D. Ohio 2008); *Flax* v. *United States*, 847 F. Supp. 1183 (D.N.J. 1994). The defendants argue that the motor vehicle statutes on which the plaintiff relies did not create a ministerial duty because they did not require Kashmanian to conduct surveillance in any particular manner and that the emergency vehicle statute, § 14-283, is inapplicable because it is limited to pursuits and emergency responses, rather than "typical patrol or surveillance activities," such as that presented in this case.[11] The defendants further contend that the motor vehicle statutes themselves impart a component of discretion insofar as they require "reasonable" conduct in controlling the motor vehicle, including its speed, and keeping a lookout, with even § 14-230 and General Statutes (Rev. to 2013) § 14-240,[12] the latter of which governs

[11] At oral argument before this court, whether Kashmanian was engaged in a "pursuit" of the plaintiff using the soft car was a significant topic of discussion. Consistent with arguments raised in his brief positing that Kashmanian operated the soft car in a manner that was "equivalent to pursuit," the plaintiff argued that Kashmanian would have violated numerous ministerial duties under the pursuit statute, General Statutes § 14-283a, and § 14-283 when he "drove at nearly double the posted speed limit, drove on the left side of the road without justification, and accelerated to close the gap between his automobile and the plaintiff's motorcycle, until he was following too closely for safety, with nearly fatal consequences." For their part, the defendants argued that Kashmanian's actions did not constitute a "pursuit" as a matter of law. Given our resolution of the plaintiff's ministerial act arguments as based on the statutory rules of the road, we need not consider the parties' pursuit related arguments.

[12] General Statutes (Rev. to 2013) § 14-240 provides in relevant part: "(a) No driver of a motor vehicle shall follow another vehicle more closely than is reasonable and prudent, having regard for the speed of such vehicles, the traffic upon and the condition of the highway and weather conditions.

"(b) No person shall drive a vehicle in such proximity to another vehicle as to obstruct or impede traffic.

following distances, providing for exceptions such as avoiding obstacles. We agree with the plaintiff, however, and conclude that the defendants were not entitled to governmental immunity because the motor vehicle statutes providing the rules of the road imposed numerous ministerial duties that Kashmanian violated in his operation of the soft car.

We begin with the standard of review. As the Appellate Court aptly stated, "[a]lthough generally a court's decision to set aside a jury verdict is subject to an abuse of discretion review . . . we afford plenary review to the present claim because, as the parties properly recognize, the ultimate determination as to whether the defendants are entitled to governmental immunity is a question of law." (Citation omitted.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 182; see, e.g., *Viking Construction, Inc.* v. *TMP Construction Group, LLC*, 338 Conn. 361, 368, 258 A.3d 80 (2021); *Ventura* v. *East Haven*, supra, 330 Conn. 634–37. Further, to the extent this appeal requires us to consider the meaning of § 52-557n itself, including whether the legislature contemplated that municipalities would be immune from liability for vehicular negligence pursuant to that statute, that inquiry presents a question of statutory interpretation governed by General Statutes § 1-2z. See, e.g., *Grady* v. *Somers*, 294 Conn. 324, 332–33, 984 A.2d 684 (2009); *Considine* v. *Waterbury*, 279 Conn. 830, 836–37, 905 A.2d 70 (2006).

"The following principles of governmental immunity are pertinent to our resolution of the plaintiff's claims.

* * *

"(d) Violation of any of the provisions of this section shall be an infraction, provided any person operating a commercial vehicle combination in violation of any such provision shall have committed a violation and shall be fined not less than one hundred dollars nor more than one hundred fifty dollars."

Hereinafter, unless otherwise indicated, all references to § 14-240 in this opinion are to the 2013 revision of the statute.

The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [a ministerial act] refers to a duty [that] is to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts. . . .

"The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer

or agent thereof acting within the scope of his employment or official duties . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary. . . .

"In accordance with these principles, our courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. . . . Because the construction of any such provision, including a municipal rule or regulation, presents a question of law for the court . . . whether the provision creates a ministerial duty gives rise to a legal issue subject to plenary review on appeal. . . .

"Because this appeal concerns the actions of police officers and the [city] police department, we also observe that [i]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality. . . . Indeed, this court has long recognized that it is not in the public's interest to [allow] a jury of lay[persons] with the benefit of 20/20 hindsight to second-guess the exercise of a [police officer's] discretionary professional duty. Such discretion is no discretion at all. . . . Thus, as a general rule, [p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer." (Internal quotation marks omitted.) *Cole* v. *New Haven*, supra, 337 Conn. 336–39; see, e.g., *Doe* v. *Madison*, 340 Conn. 1, 18–20, 31–32, 262 A.3d 752 (2021); *Borelli* v. *Renaldi*, supra, 336 Conn. 10–13; see also *Coley* v. *Hartford*, 312 Conn. 150, 164–65, 95 A.3d 480 (2014) (noting, with respect to officers' "alleged failure to adhere to specific police response procedures . . . the considerable discretion inherent in law enforcement's response to an infinite array of situations implicating public safety on a daily basis"); *Shore* v. *Stonington*, 187 Conn. 147, 153–57, 444 A.2d 1379 (1982) (whether to detain suspected drunk driver was discretionary act for police officer).

This appeal raises the question, which we left unanswered in our recent decisions in *Cole* v. *New Haven*, supra, 337 Conn. 347 n.18, and *Borelli* v. *Renaldi*, supra, 336 Conn. 4–5, of the extent to which the manner in which a police officer operates a motor vehicle while on duty is entitled to governmental immunity and, specifically, whether the motor vehicle statutes impose ministerial obligations on municipal employees such as police officers who drive during the course of their employment—particularly during circumstances that

are beyond the scope of the emergency vehicle statute, § 14-283.[13] In answering this question, we are mindful that § 52-557n, which the legislature enacted in 1986 as part of Tort Reform I; see Public Acts 1986, No. 86-338, § 13; is in large part a codification and harmonization of our case law governing the liability and immunity of municipalities. This renders critical to our analysis the legislature's understanding of the scope of municipal liability and immunity, both directly under the terms of § 52-557n and indirectly via the indemnification statutes, particularly § 7-465.[14] See *Grady* v. *Somers*, supra, 294 Conn. 348 (considering "the close relationship between § 52-557n (a) and the common-law doctrines governing municipal employees' immunity and liability for indemnification purposes under § 7-465 (a)" in concluding that "the identifiable person, imminent harm common-law exception to municipal employees' qualified immunity also applies in an action brought directly against municipalities pursuant to § 52-557n (a) (1) (A), regardless of whether an employee or officer of the municipality also is a named defendant"); *Violano* v. *Fernandez*, 280 Conn. 310, 326–28, 907 A.2d 1188 (2006) (relying on legislature's codification of discretionary act immunity in § 52-557n (a) (2) (B) in rejecting request to change definition of ministerial task to "follow the

[13] See footnote 22 of this opinion and accompanying text.

[14] "At common law, municipal officers were liable for their own torts, but the municipality, their municipal 'master,' was not vicariously liable for those torts. . . . Section 7-465 (a) effectively circumvented the general [common-law] immunity of municipalities from vicarious liability for their employees' acts by permitting injured plaintiffs to seek indemnification from a municipal employer for such acts under certain circumstances and after conformance with certain statutory requirements, but it did not bar a plaintiff from seeking redress from those employees." (Citations omitted.) *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 193, 592 A.2d 912 (1991); see, e.g., *Williams* v. *New Haven*, 243 Conn. 763, 767–68, 707 A.2d 1251 (1998) (discussing difference between action against municipality pursuant to § 52-557n, which "limit[s] governmental immunity in certain circumstances," and action against individual municipal employees or officials accompanied by statutory indemnification claim against municipality).

distinction used by other states under which governmental immunity would apply to acts that are related to policy decisions and, conversely, immunity would not apply to acts that implement policy").

Because the legislature intended § 52-557n to harmonize our state's law of municipal liability, we focus first on the statute. The text of § 52-557n (a) provides in relevant part that a municipality "shall be liable for damages to person or property caused by . . . [t]he negligent acts or omissions of such [municipality] or any employee, officer or agent thereof acting within the scope of his employment or official duties"; General Statutes § 52-557n (a) (1) (A); which presumably would include vehicular negligence, but then limits that liability by providing that the municipality "shall not be liable for damages to person or property caused by . . . *negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law*." (Emphasisadded.) General Statutes § 52-557n (a) (2) (B). The tension between these provisions is heightened by the statute's silence as to whether driving is a discretionary act for purposes of § 52-557n (a) (2) (B). Given the ambiguity that this particular silence creates, under § 1-2z, we turn to extratextual sources, in particular the legislative history of the statute.

The legislative history of the statute, although less than definitive in other contexts,[15] establishes the legislature's understanding of the effect of the Tort Reform

[15] This court has observed that the legislative history of § 52-557n is not always helpful in interpreting the statute given confusion among legislators in both houses about "the municipal liability section of the [Tort Reform I bill] as either altering [an individual's] existing right to bring an action against a municipality, or, at the very least, as having an unclear impact on [an individual's] right to sue a municipality." *Considine* v. *Waterbury*, supra, 279 Conn. 839; see *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 188, 592 A.2d 912 (1991) (describing "the legislative history of § 52-557n [as] worse than murky").

I bill enacted as § 52-557n on municipalities' liability for vehicular negligence. Most instructive are the remarks of Representative Robert G. Jaekle, the bill's sponsor, in response to "an unsuccessful amendment that would have deleted the portion of the bill enacted as § 52-557n . . . on the ground that it was too restrictive with respect to its limitations on claimants' rights," in which he answered "numerous questions about municipalities' potential liability under a variety of fact patterns, some hypothetical, and some actual cases." *Grady* v. *Somers*, supra, 294 Conn. 344. Several of Representative Jaekle's answers expressly contemplated vehicular negligence in the performance of governmental tasks as a basis for municipal liability. In one instance, Representative Jaekle responded to a question posed by Representative Gabriel J. Biafore, opining that the bill would have imposed no limitation on the liability of the city of Bridgeport when one of its snowplows struck a student who was present in the parking lot and schoolyard of a city school that was closed during a snowstorm. See 29 H.R. Proc., Pt. 16, 1986 Sess., pp. 5903–5904; see also id., pp. 5899–5901, remarks of Representative Jaekle (opining that municipality would not be immune for injuries caused by school bus crash involving "some negligence"). In another exchange with Representative Eugene A. Migliaro, Jr., concerning a hypothetical case of a fatal accident caused by a town employee who was intoxicated when he drove a town truck while on-duty, Representative Jaekle agreed with Representative Migliaro that the bill would permit both the employee and the town to be held liable, regardless of whether the employee's supervisor was aware of his intoxication. See id., pp. 5932–34. Representative Migliaro then stated that Representative Jaekle's explanation had "clarified" his understanding of the bill that, "as far as the employees are concerned, that the town, as long as they work for the town, the town can still

be held responsible for the actions of [its] employees." Id., pp. 5936–37. This legislative history suggests, therefore, that the legislature contemplated negligence in the operation of motor vehicles not to be subject to governmental immunity, both before and after the passage of § 52-557n.

Indeed, the legislature's understanding of the liability of individual police officers—and of the municipalities that employ them pursuant to § 7-465[16]—for the negligent operation of motor vehicles during law enforcement operations is implicitly confirmed by this court's nearly contemporaneous decision in *Tetro* v. *Stratford*, 189 Conn. 601, 611, 458 A.2d 5 (1983), which rejected a claim of "blanket immunity" under § 14-283 for damages arising from a crash caused by a high-speed police pursuit. This is particularly so given that we presume that the legislature is aware of the common law on a particular subject and, further, that it knows how to abrogate common-law rules, as it deems appropriate. See, e.g., *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 265, 146 A.3d 975 (2016). In *Tetro*, the defendant

[16] The indemnification statutes, such as § 7-465, are themselves also indicative of the legislature's understanding of the liability of individual employees for vehicular negligence and its effect on municipalities at the time of the enactment of § 52-557n. These statutes were "enacted to protect municipal employees, including police officers, from the financial consequences of common-law tort liability for damages caused by their on-duty, negligent operation of motor vehicles; concerns about liability arising from negligent driving in large measure account for the enactment of our municipal indemnification statutes." *Borelli* v. *Renaldi*, supra, 336 Conn. 119 (*Ecker*, *J.*, dissenting); see id., 87–95 (*Ecker*, *J.*, dissenting) (explaining history of indemnification statutes, which were intended to protect municipal employees from personal risk while averting "the manifest unfairness that inevitably resulted when the cost of a municipal employee's negligence was imposed on the victim of that negligence rather than the municipality"). "Our case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have [on] any one of them." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, 333 Conn. 283, 296, 215 A.3d 149 (2019).

town of Stratford was held liable pursuant to § 7-465 to indemnify two of its police officers for their negligence in conducting a high-speed pursuit on highly trafficked local roadways, which resulted in the pursued vehicle's crashing into the plaintiff's car. See *Tetro* v. *Stratford*, supra, 602–603 and n.1. Citing the due regard language of § 14-283 (d); see footnote 7 of this opinion; this court rejected the defendants' argument that there was "immunity conferred, as a matter of public policy, [on] emergency vehicles in pursuit of law violators." Id., 604–605; see id., 609. The court emphasized "that § 14-283 provides no special zone of limited liability once the defendants' negligence has been established." Id., 610; see id., 611 (stating in dictum that, "[a]s a general proposition, our common law and our statutes do not confer [on] police officers, whose conduct is negligent, blanket immunity from liability to an innocent bystander by virtue of their engagement in the pursuit of persons whom they believe to have engaged in criminal behavior"). As Justice Ecker observed in his dissenting opinion in *Borelli*, it is telling that "we have a unanimous precedent, decided shortly before the enactment of § 52-557n, holding that a municipality is liable for its employee's negligent operation of an emergency vehicle engaged in a police pursuit. . . . The legislature thereafter codified the then-existing common law governing municipal liability without so much as a whisper of any intention to impact, modify, or even address the law of vehicular negligence in general or the holding of *Tetro* in particular." (Citation omitted.) *Borelli* v. *Renaldi*, supra, 336 Conn. 138 (*Ecker*, *J.*, dissenting); see also id., 45–46 (*Robinson*, *C. J.*, concurring) (describing *Tetro* as having "limited" precedential value with respect to specific issue in *Borelli*, namely, whether decision to pursue vehicle for minor equipment violation was discretionary act, but agreeing with dissent that *Tetro* held that § 14-283 does not pro-

vide any immunity for operation of police vehicle during pursuit or emergency situation).

Although the legislative history of § 52-557n demonstrates the legislature's understanding that the negligent operation of motor vehicles is not shielded by governmental immunity, the legislative history provides no clarity as to the specific doctrinal basis for that understanding. In the absence of any indication in the text or legislative history of § 52-557n that the legislature intended to alter or abolish the existing liability regime under the common law and related indemnification statutes, which imposed liability on municipalities for damages caused by the negligent operation of motor vehicles driven by municipal employees, we conclude that the legislature understood the operation of a motor vehicle to be a ministerial act.[17] This is consistent with

[17] Even if we were to assume, for the sake of argument, that driving is in the nature of a discretionary act, or is an activity that lies outside the ministerial/discretionary dichotomy altogether, we would conclude that the well established law imposing municipal liability for vehicular negligence at the time § 52-557n was enacted—a body of law that was known to the legislature, as the legislative history previously recounted in this opinion reflects—illustrates that "the legislature did not contemplate § 52-557n as a bar against *all* civil actions arising from employees' discretionary acts, despite the discretionary act immunity afforded by § 52-557n (a) (2) (B)." (Emphasis added.) *Grady* v. *Somers*, supra, 294 Conn. 345. *Grady* and other decisions of this court recognize that the savings clauses in § 52-557n (a), which provide that the terms of the statute govern "[e]xcept as otherwise provided by law," preserve and incorporate common-law exceptions to municipal immunity. See *Grady* v. *Somers*, supra, 345–49. We note that, in *Borelli*, two separate opinions by members of this court embraced the proposition that driving a motor vehicle, including while engaged in emergency operation under § 14-283 (d), is not subject to discretionary act immunity under § 52-557n (a) (2) (B), given that statute's savings clauses. See *Borelli* v. *Renaldi*, supra, 336 Conn. 39–40 and n.4 (*Robinson*, *C. J.*, concurring); id., 144 (*Ecker*, *J.*, dissenting). We emphasize, however, that the extent to which governmental immunity extends to the operation of a municipal vehicle in emergency mode under § 14-283 remains an open question, particularly because this appeal does not concern operation pursuant to the privileges conferred by the emergency vehicle statute. See footnote 22 of this opinion and accompanying text.

the fact that the operation of a motor vehicle is a highly regulated activity governed by a panoply of state motor vehicle statutes establishing the rules of the road for all drivers as expressly provided. A review of this statutory scheme is instructive because it demonstrates that the terms of the relevant motor vehicle laws establish a ministerial duty insofar as they contain "mandatory statutory language" that "*itself* limits discretion in the performance of the mandatory act." (Emphasis in original.) *Northrup* v. *Witkowski*, 332 Conn. 158, 187, 210 A.3d 29 (2019). Accordingly we now turn specifically to the rules of the road that are at issue in this case, as pleaded in the operative complaint, which require vehicles to be driven to the right, govern following distances, and prohibit driving at an unreasonable rate of speed. See General Statutes (Rev. to 2013) §§ 14-218a, 14-230 and 14-240.

We begin with § 14-230, which uses definitive language in requiring vehicles to be driven to the right. It provides in relevant part: "Upon all highways, *each vehicle . . . shall be driven upon the right*, except (1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked vehicles, animals or obstructions on the right side of the highway, (3) when the right side of a highway is closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic."[18] (Emphasis added.) General Statutes (Rev. to 2013) § 14-230 (a). Thus, § 14-230 requires drivers to

[18] For other motor vehicle statutes that use definitive wording, see General Statutes § 14-219 (establishing infraction of speeding on highways by reference to speed limits), and General Statutes § 14-239 (a) (noting that "streets and highways" may be designated as one-way streets and that, "[u]pon any highway so designated a vehicle shall be driven only in the direction indicated").

drive their vehicles to the right, with no room for deviation beyond the five delineated exceptions.

In contrast to § 14-230, the two other motor vehicle statutes pleaded in the operative complaint employ *some* language of "reasonableness" that we have long held is the hallmark of a discretionary act; see, e.g., *Coley* v. *Hartford*, supra, 312 Conn. 165–66; to define the duty of the motor vehicle operator to proceed safely. Those statutes then narrow the judgment permitted in a way that provides objective guideposts for the driver's decision making—and the subsequent evaluation thereof.[19]

[19] Still other motor vehicle statutes use a mix of discretionary and definitive language across the operations governed by their subsections, such as General Statutes § 14-234, which governs passing in no-passing zones, and General Statutes §§ 14-241 and 14-242, which govern turning. Compare General Statutes § 14-234 (a) ("[w]hen [no passing] signs or markings are in place and clearly visible to an ordinarily observant person, each driver of a vehicle shall obey the directions thereof"), General Statutes § 14-241 (b) ("[a]t any intersection where traffic is permitted to move in both directions on each highway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the highway nearest the center line thereof and by passing to the right of such center line where it enters the intersection, and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the highway being entered"), General Statutes § 14-241 (e) ("when rotaries or roundabouts, signs or other devices are so placed, no driver shall turn a vehicle otherwise than as directed thereby"), General Statutes § 14-242 (b) ("[a] signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning"), General Statutes § 14-242 (d) ("[n]o person shall turn a vehicle so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of, a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred feet, or at any location where signs prohibiting U-turns are posted by any traffic authority"), and General Statutes § 14-242 (e) ("[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or within the area formed by the extension of the lateral lines of the private alley, road or driveway across the full width of the public highway with which it intersects, or so close to such intersection of public highways or to the area formed by the extension of the lateral lines of said private alley, road or driveway across the full width of the public highway as to constitute an immediate hazard"), with General Statutes § 14-234 (b) ("[t]he driver of a vehicle may overtake and pass, in a marked no-passing zone, pedestrians, parked or standing vehicles,

For example, § 14-218a, which governs speeds on local roadways such as Hartford's Sumner Street and Asylum Avenue, which are at issue in this case, provides in relevant part that "[n]o person shall operate a motor vehicle upon any public highway of the state, or road of any specially chartered municipal association . . . *at a rate of speed greater than is reasonable*, having regard to the width, traffic and use of highway, road or parking area, the intersection of streets and weather conditions," but then channels that discretion by providing that "[a]ny speed in excess of such limits, other than speeding as provided for in section 14-219, *shall be prima facie evidence that such speed is not reasonable*, but the fact that the speed of a vehicle is lower than such limits shall not relieve the operator from the

animals, bicycles, electric bicycles, mopeds, scooters, electric foot scooters, vehicles moving at a slow speed, as defined in section 14-220, or obstructions on the right side of the highway, as listed in subdivision (2) of subsection (a) of section 14-230, *provided such overtaking and passing may be conducted safely, with adequate sight distance and without interfering with oncoming traffic or endangering traffic*, as defined in section 14-297" (emphasis added)), General Statutes § 14-241 (a) ("[b]oth the approach for a right turn and a right turn shall be made *as close as practicable* to the right-hand curb or edge of the highway" (emphasis added)), General Statutes § 14-241 (c) ("[a]t any intersection where traffic is restricted to one direction on one or more of the highways, the driver of a vehicle intending to turn left shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle, and after entering the intersection the left turn shall be made so as to leave the intersection, *as nearly as practicable*, in the left-hand lane lawfully available to traffic moving in such direction upon the highway being entered" (emphasis added)), General Statutes § 14-242 (a) ("No person shall turn a vehicle at an intersection unless the vehicle is in a proper position on the highway as required by section 14-241, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a highway *unless such movement can be made with reasonable safety*. No person shall so turn any vehicle without giving an appropriate signal in the manner provided in section 14-244." (Emphasis added.)), and General Statutes § 14-242 (f) ("[n]o person operating a vehicle who overtakes and passes a person riding a bicycle, an electric bicycle or an electric foot scooter and proceeding in the same direction shall make a right turn at any intersection or into any private road or driveway *unless the turn can be made with reasonable safety* and will not impede the travel of the person riding the bicycle, electric bicycle or electric foot scooter" (emphasis added)).

duty to decrease speed when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions." (Emphasis added.) General Statutes (Rev. to 2013) § 14-218a (a). Similarly, § 14-240 (a), which governs following distances, provides: "No driver of a motor vehicle shall follow another vehicle more closely *than is reasonable and prudent*, having regard for the speed of such vehicles, the traffic upon and the condition of the highway and weather conditions."[20] (Emphasis added.) General Statutes (Rev. to 2013) § 14-240 (a).

Other relevant aspects of the motor vehicle statutory scheme leave us hard-pressed to describe the obligations that the rules of the road impose as so open-ended in their execution as to constitute a discretionary act for purposes of governmental immunity. In particular,

[20] Our research reveals several other statutory rules of the road with similar language that appears superficially discretionary but channels or limits that discretion in a way that creates a ministerial duty. See General Statutes § 14-232 (a) ("(1) the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof *at a safe distance and shall not again drive to the right side of the highway until safely clear of the overtaken vehicle*; and (2) the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle and shall not increase the speed of his or her vehicle until completely passed by the overtaking vehicle" (emphasis added)); General Statutes § 14-232 (b) ("[n]o vehicle shall be driven to the left side of the center of the highway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made *without interfering with the safe operation of any vehicle* approaching from the opposite direction or any vehicle overtaken" (emphasis added)); General Statutes § 14-233 ("The driver of a vehicle may overtake and pass upon the right of another vehicle *only when conditions permit such movement in safety* and under the following conditions: (1) When the vehicle overtaken is making or has signified the intention to make a left turn; (2) when lines of vehicles traveling in the same direction in adjoining traffic lanes have come to a stop or have reduced their speed; (3) upon a one-way street free from obstructions and of sufficient width for two or more lines of moving vehicles; (4) upon a limited access highway or parkway free from obstructions with three or more lanes provided for traffic in one direction. Such movement shall not be made by driving off the pavement or main-traveled portion of the highway except where lane designations, signs, signals or markings provide for such movement.").

§ 14-283, the emergency vehicle statute, is indicative of the lack of discretion that the rest of the statutory scheme provides to operators of motor vehicles. Section 14-283 provides the operators of emergency vehicles relief in certain discrete circumstances—such as the response to an emergency or the police pursuit of a fleeing law violator—from what ordinarily would be negligence per se, namely, the operation of a motor vehicle in violation of rules of the road such as speed limits and traffic control devices.[21] See *Tetro* v. *Stratford*, supra, 189 Conn. 609. Subsection (d) of § 14-283 emphasizes, however, that the "emergency vehicle legislation provides only limited shelter from liability for negligence. The effect of the statute is merely to displace the conclusive presumption of negligence that ordinarily arises from the violation of traffic rules. The statute does not relieve operators of emergency vehicles from their general duty to exercise due care for the safety of others." Id. Although the extent to which governmental immunity is applicable to the operation of an emergency vehicle under the privileges accorded

[21] "Section 14-283 permits the operators of emergency vehicles to disregard certain traffic rules in light of the circumstances. The term 'emergency vehicle,' as used in § 14-283 (a), includes 'any state or local police vehicle operated by a police officer . . . in the pursuit of fleeing law violators . . . .' Section 14-283 (b) (1) provides in relevant part that an operator of an emergency vehicle may '(B) . . . proceed past any red light or stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the posted speed limits or other speed limits imposed by or pursuant to section 14-218a or 14-219 as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.' The ability to disregard traffic rules is not, however, unlimited. By its terms, § 14-283 applies to state and local police vehicles only when 'operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators . . . .' General Statutes § 14-283 (a). Additionally, subsection (d) of § 14-283 provides: 'The provisions of this section *shall not* relieve the operator of an emergency vehicle from the duty to drive *with due regard for the safety of all persons and property*.' " (Emphasis in original.) *Borelli* v. *Renaldi*, supra, 336 Conn. 13.

by § 14-283 remains an open question in the wake of our decision in *Borelli* v. *Renaldi*, supra, 336 Conn. 1,[22]

[22] In our recent decision in *Borelli*, we concluded that the "due regard" requirement of § 14-283 (d) did not create a "ministerial, rather than [a] discretionary" duty for police officers "to weigh the safety of all persons and property and the seriousness of the offense *prior to initiating a pursuit* . . . ." (Emphasis added.) *Borelli* v. *Renaldi*, supra, 336 Conn. 14; see id., 16 ("the Uniform Statewide Pursuit Policy adopted pursuant to [General Statutes] § 14-283a contemplates that officers will exercise their judgment and discretion in giving due regard to the safety of all persons and property when determining whether to engage a pursuit"). We observed that the "phrase 'due regard' . . . rather than mandating a particular response to specific conditions, imposes a general duty on officers to exercise their judgment and discretion in a reasonable manner." Id., 14. We then stated that, "[b]ecause the requirement 'to drive with due regard for the safety of all persons and property' imposes a duty to exercise discretion, § 14-283 (d) falls squarely within the general rule of § 52-557n (a) (2) that municipalities 'shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.' Nothing in the language of § 14-283, which exclusively governs response to emergencies, supports the position that the legislature intended to impose anything other than a discretionary duty, or that it intended to delineate an exception to § 52-557n." Id., 15 n.6; see id., 23–24 (rejecting plaintiff's argument that, "because the statutory language mandates that police officers drive with due regard for safety, there is no discretion to drive without such regard," thus rendering that duty ministerial because "[t]he core distinction between the two types of duty lies not in whether the duty is mandatory, but in whether the performance of that duty will inherently require the municipal actor to exercise judgment").

Because *Borelli* was *not* a driving case, we emphasize that it does not stand for the proposition that emergency driving pursuant to § 14-283 is itself a discretionary activity for purposes of governmental immunity. See id., 4 ("although the plaintiff's complaint reasonably may be read to have raised the issue of whether governmental immunity shields officers with respect to the *manner* of driving while pursuing a fleeing motorist, *her argument on appeal focuses exclusively on whether governmental immunity applies to an officer's decision to engage in such a pursuit*" (emphasis altered)). We leave for another day whether emergency operation changes driving from a ministerial to a discretionary task.

We note, however, that several Superior Court decisions have concluded that *emergency* operation under the privilege conferred by § 14-283, and particularly the "due regard" standard of § 14-283 (d), is a discretionary act for purposes of governmental immunity. See, e.g., *Kajic* v. *Marquez*, Docket No. HHD-CV-16-6065320-S, 2017 WL 439963, *2, *7–8 (Conn. Super. August 16, 2017) (response to report of assault with firearm); *Parker* v. *Stadalink*, Superior Court, judicial district of Waterbury, Docket No. UWY-CV-13-6020769-S (May 4, 2016) (62 Conn. L. Rptr. 281, 284–86) (operation of police cruiser during high-speed pursuit); *Paternoster* v. *Paszkowski*, Docket No.

FBT-CV-14-6042098-S, 2015 WL 5809623, *6 (Conn. Super. September 1, 2015) (operation of police cruiser during high-speed pursuit). For a rejoinder to this line of Superior Court cases, see Judge Povodator's comprehensive decision in *Torres* v. *Norwalk*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-16-6029691-S (May 2, 2018) (66 Conn. L. Rptr. 548, 556–59), and the concurring and dissenting opinions in *Borelli*. See *Borelli* v. *Renaldi*, supra, 336 Conn. 39 (*Robinson*, *C. J.*, concurring); id., 114–15 (*Ecker*, *J.*, dissenting).

These Superior Court decisions and a broad reading of *Borelli* gave rise to a recent legislative response, albeit one that was vetoed by Governor Ned Lamont with an explanation that is instructive as we consider the governmental immunity issue before this court. See *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 184–85, 162 A.3d 706 (2017) (relying on veto message accompanying gubernatorial veto of amendment to municipal employee pension statute in determining employee's eligibility to collect disability pension while employed as mayor of municipality). Specifically, the legislature passed Senate Bill No. 204, 2022 Sess., as No. 22-22 of the 2022 Public Acts, "An Act Concerning Damages to Person or Property Caused by the Negligent Operation of a Motor Vehicle Owned by a Political Subdivision of the State." Senate Bill No. 204 would have amended § 52-557n (a) (2) by adding the following language: "Notwithstanding the provisions of subparagraph (B) of this subdivision, governmental immunity shall not be a defense in a civil action for damages to person or property caused by the negligent operation of a motor vehicle owned by a political subdivision of the state." Public Acts 2022, No. 22-22, § 1. On May 26, 2022, Governor Lamont vetoed Senate Bill No. 204, explaining his concern about the breadth of the bill, notwithstanding the legislature's apparent intention to create "parity" in liability for the negligent operation of motor vehicles as between municipalities and the state, for which sovereign immunity is waived by General Statutes § 52-556. Letter from Governor Ned Lamont to Denise W. Merrill, Secretary of the State (May 26, 2022) p. 2, available at https://portal.ct.gov/-/media/Office-of-the-Governor/Bill-notifications/2022/Bill-Notification-2022-13.pdf (last visited August 22, 2022). Governor Lamont expressed concern that it was "not evident whether in doing so, the legislature fully considered that unlike the state, municipalities face greater exposure by the simple fact that they have more emergency vehicles on the roads every day." Id. Relying on legislative testimony submitted by the Connecticut Conference of Municipalities, however, Governor Lamont emphasized: "Currently, public employees operating municipal vehicles *do not have the discretion to disregard motor vehicle laws*. They have a mandatory duty to abide by these laws and a municipality may be liable for an employee's negligent driving." (Emphasis added.) Id., p. 1; see id., p. 2 (Governor Lamont observed that Senate Bill No. 204 "eliminates completely the doctrine of governmental immunity for a municipality in the operation of a [town owned] vehicle. *This change could entail, for example, that a police officer's decision to pursue a fleeing law violator is not a discretionary act and therefore governmental immunity does not apply.* In that regard, I am concerned that the bill may inadvertently have gone too far." (Emphasis added.)); see also Written Testimony, Connecticut Conference of Municipalities (March 4, 2022) available at https://www.cga.ct.gov/2022/JUDdata/Tmy/2022SB-00204-R000304-

the motor vehicle statutory scheme establishes that—in the absence of the limited shelter of § 14-283—it imposes a ministerial duty on a government employee, including an on-duty police officer, who is operating a motor vehicle.[23]

The fact that the violation of these rules—beyond the emergency operation shelter of § 14-283—is punishable quasi-criminally as an infraction further suggests that the statutory rules of the road create a ministerial obligation. See *State* v. *Nesteriak*, 60 Conn. App. 647, 652–54, 760 A.2d 984 (2000) (concluding that § 14-283 (b) provides emergency vehicle operator with immunity

The%20Connecticut%20Conference%20of%20Municipalities%20-CCM-TMY.PDF (last visited August 22, 2022); Written Testimony, Connecticut Trial Lawyers Association (March 4, 2022) available at https://www.cga.ct.gov/2022/JUDdata/Tmy/2022SB-00204-R000304-The%20Connecticut%20Trial%20Lawyers%20Association-TMY.PDF (last visited August 22, 2022); Written Testimony, Attorney Thomas R. Gerarde on behalf of the Connecticut Conference of Municipalities (March 3, 2022) available at https://www.cga.ct.gov/2022/JUDdata/Tmy/2022SB-00204-R000304-Gerarde,%20Tom,%20Connecticut%20Conference%20of%20Municipalities-TMY.PDF (last visited August 22, 2022). Although the legislative proceedings concerning Senate Bill No. 204 are instructive with respect to the issue before us, which does *not* concern emergency vehicle operation under the aegis of § 14-283; see footnote 27 of this opinion and accompanying text; we nevertheless emphasize that the present case affords us no occasion to consider the extent to which governmental immunity extends to that unique context, and we decline to do so.

[23] Our research reveals that a recent decision from the Minnesota Court of Appeals has drawn a distinction between various provisions of the statutory rules of the road, observing that some create ministerial duties whereas other "less definite" provisions require the exercise of judgment, creating a discretionary duty. *Vanschaick* v. *Letourneau*, Docket No. A20-0705, 2021 WL 417024, *3 (Minn. App. February 8, 2021), review denied, Docket No. A20-0705, Minnesota Supreme Court (April 20, 2021); see id., *1–4 (assuming that state trooper was required to obey traffic laws in stopping speeding motorist but concluding that "less definite" statutes, such as those requiring turns to be made " 'safely,' " require exercise of judgment, creating discretionary duty). The Appellate Court's opinion in the present case contains a similar observation. See *Daley* v. *Kashmanian*, supra, 193 Conn. App. 188–89; see also footnote 8 of this opinion. We disagree with this approach as inconsistent with our legislature's intent to preserve liability for vehicular negligence under § 52-557n, as well as the effect of § 14-283 on the rules of the road provided by the motor vehicle statutory scheme.

from criminal prosecution for violation of traffic laws, including improper passing in violation of General Statutes § 14-232 and improper driving on left side of highway on curve in violation of General Statutes § 14-235, which is not overridden by "due care" requirement of subsection (d)); *State* v. *Plaskonka*, 22 Conn. App. 207, 209, 577 A.2d 729 ("the state had the burden of proving every element of the infractions beyond a reasonable doubt"), cert. denied, 216 Conn. 812, 580 A.2d 65 (1990); see also General Statutes § 51-164n (h) ("[i]n any trial for the alleged commission of an infraction, the practice, procedure, rules of evidence and burden of proof applicable in criminal proceedings shall apply"); *State* v. *Scribner*, 72 Conn. App. 736, 741–42, 805 A.2d 812 (2002) (emergency vehicle operator's privilege under § 14-283 does not provide immunity from negligent homicide with motor vehicle under General Statutes § 14-222a because that statute's terms indicate that "the legislature did not intend to put the limitation of liability offered under § 14-283 above the safety of the public"). These statutes, therefore, do not call for the kind of open-ended good professional judgment that is the hallmark of discretionary act immunity. Cf. *Coley* v. *Hartford*, supra, 312 Conn. 165–66 (police department response procedure requiring officer to remain at scene of domestic disturbance "for a reasonable time" period, as determined by "the reasonable judgment of the officer," created discretionary duty for purposes of § 52-557n (a) (2) (B) (internal quotation marks omitted)).

It is also significant that, although there is no appellate authority on point, our trial courts uniformly have held that the operation of an emergency vehicle—at least beyond the scope of § 14-283, the emergency vehicle statute—is a ministerial function for purposes of governmental immunity.[24] Prior to the enactment of

[24] For a discussion of the open debate concerning the application of governmental immunity to the operation of emergency vehicles under the privileges of § 14-283, see footnote 22 of this opinion.

§ 52-557n in 1986, "[n]o serious questions appeared to have been raised as to whether a police officer might be liable for negligence in the operation of a motor vehicle . . . [but, rather] the municipal employer would be responsible for indemnification of an officer found to have been civilly liable, under the provisions of . . . § 7-465 . . . ." *Torres* v. *Norwalk*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-16-6029691-S (May 2, 2018) (66 Conn. L. Rptr. 548, 550);[25] see *Borelli* v. *Renaldi*, supra, 336 Conn. 119 (*Ecker*, *J.*, dissenting) ("[h]istorically speaking, ordinary negligence principles so plainly apply to municipal employees who drive motor vehicles on public roadways that the rubric of municipal immunity typically is not invoked at all in this context"). These courts describe driving as an act that "occurs subconsciously much of the time" but that also "is constantly guided by a vast array of statutes and regulations that prescribe the conduct that is proper and improper while on the road. Following the rules of [the] road and exercising due care to the public is not optional for municipal employees engaged in routine driving." *Williams* v. *New London*, Superior Court, judicial district of New London, Docket No. CV-12-6012328-S (April 7, 2014) (58 Conn. L. Rptr. 86, 89–90); see id., 88 ("[R]outine driving cannot be considered a purely discretionary function. That is because, for example, municipal employees cannot claim that they have discretion to run stop signs, ignore pedestrians in the crosswalk, or exceed the speed limit while driving through city streets. These rules of the road are ministerial duties to which everyone must adhere, even police officers and firefighters when not

[25] We note that Judge Povodator's relatively recent decision in *Torres* v. *Norwalk*, supra, 66 Conn. L. Rptr. 548, is the most comprehensive Superior Court decision on this point, with its recent vintage reflecting the evolution of this court's discretionary act immunity jurisprudence after the enactment of § 52-557n.

responding to emergencies."); see also, e.g., *Torres* v. *Norwalk*, supra, 556 ("[v]iewed in isolation, the court must reject any suggestion that [nonemergency] operation of a motor vehicle, by a police officer, is a governmental function"); *Gagliardi* v. *Consiglio*, Superior Court, judicial district of New Haven, Docket No. CV-95-0380916 (September 16, 1997) (20 Conn. L. Rptr. 264, 266–67) (operation of school district truck in school parking lot was ministerial act); *Letowt* v. *Norwalk*, 41 Conn. Supp. 402, 406, 579 A.2d 601 (1989) ("[o]rdinary citizens drive their cars every day, not just police officers, and hence the operation of a motor vehicle would be deemed ministerial").

Significantly, these Superior Court decisions distinguish between the act of driving the motor vehicle, which is ministerial in nature, and the task that the employee sought to accomplish by driving the motor vehicle, which might well be discretionary, in concluding that governmental immunity does not bar claims of vehicular negligence. Most instructive is *MacMillen* v. *Branford*, Superior Court, judicial district of New Haven, Docket No. 374004 (March 30, 1998) (21 Conn. L. Rptr. 561), in which the court rejected a claim that a police officer who crashed his cruiser while in the course of investigating reported discharges of illegal fireworks was engaged in a discretionary act; the court drew a sharp distinction between the acts of driving and investigation. See id., 561–62; see also *Pelletier* v. *Petruck*, Superior Court, judicial district of Hartford, Docket No. CV-07-5009064-S (September 10, 2008) (46 Conn. L. Rptr. 288, 289) (denying motion for summary judgment in case arising from collision with snowplow because "the plaintiff does not allege that she was injured as a result of the construction or maintenance of the highways, but rather that her damages were the result of [the town employee's] alleged negligent operation of a motor vehicle"); *Letowt* v. *Norwalk*, supra, 41 Conn.

Supp. 406 (contrasting act of driving police car to accident scene from duties officer performed once there, such as measuring skid marks or caring for injured person).

The decisions of our sister states similarly support the conclusion that driving a motor vehicle in a nonemergency situation is a ministerial act for purposes of governmental immunity. See, e.g., *Loxley* v. *Coleman*, 720 So. 2d 907, 909 (Ala. 1998) (observing that "trying to avoid potholes while driving a motor vehicle is a ministerial, and not a discretionary, function" in concluding that supervisor was not entitled to governmental immunity for injuries caused when inmate fell from back of truck she was driving); *Wakarusa* v. *Holdeman*, 582 N.E.2d 802, 803–804 (Ind. 1991) (concluding that police officer involved in rear-end collision while on patrol looking for license plate violations was not engaged in "law enforcement" activities for purposes of governmental immunity statute, rendering "the controlling question" whether officer breached his duty to operate vehicle with reasonable care on public roadway); *Kyllo* v. *Panzer*, 535 N.W.2d 896, 903 (S.D. 1995) ("[i]t is inconceivable that driving a motor vehicle is anything other than a ministerial function"); *Hulick* v. *Houston*, Docket No. 14-20-00424-CV, 2022 WL 288096, *4–5 (Tex. App. February 1, 2022, pet. review filed) (officer driving cruiser during search for homeless person who allegedly caused disturbance was engaged in ministerial act and, therefore, was not entitled to governmental immunity for collision); *Heider* v. *Clemons*, 241 Va. 143, 145, 400 S.E.2d 190 (1991) ("[although] every person driving a car must make myriad decisions, in ordinary driving situations the duty of due care is a ministerial obligation"); *Morway* v. *Trombly*, 173 Vt. 266, 273, 789 A.2d 965 (2001) (operation of snowplow is ministerial act); see also 4 Restatement (Second), Torts § 895D, comment (h), p. 418 (1979) (noting that

"the driving of vehicles" is example of ministerial act "under ordinary circumstances" as one "done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done"). Accordingly, the decisions of our sister states lend further support to the proposition that driving is a ministerial act for purposes of governmental immunity.[26]

We therefore conclude that, because the operation of a motor vehicle is a highly regulated activity that constitutes a ministerial function, Kashmanian's operation of the soft car was not itself a discretionary activity during the surveillance operation that led to the collision that injured the plaintiff. The decision of Kashmanian and his fellow officers to use the soft car to surveil the plaintiff was indeed a discretionary one. See, e.g., *Priah* v. *United States*, supra, 590 F. Supp. 2d 922–23, 928–29 (there was no liability under Federal Tort Claims

[26] Consistent with the decisions of some of our trial courts; see footnote 22 of this opinion; some of our sister states draw a distinction between emergency and nonemergency operation for purposes of governmental immunity under a ministerial/discretionary regime. See, e.g., *Davis* v. *Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763–64 (Mo. 2006) (emergency response to call for assistance by fellow officer); *Woods* v. *Moody*, 933 S.W.2d 306, 308 (Tex. App. 1996) (observing that, "[u]nlike [high-speed] chases or traffic stops, operating a car in a [nonemergency] situation does not involve personal deliberation or the exercise of professional expertise, decision, or judgment," in holding that, "absent special circumstances that suggest the officer was performing a discretionary function, such as engaging in a [high-speed] chase . . . an officer driving a motor vehicle while on official, [nonemergency] business is performing a ministerial act"); *McBride* v. *Bennett*, 288 Va. 450, 457–58, 764 S.E.2d 44 (2014) (emergency response to domestic violence call). Because this case does not concern emergency operation, and particularly because the extent to which governmental immunity should extend to the emergency operation of municipal vehicles pursuant to § 14-283 has been the topic of recent legislative attention; see footnote 22 of this opinion; we need not and do not address the extent to which emergency operation and nonemergency operation are distinct for purposes of governmental immunity.

Act because federal agents were engaged in discretionary act in attempting to rescue kidnapped confidential informant via SWAT team raid, which led to death of informant when agents fired on vehicle in self-defense); *Flax* v. *United States*, supra, 847 F. Supp. 1190–91 (there was no liability under Federal Tort Claims Act because federal agents were engaged in discretionary act in deciding to engage in further surveillance of kidnapper in hopes of locating accomplice and victim, which was unsuccessful, rather than to apprehend kidnapper immediately after ransom pickup). But see *State Farm Mutual Automobile Ins. Co.* v. *United States*, supra, 2017 U.S. Dist. LEXIS 62132, *9 (vehicle surveillance without use of warning devices when proceeding against red light was expressly discretionary act under terms of Federal Bureau of Investigation's ground surveillance policy, which recognized that, "under certain conditions, the rules of the road give way to the exigencies of surveillance"); cf. *Borelli* v. *Renaldi*, supra, 336 Conn. 14–15 (decision to pursue is discretionary). Nevertheless, once the officers decided to operate a motor vehicle on public streets for the surveillance operation, they were legally bound to comply with the statutory rules of the road unless they were operating as an emergency vehicle within the meaning of § 14-283, which they concede was not the case under the present circumstances because § 14-283 is expressly limited to pursuits and emergency call responses, neither of which is a scenario presented in this case. Accordingly, Kashmanian's operation of the soft car was a ministerial act for purposes of his governmental immunity and that of the city pursuant to § 52-557n.

We disagree with the defendants' argument, echoed in the Appellate Court's opinion in this case; see *Daley* v. *Kashmanian*, supra, 193 Conn. App. 188–89; that a conclusion that our motor vehicle statutes create a ministerial duty frustrates public policy by cramping

police officers' discretion while undertaking their surveillance function, which is not covered by § 14-283. We recently rejected a similar argument in *Cole*, which concerned the highly regulated area of police pursuits, observing: "Although our case law repeatedly emphasizes the broad discretion generally afforded to police officers in the performance of their duties . . . the . . . arguments in the present case verge on ask[ing] too much in urging us to conclude that *all* police conduct in emergency situations is discretionary. We do not read our previous cases as establishing the broad proposition that *all* police conduct in emergencies is discretionary, even in the face of binding police department policies." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Cole* v. *New Haven*, supra, 337 Conn. 347. It is beyond our purview to extend an advantage to law enforcement by extending the limited relief from compliance with the traffic laws provided by § 14-283 to surveillance operations. As with pursuits, which are regulated comprehensively by General Statutes § 14-283a, the complex balancing of public safety against the exigencies of law enforcement is a public policy question for the legislature.[27] See, e.g.,

[27] As we previously noted, the legislature recently enacted Senate Bill No. 204, which Governor Ned Lamont subsequently vetoed, in an effort to clarify the scope of governmental immunity with respect to the negligent operation of motor vehicles. See footnote 22 of this opinion. Similarly, should the legislature determine that public policy favoring effective law enforcement requires an expansion of the scope of § 14-283 to exempt certain types of nonemergency motor vehicle operation from the ordinary rules of the road, it is well equipped to make those changes. Cf. Wis. Stat. Ann. § 346.03 (4) (a) and (b) (West 2019) (The Wisconsin emergency vehicle statute authorizes law enforcement officers to exceed the speed limit without "giving audible and visual signal" if "the officer is obtaining evidence of a speed violation" or "is responding to a call which the officer reasonably believes involves a felony in progress and the officer reasonably believes any of the following: 1. Knowledge of the officer's presence may endanger the safety of a victim or other person. 2. Knowledge of the officer's presence may cause the suspected violator to evade apprehension. 3. Knowledge of the officer's presence may cause the suspected violator to destroy evidence of a suspected felony or may otherwise result in the loss of evidence of a suspected

Mayer v. *Historic District Commission*, 325 Conn. 765, 780 and n.10, 160 A.3d 333 (2017); *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 549–50, 93 A.3d 1142 (2014).

The judgment of the Appellate Court is reversed insofar as that court upheld the trial court's motion to set aside the jury's verdict on count one of the operative complaint alleging negligence on the part of Kashmanian, and the case is remanded to the Appellate Court with direction to reverse that part of the trial court's judgment in favor of Kashmanian on count one and in favor of the city on count four of the operative complaint seeking indemnification from the city pursuant to § 7-465 for Kashmanian's negligence, to reinstate the jury's verdict, and to render judgment for the plaintiff on count four of the operative complaint; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TERRY FREEMAN (SC 20554)

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

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crime of robbery in the first degree, the defendant appealed to the Appellate Court, claiming that his prosecution was time barred by the applicable five year statute of limitations ((Rev. to 2017) § 54-193 (b)) because, although the warrant for his arrest was issued two weeks before the expiration of

felony. 4. Knowledge of the officer's presence may cause the suspected violator to cease the commission of a suspected felony before the officer obtains sufficient evidence to establish grounds for arrest.").

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Kahn, Ecker and Keller. Although Justice Mullins was not present at oral argument, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

the limitation period set forth in § 54-193 (b), it was executed one week after its expiration. The defendant had filed a motion to dismiss, which the trial court denied, finding that, because there was at least some evidence that the state had made efforts to execute the warrant before the expiration of the limitation period, the delay in the execution of the warrant was reasonable. At the hearing on that motion, the prosecutor relied on a stipulation of facts setting forth a relevant chronology of events. The stipulation provided that, while incarcerated on unrelated charges in early November, 2018, the defendant confessed to his involvement in the robbery, which occurred on November 29, 2013. On November 19, 2018, the police obtained a signed warrant for the defendant's arrest and requested that the Office of the State's Attorney prepare an application for a writ of habeas corpus to have the defendant transported from the correctional facility at which he was incarcerated to the trial court, where he could be served with the warrant. The Office of the State's Attorney prepared the application for a writ of habeas corpus on November 21, 2018, but it was not signed until November 27, 2018. Thereafter, on December 6, 2018, the defendant was transported to court, where he was served with the warrant. The prosecutor adduced no additional evidence at the hearing, aside from the arrest warrant and the writ of habeas corpus. When the trial court asked the prosecutor to explain the three week delay between the issuance and execution of the arrest warrant, he stated that the warrant was not picked up until two days after it was signed by the judge and that the Thanksgiving holiday took place during the period between when the application for the writ of habeas corpus was prepared and signed. He also explained that the procedure for transporting an inmate to court involves various factors, including staff availability, limits on how many inmates can be transported on a given day, and coordination among various state agencies, such that a one week delay between the signing of a writ of habeas corpus and the transport of an inmate was not unusual. On appeal to the Appellate Court from the denial of the defendant's motion to dismiss, that court affirmed, concluding that the trial court had correctly determined that there was sufficient evidence to establish that the delay in the service of the arrest warrant after the expiration of the statute of limitations was reasonable. On the granting of certification, the defendant appealed to this court. *Held* that the state failed to satisfy its burden of establishing that it acted with due diligence in its efforts to execute the arrest warrant within the limitation period without unreasonable delay, and, accordingly, the judgment of the Appellate Court was reversed and the case was remanded with direction to reverse the trial court's judgment and to order the trial court to grant the defendant's motion to dismiss: once a defendant demonstrates his nonelusiveness and his availability for arrest during the time period between the issuance and the execution of a warrant, the burden shifts to the state to present evidence of its due diligence and reasonable efforts in executing the

warrant, and this court clarified that, to satisfy that burden, the state must produce admissible evidence to explain the reasonableness of the delay and to demonstrate its due diligence, which does not include the unsworn factual representations of counsel, insofar as such assertions cannot be tested in the crucible of cross-examination; in the present case, the parties did not dispute that the defendant met his burden of demonstrating his availability for arrest during the statutory period and, therefore, that the burden shifted to the state to present evidence of its due diligence in executing the warrant; moreover, the stipulation on which the state relied was an unadorned chronology of events that, despite reflecting a three week delay between the issuance and execution of the arrest warrant, did not reveal the reasons for the various delays or explain how the efforts undertaken to execute the warrant reflected the state's due diligence, no evidence was presented at the hearing to establish the facts underlying the prosecutor's assertions that the delay was caused by a holiday and general logistical factors affecting the transportation of inmates, and the prosecutor could not explain why the state did not try to arrange for the transportation of the defendant before the expiration of the statute of limitations.

(*One justice concurring separately*; *three justices dissenting in one opinion*)

Argued February 17—officially released August 30, 2022

Procedural History

Information charging the defendant with the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, larceny in the fifth degree, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Brown*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court, *Brown*, *J.*, on a conditional plea of nolo contendere to the charge of robbery in the first degree; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to the charges of conspiracy to commit robbery in the first degree and criminal possession of a firearm, and the court dismissed the charge of larceny in the fifth degree; thereafter, the defendant appealed to the Appellate Court, *Bright*, *C. J.*, and *Cradle* and *Alexander*, *Js.*, which affirmed the trial court's judgment, and the defen-

dant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

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

Thadius L. Bochain, deputy assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Matthew R. Kalthoff*, assistant state's attorney, and *Samantha L. Oden*, former deputy assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The defendant, Terry Freeman, appeals from the judgment of the Appellate Court affirming his conviction of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), following the entry of a conditional plea of nolo contendere. The sole issue on appeal is whether the prosecution of the defendant was time barred by the five year statute of limitations set forth in General Statutes (Rev. to 2017) § 54-193 (b)[1] on the ground that the state failed to establish that the warrant for the defendant's arrest was executed without unreasonable delay. See *State* v. *Swebilius*, 325 Conn. 793, 802, 159 A.3d 1099 (2017); *State* v. *Crawford*, 202 Conn. 443, 451, 521 A.2d 1034 (1987). We conclude that the state failed to produce sufficient evidence to establish that the arrest warrant was executed with due diligence, and, accordingly, we reverse the judgment of the Appellate Court.

[1] General Statutes (Rev. to 2017) § 54-193 (b) provides: "No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."

The statute was revised in 2019. See Public Acts 2019, No. 19-16, § 17. All references to the statute in this opinion are to the 2017 revision, unless otherwise noted.

The Appellate Court's opinion sets forth the following relevant facts, which we supplement with additional undisputed facts as necessary. "On November 5, 2018, Jeffrey Gabianelli, a detective with the West Haven Police Department, received a letter from the defendant containing information about an armed robbery that had occurred at the Wine Press Liquor Store in West Haven on November 29, 2013. The next day, Gabianelli visited the defendant at the Carl Robinson Correctional Institution in Enfield, where the defendant was incarcerated on unrelated charges. The defendant confessed to Gabianelli as to his involvement in the November 29, 2013 robbery. On November 9, 2018, Gabianelli prepared an arrest warrant. On November 15, 2018, a Superior Court judge signed the warrant. On November 19, 2018, John Laychak, a West Haven police officer, obtained the signed warrant and submitted a request that the Office of the State's Attorney prepare an application for a writ of habeas corpus to transport the defendant to the Superior Court in the judicial district of Ansonia-Milford for service of the arrest warrant. On November 21, 2018, the Office of the State's Attorney prepared the application for a writ of habeas corpus requesting that the defendant be transported to the court on December 6, 2018. On November 27, 2018, a prosecutor and a clerk of the court signed the writ of habeas corpus. On December 6, 2018, the defendant was transported to the Superior Court where he was served with the arrest warrant.

"Thereafter, the defendant filed a motion to dismiss, claiming that the prosecution was barred due to the lapse of the five year statute of limitations set forth in § 54-193 (b). The defendant argued that the statute of limitations had lapsed on November 29, 2018, five years after the robbery had occurred, and that the state had failed to proffer sufficient evidence to show that the delay in the execution of the arrest warrant until Decem-

ber 6, 2018, was reasonable." (Footnotes omitted.) *State* v. *Freeman*, 201 Conn. App. 555, 557–58, 242 A.3d 1059 (2020).

The trial court, *Brown*, *J.*, held an evidentiary hearing on the defendant's motion to dismiss. The prosecutor conceded that the defendant had met his burden of demonstrating that he "lived openly, was nonelusive, and was available for arrest throughout the relevant period of limitation" and, thus, that the burden shifted to the state to demonstrate that the warrant was executed without unreasonable delay. See *State* v. *Swebilius*, supra, 325 Conn. 807 ("[o]nce the defendant has presented evidence of his availability for arrest, it is reasonable and proper that the burden should then shift to the state to explain why, notwithstanding the defendant's availability during the statutory period, the delay in his arrest was reasonable"). To fulfill that burden, the state relied on a written stipulation of facts agreed on by the parties, which set forth the relevant chronology of events described previously in this opinion. The state adduced no additional evidence, aside from the arrest warrant application issued on November 15, 2018, and the writ of habeas corpus dated November 21, 2018.

The trial court asked the prosecutor to explain the delay between the issuance of the arrest warrant on November 15, and its execution on December 6. The prosecutor explained that the court liaison officer did not pick up the signed warrant until Monday, November 19, and that he had no "information as to why [the warrant] wasn't picked up on [that] Friday [i.e., November 16]," but "the court liaison officer would . . . pick up the warrant [only] during the business day, so that would account, at least in part, for that four day gap . . . ." The prosecutor did not offer an explanation for the two day gap between November 19, and November 21, the date on which the state prepared the application for the writ of habeas corpus. Regarding the six day

gap between November 21, and November 27, the date on which the writ of habeas corpus was signed, the prosecutor explained that Thursday, November 22, was the Thanksgiving holiday and that Friday, November 23, was "a relatively light day . . . ." As for the nine day gap between November 27, and December 6, the date on which the defendant was transported and the warrant was executed, the prosecutor explained that the transport was arranged "as a matter of course" in light of the various "factors that play in effectuating the transport of an inmate to [the] court," such as the availability of staff, the maximum number of inmates that may be transported on a given day, and the necessary coordination among the relevant state agencies. The prosecutor "could offer no explanation as to why the defendant was not transported to court for service of the warrant on or before November 29, 2018, except to say that a one week delay between the signing of a habeas writ and the transport of a defendant was not unusual."

The trial court denied the defendant's motion to dismiss, finding "that the state, in fact, made at least some effort to execute the warrant on or before November 29, 2018. The state acted reasonably and diligently to follow up on the defendant's letter, to obtain his confession, and to prepare an arrest warrant for court review and action. Once the warrant was issued, the state acted reasonably and made at least some effort to have the defendant brought to court for execution of the warrant." Although the statute of limitations expired seven days before the warrant was executed, the trial court found "at least some evidence explaining why the delay was reasonable. The writ had to be prepared and approved before the defendant could be ordered transported to court." Significantly, the court noted that "[t]he state should have been more mindful that, as of November 15, 2018, [the state] . . . had [only] fourteen more days

to get the warrant executed to be within the five year limitation period" but determined that, because the state made some "efforts to meet the November 29, 2018 [expiration] date," the delay in the execution of the warrant was reasonable.

The defendant thereafter entered a conditional plea of nolo contendere to the charge of robbery in the first degree. The trial court sentenced the defendant to one year of imprisonment, consecutive to his current sentence.

The defendant appealed from the trial court's judgment to the Appellate Court, claiming that the trial court had improperly denied his motion to dismiss because (1) it misinterpreted and misapplied the legal standard set forth in *State* v. *Crawford*, supra, 202 Conn. 443, and *State* v. *Swebilius*, supra, 325 Conn. 793, and (2) there was insufficient evidence to establish that the delay in the service of the arrest warrant after the expiration of the statute of limitations was reasonable. See *State* v. *Freeman*, supra, 201 Conn. App. 559. The Appellate Court rejected the defendant's first claim, explaining that *Swebilius* neither "qualif[ies] the efforts the state must show to satisfy its burden nor explain[s] the degree of effort necessary." Id., 563. Instead, "the state must prove that any delay in serving the warrant beyond the statute of limitations was reasonable. What efforts the state made to accomplish service and the reasons why service was not accomplished before the statute of limitations expired are necessary parts of the court's reasonableness analysis." Id., 564. The Appellate Court concluded that "the [trial] court applied the correct legal test as set forth by [this court] in *Swebilius* and by [the Appellate Court] in [other cases]." Id., 566.

Regarding the sufficiency of the evidence produced by the state, the Appellate Court determined that the state had fulfilled its burden of demonstrating that it

made reasonable efforts to obtain and execute the arrest warrant, reasoning that, "[f]ollowing the defendant's confession to [the detective], the state made continuous efforts to obtain a warrant and to facilitate the appropriate transportation of the defendant to the Superior Court for the execution of that warrant; efforts that were all made before the statute of limitations expired." Id. Although the defendant was not transported and served with the warrant until seven days after the expiration of the statute of limitations, the Appellate Court opined that "the nine day delay from the signing of the habeas writ to the transportation of the defendant was not unusual, as a matter of course, given the logistical, practical and safety precautions that must be taken whenever an incarcerated individual is transported from a correctional facility to a courthouse." Id., 567–68. The court further explained that it was "within the purview of the trial court to use its knowledge of the inner workings of the courts and the process by which incarcerated persons are transported to a court in its determination of the reasonableness of the state's efforts." Id., 568. Accordingly, the Appellate Court affirmed the judgment of conviction. Id.

On appeal to this court,[2] the defendant claims that the Appellate Court improperly upheld the trial court's denial of his motion to dismiss on the basis of its conclusion that the state executed the arrest warrant without unreasonable delay. The defendant contends that "[t]here was no evidence of any effort by the state to attempt to execute the warrant before the statute of limitations expired or any evidence offered to explain why the state's failure to do so was reasonable under these

[2] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court properly denied the defendant's motion to dismiss on the basis of its determination that the state had executed the arrest warrant without unreasonable delay?" *State* v. *Freeman*, 336 Conn. 907, 243 A.3d 1180 (2021).

circumstances." The state responds that the Appellate Court correctly concluded that the trial court's denial of the defendant's motion to dismiss was proper because the state fulfilled its burden of proving that the warrant was executed without unreasonable delay. We agree with the defendant.

The standard of review on a motion to dismiss is well established. "Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the [trial] court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo." (Internal quotation marks omitted.) *State* v. *A. B.*, 341 Conn. 47, 55, 266 A.3d 849 (2021). Whether a warrant was executed within a reasonable period of time under § 54-193 (b) ordinarily "is a question of fact that will depend on the circumstance of each case." *State* v. *Crawford*, supra, 202 Conn. 451. In the present case, however, the facts are undisputed, and the sole question is whether the stipulated facts are sufficient to demonstrate that the state fulfilled its burden of proving that it executed the warrant with due diligence. Under these circumstances, we review the trial court's reasonableness conclusion de novo. See *Jones* v. *State*, 328 Conn. 84, 101, 177 A.3d 534 (2018) (observing that, "when the facts are undisputed, determining the legal import of those facts presents a question of law subject to de novo review"); *One Country, LLC* v. *Johnson*, 314 Conn. 288, 300, 101 A.3d 933 (2014) ("when the facts are undisputed," application of legal standard is "a question of law over which we exercise plenary review"); *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 62, 591 A.2d 1231 (1991) (same); see also *Nelson* v. *State Farm Mutual Automobile Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005) ("[w]hether a court properly applied a statute of limitations and the date a

statute of limitations accrues under undisputed facts are questions of law we review de novo"); *Spitsyn* v. *Moore*, 345 F.3d 796, 799 (9th Cir. 2003) ("[i]f the facts underlying a claim for equitable tolling are undisputed, the question of whether the statute of limitations should be equitably tolled is . . . reviewed de novo").

We begin our analysis with the relevant case law. In *State* v. *Crawford*, supra, 202 Conn. 443, this court held that the issuance of an arrest warrant within the limitation period set forth in General Statutes (Rev. to 1983) § 54-193 (b) commences a prosecution for purposes of satisfying the statute of limitations, so long as the warrant is executed without unreasonable delay. See id., 450–51. In *Crawford*, the state had issued a warrant for the arrest of the defendant, Ronald L. Crawford, approximately two months after the commission of the charged offenses, but the warrant was executed more than one year after the statute of limitations lapsed. Id., 445. Crawford filed a motion to dismiss the charges against him, arguing that, because he was not prosecuted within the one year limitation period, the prosecution was time barred. Id. We explained that, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is [satisfied]."[3] (Footnote omitted.)

[3] *Crawford* uses the word "toll" rather than "satisfy," but we have since clarified that a distinction exists between "tolling" and "satisfying" the statute of limitations and that the latter term is the more accurate one in the present context. See *State* v. *A. B.*, supra, 341 Conn. 57 n.6 (noting that we previously have "used the term 'tolled,' and other forms of the verb 'toll,' rather than 'satisfied,' to describe the state's meeting its obligation under § 54-193 (b) to have 'prosecuted' a crime within the relevant limitation period" and concluding that " 'satisfie[d]' is the appropriate term to describe the state's meeting such obligation under [the statute]").

Id., 450. "We recognize[d], however, that some limit as to when an arrest warrant must be executed after its issuance is necessary in order to prevent the disadvantages to an accused attending stale prosecutions, a primary purpose of statutes of limitation[s]." Id. We therefore concluded that, "in order to [satisfy] the statute of limitations, an arrest warrant, when issued within the time limitations . . . must be executed without unreasonable delay." Id., 450–51.

We declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." Id., 451. Instead, we clarified that "[a] reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, *failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to* [*satisfy*] *the statute of limitations*." (Emphasis added.) Id.

In *State* v. *Swebilius*, supra, 325 Conn. 793, we considered whether a brief delay in the execution of an arrest warrant could be per se reasonable. The defendant, Jon Swebilius, was arrested thirty-two days after the issuance of the warrant for his arrest and thirteen days after the expiration of the applicable five year statute of limitations. Id., 796. Swebilius "moved to dismiss the charge on the ground that the prosecution was barred by the statute of limitations because . . . the delay in the execution of the warrant was unreasonable." Id. We concluded that the Appellate Court had "incorrectly determined that some delays in the execution of an arrest warrant may be so brief as to be reasonable as a matter of law for the purpose of [satisfying] the applicable statute of limitations." Id., 801.

We explained that, "once the defendant has demonstrated his availability for arrest, he has done all that is required to carry his burden; the burden then shifts to the state to demonstrate that any period of delay in executing the warrant was not unreasonable." Id., 804; see *State* v. *Woodtke*, 130 Conn. App. 734, 740, 25 A.3d 699 (2011). The "burden shifting scheme" required by *Swebilius* "encourages diligence by law enforcement officials in providing timely notice of charges to defendants." *State* v. *Swebilius*, supra, 325 Conn. 808. We "decline[d] to specify the precise actions that [law enforcement officials] must undertake to serve a warrant with due diligence, or the precise time line within which they must act," but held that "such officials must present some credible and persuasive factual basis for inaction when they fail to observe the statute of limitations. This requirement is consistent with the principle that, when a judicial doctrine, for all practical purposes, extends the statute [of limitations] beyond its stated term, that doctrine should be applied in only limited circumstances . . . ." (Internal quotation marks omitted.) Id., 808–809. We emphasized that such a rule "is not intended to impose an undue burden on the state"; id., 814; but to effectuate "the purposes of statutes of limitations," namely, "prevent[ing] the unexpected enforcement of stale and fraudulent claims" and "aid[ing] in the search for truth that may be impaired by the loss of evidence" due to the passage of time. (Internal quotation marks omitted.) Id., 812.

The burden imposed on the state is not onerous, but neither is it trivial. Although the dissent accurately observes that *Swebilius* (on a single occasion) referred to the requirement that the state "make *some effort* to serve the arrest warrant before the relevant statute of limitations expires"; (emphasis added) id., 814; *Swebilius* otherwise uniformly characterized the state's burden as requiring "*reasonable* efforts"; (emphasis added)

id., 815; or evidence of "due diligence . . . ." Id., 808; accord id., 804 n.8, 812. The dissent is correct that these standards are all "functionally equivalent"—but they are equivalent only if "some effort" is understood to require reasonable and diligent efforts. The dissent goes too far, and would empty *Swebilius* of its significance, by suggesting that a single reference in *Swebilius* to "some effort," in contrast to its more than one dozen references to "reasonable efforts" and "due diligence," means that the state satisfies its burden by making anything less than reasonable and diligent efforts. Indeed, that burden is no burden at all because it allows the state to satisfy the statute of limitations by ignoring it entirely, and simply to proceed with business while exhibiting no regard for, or even awareness of, the statutory deadline. That meaning is the opposite of what *Swebilius* intended when it stated that "a rule making some delays reasonable without any showing of *due diligence* is inconsistent with the purposes of the statutes of limitations." (Emphasis added.) *State* v. *Swebilius*, supra, 325 Conn. 812. We reaffirm that, once a defendant's availability for arrest is established, the state must demonstrate that it made diligent efforts to execute an arrest warrant within the limitation period or "offer some *evidence* explaining why its failure to do so was reasonable under the circumstances."[4] (Emphasis added.) Id., 814; see *State* v. *Ali*, 233 Conn. 403, 416, 660 A.2d 337 (1995) ("the issuance of an arrest

[4] The dissent states that "[t]he court in *Swebilius* required the state to provide an explanation only when it failed to make 'some' . . . effort . . . ." We disagree. As we explained in *Swebilius*, "[o]nce the defendant has presented evidence of his availability for arrest, it is reasonable and proper that the burden should then shift to the state *to explain why, notwithstanding the defendant's availability during the statutory period, the delay in his arrest was reasonable.* Doing so allocates burdens efficiently by requiring each party to bring forth evidence uniquely within its knowledge." (Emphasis added.) *State* v. *Swebilius*, supra, 325 Conn. 807. To read *Swebilius* as the dissent suggests is inconsistent with the plain language and clear import of our holding in that case.

warrant is sufficient 'prosecution' to satisfy the statute of limitations only if the warrant is executed with *due diligence*" (emphasis added)); *State* v. *Crawford*, supra, 202 Conn. 452 (same).

In the present case, the parties do not dispute that the defendant fulfilled his burden of demonstrating his availability for arrest during the statutory period and, therefore, that the burden shifted to the state "to present evidence of its due diligence in executing the warrant." *State* v. *Swebilius*, supra, 325 Conn. 803. We emphasize that the requirement of "evidence" to satisfy the state's burden under *Swebilius* must not be overlooked. "Evidence" in this context means what it normally means, namely, the formal presentation in a judicial proceeding of testimony, documents, or exhibits " 'to prove or disprove the existence of an alleged fact . . . .' " *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 602, 999 A.2d 741 (2010), quoting Black's Law Dictionary (9th Ed. 2009) p. 635. "Fairly stated, evidence legally is the means by which alleged matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. On the other hand, 'proof' is the result or the effect of such 'evidence.' Moreover, [counsel's] representations [are] not 'testimony,' which, in turn, when given under oath or stipulated to, is a species of 'evidence.' " *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153–54, 496 A.2d 476 (1985); see *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn. App. 743, 751, 201 A.3d 485 (2018) ("[u]nsworn 'representations of counsel are not, legally speaking, evidence' [on] which courts can rely"), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019); *Constantine* v. *Schneider*, 49 Conn. App. 378, 395, 715 A.2d 772 (1998) (same).

To fulfill its burden of proof regarding the delay in the execution of the warrant, the state was required to produce admissible *evidence* to explain the delay. This

proposition is not contested by the state. The unsworn factual representations of counsel, which cannot be tested in the crucible of cross-examination, are not evidence on which the state may rely to fulfill its burden of production and persuasion. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.9, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (party bearing evidentiary burden of proof "cannot meet its burden merely through . . . argument of counsel"); *Pretzantzin* v. *Holder*, 736 F.3d 641, 651 (2d Cir. 2013) (government failed to fulfill burden of production because "the arguments of counsel are not evidence . . . and the [g]overnment failed to make any evidentiary proffer" (citation omitted)). This important precept derives from the recognition that "[s]tatements as to facts that have not been proven [or subject to cross-examination] amount to unsworn [and unchecked] testimony . . . ." (Internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 717, 793 A.2d 226 (2002). Allowing assertions of counsel to serve as evidence, moreover, erases the elemental and crucial distinction between advocate and witness in our adversary system. See Rules of Professional Conduct 3.7 (prohibiting lawyer from testifying as witness except in certain circumstances not at issue in present case).

The question, then, is whether the stipulation of facts, arrest warrant application, and writ of habeas corpus constituted sufficient evidence to establish that the state acted with due diligence in executing the warrant such that the delay in the execution was not unreasonable. Although we have not defined the term "due diligence" in this context, we previously have observed that "[d]ue diligence does not require omniscience. Due diligence means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *Skakel* v. *State*, 295 Conn. 447, 507, 991 A.2d 414 (2010); see *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004)

(in context of termination of parental rights, reasonable efforts to reunify family means "doing everything reasonable, not everything possible" (internal quotation marks omitted)). Due diligence does not require a party to do everything possible to attain its objective, but, at the same time, it requires something more than nonchalance. The state exercises due diligence, in short, if it undertakes efforts to execute a warrant "by persevering application . . . [made] in good earnest." (Internal quotation marks omitted.) *Skakel* v. *State*, supra, 507, quoting *Kubeck* v. *Foremost Foods Co.*, 190 Conn. 667, 672, 461 A.2d 1380 (1983).

We conclude that the evidence adduced by the state was insufficient to meet its burden of demonstrating that it exercised due diligence in its efforts to execute the warrant within the limitation period without unreasonable delay. The record reflects that the warrant was issued on November 15, 2018, but was not executed until three weeks later, on December 6, 2018, seven days after the expiration of the five year statute of limitations on November 29, 2018. The three week delay requires explanation in the form of *evidence* to establish that the delay was not unreasonable. Although the state prepared a writ of habeas corpus requesting the transportation of the defendant on November 21, 2018, eight days before the expiration of the limitation period, the writ was not signed by the prosecutor and the clerk of the court until six days later, on November 27, 2018. Additionally, the defendant was not transported to court, and the warrant was not executed, until December 6, 2018, nine days after the habeas writ was signed and seven days after the expiration of the limitation period. The stipulated facts do not reveal the reasons for these delays. Nor do they explain how the efforts undertaken to execute the warrant reflect due diligence by the state.

At the hearing on the defendant's motion to dismiss, the lack of evidence regarding these critical issues was

highlighted by the fact that the trial court found it necessary to ask the prosecutor to explain the reason for the delay in the execution of the warrant. The prosecutor cited state holidays, weekends, a "light" work day, and his own assessment of general logistical factors affecting the transportation of inmates, such as "certain limitations on the staff of [the] court with respect to how many inmates will be housed downstairs on any particular day" and "the involvement of other agencies, notably, the judicial marshals . . . ." According to the prosecutor, as "a matter of course and a matter of courtesy," the state does not "[make] a habit of requesting transport a day later, [or] two days later," but prefers to give "a little bit of lead time for the relevant agencies . . . to plan the transport . . . ." The prosecutor was unable to explain why, in this particular case, the state did not try to arrange for the transportation of the defendant before the expiration of the statute of limitations on November 29, 2018, but maintained that, in general, a delay of two to three weeks is "consistent with [his] office's practice . . . ." No evidence was presented to establish the facts underlying these assertions.

As we previously discussed, representations of counsel are not evidence. For this reason, we reject the suggestion in the concurring opinion that it may be permissible for a party to rely on the representations of counsel to satisfy their respective burdens under *Swebilius*. In *Swebilius*, we made it very clear that the representations of counsel, factual or otherwise, are insufficient. If a statute of limitations defense has been raised, the parties are under an obligation to adduce *evidence* regarding (1) the defendant's availability for arrest during the limitation period, and, if applicable, (2) the state's due diligence in executing the warrant. See *State* v. *Swebilius*, supra, 325 Conn. 803 ("once a defendant presents *evidence* of his availability for arrest

during the limitation period, the burden shifts to the state to present evidence of its due diligence" (emphasis added)). We again emphasized the evidentiary nature of the requirement when we noted the near unanimous case law supporting the burden shift: "We note that the cases since *Crawford* that have considered the distribution of burdens in relation to § 54-193 (b) have been nearly uniform in placing the burden on the state *to present evidence* of due diligence." (Emphasis added.) Id., 804 n.8. Indeed, we noted that, "in cases involving relatively brief delays, *evidence* of [the state's] legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate compliance with the dictates of *Crawford*." (Emphasis added.) Id., 814. We even pointed out that the state's evidentiary burden was not onerous and could be satisfied by compiling publicly available governmental statistics. See id., 814–15 n.17. In sum, we are unaware of any case, in Connecticut or elsewhere, that permits a party to satisfy its burden of proof relating to a statute of limitations by relying on the representations of counsel.

Accordingly, the explanations offered by the prosecutor in response to the trial court's search for answers, while no doubt made in good faith, are insufficient to satisfy the state's burden under *Swebilius* to "present some credible and persuasive factual basis for . . . [the state's] fail[ure] to observe the statute of limitations."[5] Id., 808. Although the prosecutor presented the

[5] As this court recently explained in *A. B.*, "[w]e have long held that the primary purpose of statutes of limitations is to encourag[e] law enforcement officials promptly to investigate suspected criminal activity . . . so as to ensure that a defendant receives notice, within a prescribed time, of the acts with which he is charged . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *A. B.*, supra, 341 Conn. 68–69. "Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." (Internal quotation marks omitted.) Id., 56; see *State* v.

trial court with a stipulated chronology of events, he failed to provide *any* admissible evidence to explain the reasons for the delay in the execution of the warrant.[6] As a result of that evidentiary deficiency, the state failed to fulfill its burden of proving that the warrant was executed with due diligence, and the trial court improperly denied the defendant's motion to dismiss.

The dissent would dilute the requirements of *Swebilius*—and, in the process, the statute of limitations—to

Crawford, supra, 202 Conn. 450. Although the delay in the execution of the warrant in the present case was relatively brief, we previously have explained that even a brief delay beyond the expiration of the limitation period cannot be deemed "reasonable as a matter of law, solely on the basis of the length of the delay and irrespective of other facts." *State* v. *Swebilius*, supra, 325 Conn. 799 n.5.

[6] We reject the Appellate Court's determination that "it [was] within the purview of the trial court to use its knowledge of the inner workings of the courts and the process by which incarcerated persons are transported to a court in its determination of the reasonableness of the state's efforts." *State* v. *Freeman*, supra, 201 Conn. App. 568. There is no indication in the trial court's decision that it relied on its *own* knowledge of the inner workings of the courts and the process by which incarcerated persons are transported, rather than the prosecutor's factual representations. Stated another way, there is no indication that the state was excused from fulfilling its burden of proof because the trial court took judicial notice of these facts. See, e.g., *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 730 n.24, 652 A.2d 496 (1995) ("The doctrine of judicial notice excuses the party having the burden of establishing a fact from introducing formal proof of the fact. Judicial notice takes the place of proof." (Internal quotation marks omitted.)). Regardless, the inner workings of the courts and the process by which incarcerated persons are transported are "matters susceptible of explanation or contradiction," and, therefore, the defendant was "entitled to receive notice and have an opportunity to be heard" before the trial court took judicial notice of these facts on its own initiative. Conn. Code Evid. § 2-2 (b); see *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) (recognizing distinction "between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing" (citations omitted)). It is undisputed that, to the extent the trial court took judicial notice of these facts, it failed to provide the defendant with the requisite notice and opportunity to be heard.

require nothing more than "business as usual" without regard to the statutory deadline, and without regard to when the defendant was actually served with process. The dissent opines that the state satisfied its burden of demonstrating that its efforts to execute the arrest warrant were reasonable because, "before the statute of limitations expired, the state had undertaken all of the necessary preparatory steps for execution of the warrant . . . ." This observation begs the critical question under *Crawford* and *Swebilius*. That question is whether the "preparatory" steps taken by the state, if any, *were sufficient under the applicable legal standard* when the warrant was executed on a nonelusive defendant *after* the expiration of the limitation period. Under those circumstances, our precedent is very clear that the statute of limitations is satisfied only if the warrant is "executed with due diligence" such that there is not "unreasonable delay" between issuance and execution of the warrant. *State* v. *Crawford*, supra, 202 Conn. 451.[7] This burden, once again, obligates the state to demonstrate the reasonableness of the delay between issuance and execution of the warrant by presenting evidence that it sought to meet its obligations by making efforts demonstrating diligence, that is, something more than nonchalance, throughout that time period. For the reasons previously explained, we conclude that the state failed to fulfill this burden.[8]

[7] The dissent acknowledges that the inquiry focuses on the time period between issuance and execution of the warrant, which, in the present case, was from November 15 to December 6, 2018.

[8] The dissent misinterprets our holding in two respects when it states that we (1) determine that the state's delay in executing the warrant was unreasonable, and (2) effectively require that "the state . . . do everything possible to serve the warrant within the limitation period." Footnote 3 of the dissenting opinion. We intend to say nothing of the kind. Rather, we hold that the state failed to produce *evidence* that it undertook efforts to meet its obligation to execute the warrant without unreasonable delay. In undertaking those efforts, the state was not required to do everything possible to timely execute the warrant, but it was required by our law to make efforts indicating that it was acting in earnest to meet the statutory deadline. See *State* v. *Swebilius*, supra, 325 Conn. 814 (recognizing that "[t]he policies

Finally, we address the appropriate remedy. The state argues that, pursuant to *State* v. *Swebilius*, supra, 325 Conn. 815, the proper remedy is to reverse the judgment of the Appellate Court and to remand the case to the trial court so that the state is " 'afforded the opportunity to demonstrate that it made reasonable efforts to execute the warrant before the expiration of the statute of limitations or to explain why its failure to do so was reasonable under the circumstances.' " We disagree. In *Swebilius*, the proper remedy was to remand the case for further factual development because the trial court applied an incorrect legal standard when it determined that some delays in the execution of a warrant are sufficiently short that they may be deemed reasonable as a matter of law. The trial court's application of the wrong legal standard, combined with our articulation of the burden shifting framework for the first time in *Swebilius*, necessitated a remand so that the trial court could "evaluate the facts in light of [the] correct legal standard." *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015). In contrast, in the present case, the trial court applied the correct legal standard, and "any

underlying statutes of limitations are best served when . . . the state has a strong incentive to ensure that a defendant is provided timely notice of charges"). In both regards, these are important distinctions. Finally, to the extent that the dissent suggests that the delay in the present case was somehow presumptively reasonable "[i]n light of the need for coordination among various agencies to temporarily transfer custody of the defendant from prison to the court," we reject the notion that we can presume anything of the kind without supporting evidence. It took the state from November 15 to December 6 to execute the warrant in this case. The record is devoid of evidence about the period of time that is, in fact, reasonably necessary to execute an arrest warrant on a defendant in custody under the circumstances as they existed. In the absence of such evidence, we are unwilling to speculate on that issue. Moreover, we consistently have declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." *State* v. *Crawford*, supra, 202 Conn. 451; see *State* v. *Swebilius*, supra, 809 (rejecting state's claim that "some delays in the execution of an arrest warrant . . . are so brief as to require no justification on the part of the state").

insufficiency in proof was [not] caused by [a] subsequent change in the law" but, rather, by the state's "failure to muster evidence." (Internal quotation marks omitted.) Id. The state was well aware of its evidentiary burden under our precedent but nonetheless elected to offer no evidence other than an unadorned chronology of events. Under these circumstances, we can perceive no reason to provide the state with a second opportunity to meet that burden.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case with direction to grant the defendant's motion to dismiss.

In this opinion McDONALD and D'AURIA, Js., concurred.

ROBINSON, C. J., concurring in the judgment. I concur in this court's judgment reversing the judgment of the Appellate Court, which affirmed the conviction of the defendant, Terry Freeman, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), following the entry of a conditional plea of nolo contendere. See *State* v. *Freeman*, 201 Conn. App. 555, 568, 242 A.3d 1059 (2020). I agree with the court's ultimate conclusion that the prosecution of the defendant was time barred by the five year statute of limitations set forth in General Statutes (Rev. to 2017) § 54-193 (b)[1] on the ground that the state failed to establish that the

[1] General Statutes (Rev. to 2017) § 54-193 (b) provides: "No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."

The statute was revised in 2019. See Public Acts 2019, No. 19-16, § 17. All references to the statute in this opinion are to the 2017 revision, unless otherwise noted.

warrant for the defendant's arrest was executed without unreasonable delay. I write separately because I respectfully disagree with those portions of the opinion announcing the judgment of the court[2] holding that the "evidence" of the "reasonable efforts to execute the arrest warrant" after the running of the statute of limitations that are required by this court's decisions in *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017), and *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), cannot be established by the factual representations of counsel. To the contrary, I conclude that the prosecutor's personal involvement in and familiarity with arranging the process by which the defendant would be transported to court from the Carl Robinson Correctional Institution for service of the warrant rendered the prosecutor's unchallenged factual representations an appropriate vehicle by which the state could establish "evidence" of its efforts to serve the warrant after the lapse of the statute of limitations. Because I nevertheless conclude that the facts established by those representations did not satisfy the state's obligation to make reasonable efforts to serve the arrest warrant following the lapse of the statute of limitations, I concur in the judgment of the court.

I note my agreement with the majority opinion's recitation of the facts, procedural history, and governing legal principles as set forth by, inter alia, *State* v. *Swebilius*, supra, 325 Conn. 793, and *State* v. *Crawford*, supra, 202 Conn. 443. Specifically, I agree that, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done

[2] Hereinafter, in the interest of simplicity, I refer to the opinion announcing the judgment of the court as the majority opinion.

everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is [satisfied]." (Footnote omitted.) *State* v. *Crawford*, supra, 450; see *State* v. *A. B.*, 341 Conn. 47, 57 n.6, 266 A.3d 849 (2021) (explaining that " 'satisfie[d]' is the appropriate term to describe the state's meeting such obligation under" criminal statute of limitations). There must, "however, [be] some limit as to when an arrest warrant must be executed after its issuance . . . in order to prevent the disadvantages to an accused attending stale prosecutions, a primary purpose of statutes of limitation[s]." *State* v. *Crawford*, supra, 450. "[I]n order to [satisfy] the statute of limitations, an arrest warrant, when issued within the time limitations . . . must be executed without unreasonable delay." Id., 450–51.

In *Crawford*, this court declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." Id., 451. Instead, the court clarified that "[a] reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to [satisfy] the statute of limitations." Id.

In *State* v. *Swebilius*, supra, 325 Conn. 793, we recently held that even a very brief delay in the execution of an arrest warrant following the lapse of the statute of limitations cannot "be reasonable as a matter of law . . . ." Id., 801; see id., 809–10. We then clarified the parties' respective obligations with respect to the proof of a statute of limitations defense, observing that, "once the defendant has demonstrated his availability

for arrest, he has done all that is required to carry his burden [of proving the statute of limitations defense]; the burden then shifts to the state to demonstrate that any period of delay in executing the warrant was not unreasonable." Id., 804; see id., 803 (discussing Appellate Court case law shifting burden "to the state to present evidence of its due diligence in executing the warrant"). Requiring "the state to explain why, notwithstanding the defendant's availability during the statutory period, the delay in his arrest was reasonable . . . allocates burdens efficiently by requiring each party to bring forth evidence uniquely within its knowledge." Id., 807; see id., 808 ("the state is in a far better position to determine what efforts were undertaken to ensure the defendant's prompt arrest").

We emphasized in *Swebilius* that "[t]his burden shifting scheme also encourages diligence by law enforcement officials in providing timely notice of charges to defendants. Although we decline[d] to specify the precise actions that they must undertake to serve a warrant with due diligence, or the precise timeline within which they must act, such officials must present some credible and persuasive factual basis for inaction when they fail to observe the statute of limitations. This requirement is consistent with the principle that, when a judicial doctrine, for all practical purposes, extends the statute [of limitations] beyond its stated term, that doctrine should be applied in only limited circumstances . . . . Accordingly, once a defendant has demonstrated his availability and nonelusiveness during the statutory period, the state must then demonstrate the reasonableness of any delay between the issuance and the service of an arrest warrant, at least when service occurs after the expiration of the limitation period." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 808–809.

I agree with the majority opinion that, despite our reference in *Swebilius* requiring "that the state make *some effort* to serve the arrest warrant before the relevant statute of limitations expires . . . that opinion otherwise uniformly characterized the state's burden as requiring *reasonable* efforts . . . or evidence of due diligence . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) Thus, "reasonableness" and "due diligence" remain the touchstone in determining whether the state has demonstrated a "credible and persuasive factual basis" for its failure to serve the arrest warrant within the limitation period, and the reasonableness of the additional time needed beyond the expiration of that period. *State* v. *Swebilius*, supra, 325 Conn. 808. As *Swebilius* itself emphasized, this standard does not "impose an undue burden on the state. [The court in *Swebilius*] concluded merely that, if the defendant can demonstrate his availability during the statutory period, the state must make some effort to serve the arrest warrant before the relevant statute of limitations expires, or to offer some evidence explaining why its failure to do so was reasonable under the circumstances. Indeed, in cases involving relatively brief delays, evidence of a legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate compliance with the dictates of *Crawford*." Id., 814.

I part company from the conclusion in the majority opinion that a prosecutor's representations of fact to the court may not be used to satisfy the state's obligation under *Swebilius* to use "evidence" to prove the reasonableness of its efforts to serve the warrant, or the failure of those efforts. See id., 814–15. First, the majority's reading of the word "evidence" is inconsistent with its ordinary meaning, which is simply "something that furnishes proof" or "something legally submitted to a tribunal to ascertain the truth of a matter

. . . .” Merriam-Webster’s Collegiate Dictionary (10th Ed. 1993) p. 402; see also American Heritage College Dictionary (4th Ed. 2007) p. 484 (defining “evidence” as “[a] thing or things helpful in forming a conclusion or judgment” or “[t]he documentary or oral statements and the material objects admissible as testimony in a court of law”). The majority’s restrictive reading of the word even goes beyond the more technical definition of the word set forth in Black’s Law Dictionary, which defines “evidence” expansively as “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact”; Black’s Law Dictionary (11th Ed. 2019) p. 697; Black’s specifically draws a distinction between evidence generally and “admissible evidence.” See id., pp. 697–98. Put differently, the majority opinion’s reading of *Swebilius* adds the word “admissible” where it does not exist.

Second, the majority opinion’s restrictive reading of the word “evidence” is in direct conflict with the well established “practice that a trial court may rely [on] certain representations made to it by attorneys, who are officers of the court and bound to make truthful statements of fact or law to the court.” (Internal quotation marks omitted.) *State* v. *Chambers*, 296 Conn. 397, 419, 994 A.2d 1248 (2010); see Rules of Professional Conduct 3.3 (a) (1) (duty of candor to tribunal). Particularly given the prosecutor’s role as “a high public officer” and “a minister of justice”; (internal quotation marks omitted) *State* v. *Courtney G.*, 339 Conn. 328, 341, 350 n.9, 260 A.3d 1152 (2021); accord Rules of Professional Conduct 3.8, commentary; I would not preclude our trial courts from relying on the statements of a prosecutor about events in which he or she played a personal role,[3] particularly when those factual repre-

[3] The majority opinion accurately quotes this court’s decision in *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153–54, 496 A.2d 476 (1985), as providing: “Fairly stated, evidence legally is the means by which alleged

sentations are, as the dissent correctly observes in the present case, entirely uncontested. See *State* v. *Chambers*, supra, 421–22; see also, e.g., *State* v. *Nguyen*, 253 Conn. 639, 658–60, 756 A.2d 833 (2000) (trial court was not required to conduct evidentiary hearing prior to barring witness' testimony as sanction for violation of sequestration order given "effectively uncontested" representations by prosecutor and defense counsel, and defendant's failure to request evidentiary hearing). Put differently, had the defendant desired to challenge the factual underpinnings of the prosecutor's explanation of the delays, he could have done so.

Having said that, the explanation offered by the prosecutor in this case does not convince me that the state's failure to serve the arrest warrant before the expiration of the statute of limitations on November 29, 2018, and the delay in service to December 6, 2018, were in fact reasonable, even though there were two state holidays during that period and interagency coordination was required to transport the defendant from the correctional facility to court.[4] I acknowledge the prosecutor's

matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. On the other hand, 'proof' is the result or the effect of such 'evidence.' Moreover, [counsel's] representations [are] not 'testimony,' which, in turn, when given under oath or stipulated to, is a species of 'evidence.' " In my view, *Cologne* is distinguishable, notwithstanding its conclusion that the representations of the plaintiffs' attorney were a factually insufficient basis on which to hold the defendants in indirect civil contempt of court, because those representations did not concern events that the attorney herself had witnessed. See *Cologne* v. *Westfarms Associates*, supra, 153, 156. Indeed, this court's decision in *Cologne* contemplates permitting courts to rely on attorneys' factual representations concerning events in which they are personally involved—noting specifically that "the record is barren of any indication that the plaintiffs' counsel herself had directly observed the conduct of the defendant that was purported to constitute contempt." Id., 153.

[4] In addition to noting that the Thanksgiving holiday and weekend days fell in the period between the issuance of the warrant and the date on which the defendant was transferred to court to allow for execution of the warrant, the prosecutor explained: "So, it was reasonable because there are a number of factors that play in effectuating the transport of an inmate to this court

explanation that he would not ordinarily request immediate transportation, as a "courtesy" to the various agencies involved, such as the Department of Correction and the judicial marshals, and his office's ordinary timing and practices with respect to the transportation of inmates to court. Nevertheless, I remain unconvinced that the state made the requisite reasonable efforts to serve the warrant in a timely fashion, insofar as there is no indication that the state attempted to expedite the process to have the defendant transported sooner, despite knowing of the impending expiration of the statute of limitations. Although it may well be that expediting the transportation of the defendant would in fact have been unreasonable, given its ripple effect on other judicial or law enforcement matters; cf. *State* v. *Swebi-*

here in Milford. It is not as simple as having the West Haven Police Department take a ride up to Carl Robinson [Correctional Institution] and serve the warrant because . . . if that warrant is served, [the defendant] would have to be transported here to court the next day for his arraignment before the court. So, it's not as logistically simple as just taking a ride up there and serving the warrant.

"As Your Honor is aware, there are certain limitations on the staff of this court with respect to how many inmates will be housed downstairs on any particular day. I know that our office and our administrative staff, in making requests for writs of habeas corpus, are mindful of dates . . . [that are] already at capacity as far as prisoner transport. It also requires the involvement of other agencies, notably the judicial marshals, to transport inmates from . . . correctional facilities and—and, frankly, I think [as] a matter of course and a matter of courtesy, we . . . haven't made a habit of requesting transport a day later, two days later or a week later. I think typically it's a date that kind of works with the calendar that has been set out as far as how many inmates are being transported to court on a given day, and then giving a little bit of lead time for the relevant agencies to . . . plan the transport of the inmate to court. . . .

"[A]s to whether it was reasonable that it was done on December 6, roughly two weeks after, maybe three weeks after the warrant had been signed, and about two weeks after the habeas was requested, you know, I think that's consistent with our office's practice and consistent with—with our course of action, which is to [be] mindful that there are other people involved in the system who have to act when we issue a writ of habeas corpus, and giving the two week lead time is reasonable to allow all of those various factors, the time to make preparations."

lius, supra, 325 Conn. 814; the current state of the record in this case leaves me entirely unable to arrive at that conclusion as a matter of law because the prosecutor's representations do not establish that expediting the transportation of the defendant to court would have resulted in anything more than potential inconvenience to the state actors involved. Because the state failed to carry its burden of proving the reasonableness of its failure to serve the arrest warrant on or before the date on which the statute of limitations expired, on November 29, 2018, I agree with the conclusion in the majority opinion that the robbery charge is time barred and should be dismissed on remand.

I join in the judgment of the court to reverse the judgment of the Appellate Court.

KELLER, J., with whom MULLINS and KAHN, Js., join, dissenting. I respectfully disagree with the majority's[1] conclusion that the Appellate Court erred in holding that the trial court correctly determined that the state had executed the arrest warrant for the defendant, Terry Freeman, without unreasonable delay and, therefore, properly denied the defendant's motion to dismiss the criminal charges against him in connection with a 2013 armed robbery. In determining that the delay was unreasonable, the majority effectively concludes that the state must not only obtain the arrest warrant but also execute the warrant before the statute of limitations has expired or offer evidence as to why it was not possible to have done so. Such a standard clearly exceeds what is required under our case law.[2]

[1] In the interest of simplicity, I refer to the opinion announcing the judgment as the majority opinion.

[2] I agree with the majority that de novo review is appropriate because we are considering stipulated facts on a cold record. See *Jones* v. *State*, 328 Conn. 84, 101, 177 A.3d 534 (2018) ("Ordinarily, when the facts are undisputed, determining the legal import of those facts presents a question of law subject to de novo review. . . . This is so even in the context of fact laden disputes ordinarily subject to a trial court's discretion." (Citations omitted.)).

Twenty-three days before the statute of limitations expired on charges relating to the 2013 armed robbery, the defendant provided a police detective with a confession to his participation in that cold case. The detective timely prepared an arrest warrant, and, by the time the judge signed the warrant, the statute of limitations was due to expire in fourteen days. The following activities ensued in those fourteen days: a police officer obtained the signed warrant and submitted a request for an application for a writ of habeas corpus to transport the defendant to court for service of the warrant, the Office of the State's Attorney prepared the application for the writ, and the writ was signed by that office and by the clerk of the court. Thus, before the statute of limitations expired, the state had undertaken all of the necessary preparatory steps for execution of the warrant under the unusual circumstances of the case.

The majority concludes that these efforts were inadequate on their face to comply with the dictates of *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017); consequently, the state was required to provide evidence to explain why it failed to do more. In particular, the majority deems fatal the state's failure to provide evidence to explain why the defendant could not have been transported to the court for service of the warrant before the statute of limitations expired. The standard applied by the majority misapprehends the burden that this court imposed on the state in *Swebilius*.

To understand this court's intention in that case, it is important to focus on the specific context in which this issue came before the court. It had long been established that, in Connecticut, "the issuance of an arrest warrant is sufficient 'prosecution' to satisfy the statute of limitations only if the warrant is executed with due diligence." *State* v. *Ali*, 233 Conn. 403, 416, 660 A.2d 337 (1995). The court in *Swebilius* addressed the question of whether the state can be deemed to have acted

with due diligence, as a matter of law, when *no* effort was made to execute the warrant during the limitation period, if the warrant was executed within a sufficiently brief period after the limitation period expired. *State* v. *Swebilius*, supra, 325 Conn. 798–800. In *Swebilius*, the arrest warrant was executed thirteen days after the limitation period expired when the defendant voluntarily surrendered to the police after learning that the warrant had been issued. Id., 797. This court rejected the notion that any brief period of delay could be presumed reasonable as a matter of law. Id., 801.

Before articulating the state's burden, this court noted its "agree[ment] with the drafters of . . . the Model Penal Code that [i]t is undesirable . . . to toll the statute of limitations in instances [in which] the warrant is issued but *no* effort is made to arrest a defendant whose whereabouts are known."[3] (Emphasis added; footnote omitted; internal quotation marks omitted.) Id., 814. To strike the proper balance of a rule that would discourage such inaction without imposing an "undue burden" on the state; id., 814; this court articulated the following standard: "[I]f the defendant can demonstrate his availability during the statutory period, the state must make *some* effort to serve the arrest warrant before the relevant statute of limitations expires, or to offer some evidence explaining why its failure to do so was reasonable under the circumstances." (Emphasis added.) Id. "Some" effort, then, was in contraposition to "no" effort. See id., 808 ("such officials must present some credible and persuasive

[3] Much of the court's analysis in *Swebilius* rested on *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), a case in which there similarly was no evidence that the state had made *any* effort to execute the arrest warrant before the limitation period expired. See *State* v. *Swebilius*, supra, 325 Conn. 801–802 (noting that, in *Crawford*, "this court was asked to determine whether the mere issuance of an arrest warrant within the limitation period was sufficient to commence a prosecution for purposes of [General Statutes] § 54-193, thereby tolling the limitation period").

factual basis for *inaction* when they fail to observe the statute of limitations" (emphasis added)). The court emphasized the modest nature of the burden in other ways. It noted that, "in cases involving relatively brief delays, evidence of a legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate [that the warrant was executed without unreasonable delay]." Id., 814; see also id., 814 n.17. This example further signaled that the state was not required to go to extraordinary lengths or to upend other important obligations to demonstrate due diligence.

Instead of considering whether the state made "some effort" to execute the warrant, a burden that the state plainly satisfied, the majority seizes on the court's subsequent reference in *Swebilius* to "reasonable efforts . . . ." Id., 815. It then ascribes a meaning to that term that effectively equates to "best efforts" (i.e., "*every* reasonable effort"), which far exceeds "some effort." Insofar as the majority concludes that the state was required to explain why it could not have executed the warrant within the limitation period, it appears to require the state to present additional evidence to explain why it did not do everything *possible* to accomplish that end, a far cry from "some effort."[4] As the Kansas Court of Appeals explained in a case favorably cited by this court in *State* v. *Swebilius*, supra, 811 n.13, "[w]hen determining the reasonableness of a delay in the execution of an arrest warrant, it is key to look at what the [s]tate did do, *not what it did not do*." (Emphasis added.) *State* v. *Divers*, Docket No. 106,312, 2012

[4] The majority denies that it is effectively requiring the state to do everything possible to serve the warrant within the limitation period. Although the majority's determination that the state is required to provide evidence to explain why it did not execute the warrant within the limitation period leaves the door open for some explanation short of impossibility to suffice, the state cannot have confidence that any effort short of everything that is possible will be deemed "reasonable" under the majority's view.

WL 4794603, *3 (Kan. App. October 5, 2012) (decision without published opinion, 286 P.3d 239), review denied, Kansas Supreme Court, Docket No. 11-106312-A (June 14, 2013); see *State* v. *Long*, 276 Kan. 297, 300, 75 P.3d 1217 (2003) ("the reasonableness of the delay in executing the warrant cannot be measured by what the [s]tate could have or should have done"); see also *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004) (stating, in context of case involving constitutional rights, that "[r]easonable efforts means doing everything reasonable, not everything possible" (internal quotation marks omitted)).

Only four sentences stand between the court's references in *Swebilius* to "some effort" and "reasonable efforts . . . ." *State* v. *Swebilius*, supra, 325 Conn. 814–15. This proximity clearly indicates that the court viewed these standards to be functionally equivalent.[5] Those terms can easily be reconciled if "reasonable" was simply intended to make clear that "some" effort is not satisfied by any effort no matter how inconsequential or ineffective to accomplish the intended goal. See id., 811 n.13 (favorably citing approach in *State* v. *Gauthier*, Superior Court, judicial district of New Haven, Docket No. N23N-MV-11-0074499-S (September 11, 2012), in which delay of "forty-nine days after statute of limitations expired was not unreasonable because officers 'maintained diligent attention to [the] case' and attempted to serve warrant as soon as officer was aware it had been signed," despite one month lapse between efforts to see whether warrant had been signed). To the extent that the majority implies that the standard as I have interpreted it would be satisfied by efforts amounting to "nonchalance" or less, it is clearly mistaken.

[5] The court in *Swebilius* used "some effort" when articulating the general standard; *State* v. *Swebilius*, supra, 325 Conn. 814; and "reasonable efforts" when referring to the state's burden on remand. Id., 815.

Another problem with the majority's analysis is that it appears to require the state to provide an explanation whenever it fails to execute the warrant within the limitation period. For example, it would not be good enough for the state to establish that it attempted to execute the warrant where the defendant was believed to reside; it would be required to explain why service could not be effectuated at that time and why further efforts could not have been made to successfully execute the warrant within the limitation period. The court in *Swebilius* only required the state to provide an explanation when it failed to make "some" (i.e., "reasonable") effort within the limitation period. *State* v. *Swebilius*, supra, 325 Conn. 814.

When assessed against that standard, it is clear that the state made reasonable efforts to execute the warrant before the statute of limitations expired. As I previously noted, the state undertook all of the necessary preparatory steps for execution of the warrant before the limitation period expired.

The only question that remains is whether execution of the warrant seven days after the statute of limitations expired (five days if one does not count weekend days, when the court was not open) was "without unreasonable delay."[6] *State* v. *Crawford*, 202 Conn. 443, 451, 521 A.2d 1034 (1987). The majority overlooks the signifi-

[6] Whether the delay is unreasonable is assessed in relation to the period between the issuance of the arrest warrant and its execution. See *State* v. *Swebilius*, supra, 325 Conn. 809 ("the state must . . . demonstrate the reasonableness of any delay between the issuance and the service of an arrest warrant") Thus, for example, if the state had made some effort to serve the warrant long before the statute of limitations expired and then did nothing else of consequence before that period expired, we would consider the entire period between issuance and execution, including that period of inaction, in assessing whether the delay in execution was unreasonable. In the present case, I focus on the delay following the expiration of the statute of limitations because I conclude that the state made sufficient efforts to execute the warrant during the limitation period.

cance of the fact that the present case is atypical. In the usual case, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him." Id., 450. In the present case, the defendant was in the custody and control of the Commissioner of Correction when the arrest warrant was issued. The defendant was a convicted felon with four years of his sentence remaining. Even without taking the prosecutor's explanation into account,[7] the evidence submitted reflects

[7] In addition to noting that the Thanksgiving holiday and weekend days fell in the period between the issuance of the warrant and the date on which the defendant was transferred to the court to allow for execution of the warrant, the prosecutor explained: "So, it was reasonable because there are a number of factors that play in effectuating the transport of an inmate to this court here in Milford. It is not as simple as having the West Haven Police Department take a ride up to Carl Robinson [Correctional Institution] and serve the warrant because, of course, then, if that warrant is served, [the defendant] would have to be transported here to court the next day for his arraignment before the court. So, it's not as logistically simple as just taking a ride up there and serving the warrant.

"As Your Honor is aware, there are certain limitations on the staff of this court with respect to how many inmates will be housed downstairs on any particular day. I know that our office and our administrative staff in making requests for writs of habeas corpus are mindful of dates in which . . . [we are] already at capacity as far as prisoner transport. It also requires the involvement of other agencies, notably the judicial marshals, to transport inmates from . . . correctional facilities . . . and, frankly, I think [as] a matter of course and a matter of courtesy, we . . . haven't made a habit of requesting transport a day later, two days later or a week later. I think typically it's a date that kind of works with the calendar that has been set out as far as how many inmates are being transported to court on a given day, and then giving a little bit of lead time for the relevant agencies to . . . plan the transport of the inmate to court. . . .

"[A]s to whether it was reasonable that it was done on December 6, roughly two weeks after, maybe three weeks after the warrant had been signed, and about two weeks after the habeas [writ] was requested, you know, I think that's consistent with our office's practice and consistent . . . with our course of action, which is to [be] mindful that there are other people involved in the system who have to act when we issue a writ of habeas corpus, and giving the two week lead time is reasonable to allow all of those various factors the time to make preparations."

that the procedures undertaken to execute the warrant required the cooperation of the Department of Correction, judicial marshals, and a court liaison officer for the New Haven Police Department. In light of the need for coordination among various agencies to temporarily transfer custody of the defendant from prison to the court and to execute the warrant in a manner consistent with procedures to maintain control over the defendant and to protect public safety, I would conclude that execution of the warrant five (or seven) days after the limitation period expired under such circumstances was without unreasonable delay.[8]

I note that this contextual explanation of the myriad specific considerations that were factors in the present case is a far cry from the type of generic excuse that this court deemed inadequate in *Swebilius*. See *State* v. *Swebilius*, supra, 325 Conn. 814–15 n.17 (noting that properly contextualized statistics demonstrating competing demands on police department could provide evidence of reasonableness of delay, whereas "[t]he mere fact that a police department is a very busy urban police department is not enough for it to avoid its obligation to serve the warrants in a timely manner" (internal quotation marks omitted)). Contrary to the majority, I see nothing inherently unreasonable about a prosecutor's adhering to procedures put into place to accommodate coordination among the various agencies involved in the transportation of an inmate, such that further explanation is required under the present circumstances.

[8] In light of my conclusion that the state's efforts within the limitation period were reasonable, I need not consider the majority's determination that "admissible evidence" was required to explain the purported inadequacy of those efforts and, thus, that the trial court could not consider the prosecutor's representations to the trial court, which were made in response to the court's direct questions. This court has permitted trial courts to rely on such representations with respect to matters of similar import when there is no objection to the veracity or accuracy of the statements, no request for an evidentiary hearing on the matter, and no statute or court rule requiring such an evidentiary hearing. See, e.g., *Maio* v. *New Haven*, 326 Conn. 708, 729, 167 A.3d 338 (2017); *In re Natalie S.*, 325 Conn. 849, 857–58, 163 A.3d 1189 (2017); *State* v. *Lopez*, 239 Conn. 56, 79, 681 A.2d 950 (1996); *State* v. *Haye*, 214 Conn. 476, 482–83, 572 A.2d 974 (1990). Even if, however, the majority were correct that "admissible evidence" is required and that a prosecutor's statements to the trial court are not admissible evidence, under well settled principles, the defendant's failure to object when the court solicited explanations from the prosecutor would constitute a waiver of any nonconstitutional claim that the statements were inadmissible evidence. See, e.g., *Pereira* v. *State Board of Education*, 304 Conn. 1, 46 n.33, 37 A.3d 625 (2012) ("[i]t is well established that [during trial] a party that fails to

The majority perceives unjustifiable nonchalance on the part of the state; I see sufficient evidence of due diligence in the brief period of time between the date the warrant was issued and the date it was executed.

Accordingly, I respectfully dissent.

STATE OF CONNECTICUT *v.* METESE HINDS (SC 20555)

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

Syllabus

Convicted of the crimes of murder and carrying a dangerous weapon in connection with the stabbing death of the victim, the defendant appealed to this court. The defendant had been staying with his friend L in L's apartment. On the evening of the murder, the victim, J, and another individual were consuming alcohol and drugs in J's apartment, which was on the floor above L's apartment. At some point that evening, the defendant, who was highly intoxicated, entered J's apartment and began arguing with the victim. J then expelled both men from her apartment. Soon thereafter, J learned that the victim had been in a fight, and she immediately went to the floor on which L's apartment was, where she found the victim, who had been stabbed multiple times. The police subsequently arrived at the scene, and, while they were attending to the victim, the defendant emerged from L's apartment and started kicking the victim and yelling. During a search of L's apartment, the police found a knife on the kitchen floor lying next to a pool of blood. It was later determined that the knife had both the victim's and the defendant's DNA on it. Following the incident, the police interviewed the defendant on two occasions. Over the course of those interviews, the defendant repeatedly changed his version of the events, stating first that he did not know the victim, but later stating that he fought with the victim, whom he knew, after confronting him about the victim's alleged sexual

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object timely to the introduction of evidence . . . is deemed to have waived such objection . . . and may not subsequently resurrect it" (internal quotation marks omitted)); *State* v. *Brown*, 279 Conn. 493, 503, 903 A.2d 169 (2006) ("any infirmity in the evidence . . . is deemed to be waived if not seasonably raised" (internal quotation marks omitted)).

Moreover, as I do not believe that the state had clear notice either that it was required to explain its failure to do more or that its representations to the trial court would not be accepted by reviewing courts, I do not agree with the majority's determination that a remand would not be warranted.

assault of J's daughter. The defendant also stated that he was attacked by the victim and his "crew," forcing him to fight with up to ten individuals at once. At trial, L testified that, after the defendant returned to L's apartment on the evening of the murder, he heard the defendant rummaging through a drawer in the kitchen and then saw him leave the apartment and engage in a physical altercation with the victim on the fire escape landing outside of L's apartment. L further testified that, when the victim collapsed, the defendant reentered L's apartment, and L observed that the defendant was holding a knife from the kitchen drawer. During closing argument, the prosecutor argued that the evidence overwhelmingly established the defendant's guilt, despite some discrepancies between the testimony of certain witnesses, and that the jury could infer that L's prior statements to the police, which L had given on the night of the victim's murder but were not in evidence, were consistent with his trial testimony because, otherwise, the defense would have used the statements to impeach him, as it had with respect to the prior statements of two of the state's other witnesses. Defense counsel did not object to these remarks by the prosecutor. During his closing argument, defense counsel argued that the state had failed to prove beyond a reasonable doubt that it was the defendant, as opposed to some other person, who murdered the victim and that the jury should not credit L's testimony because, inter alia, he had entered into a cooperation agreement with the state. During his rebuttal argument, the prosecutor referred to Occam's razor, the principle that the simplest of competing theories should be preferred over more complex ones, in arguing that the jury should credit the state's simple, straightforward version of events rather than the defendant's unreal, complex story. Defense counsel did not object to this reference either. On appeal, the defendant claimed that he was deprived of his due process right to a fair trial as a result of the prosecutor's allegedly improper remarks during closing and rebuttal arguments. *Held* that the defendant could not prevail on his claim that the prosecutor's references during closing argument to L's prior statements to the police and during rebuttal argument to Occam's razor constituted prosecutorial impropriety that deprived the defendant of his right to a fair trial: the prosecutor did not improperly reference facts not in evidence or vouch for L's credibility by inviting the jury to infer that L's prior statements to the police were consistent with his trial testimony, as L and two other witnesses testified that L had given statements to the police, and the jury was aware that certain other state witnesses had given statements to the police and that the defense had used their statements to discredit them, and, therefore, the prosecutor merely was asking the jurors to infer from evidence properly before them, and from their personal experience as jurors in this case, that, if L had changed his story as a result of his cooperation agreement, the defense could and would have used his prior statements to discredit him; moreover, the prosecutor's reference to Occam's razor did not

improperly dilute the state's burden of proof or otherwise mislead the jury as to the nature of that burden, as it was used as a rhetorical device in response to defense counsel's closing argument that the jury must choose between the state's and the defendant's competing versions of events, and nothing in the prosecutor's remarks expressly or implicitly suggested to the jurors that they must choose the simpler version of events, even if they did not find it proven beyond a reasonable doubt; furthermore, even if the prosecutor's remarks were improper, there was no possibility that they deprived the defendant of a fair trial, as each of the alleged improprieties occurred only once, neither was perceived by defense counsel as being so severe as to warrant an objection or a request for curative measures, this court did not perceive them as being severe, the state's case was strong, and the trial court's instructions pertaining to the jurors' exclusive role as the arbiters of credibility, the state's burden of proof, and the principle that jurors must confine themselves to the evidence in the record were more than adequate to counteract any harm resulting from the alleged improprieties.

Argued May 5—officially released August 30, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and carrying a dangerous weapon, brought to the Superior Court in the judicial district of New London and tried to the jury before *Kwak*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Thomas M. DeLillo*, senior assistant state's attorney, and, on the brief, *Paul J. Narducci*, state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. Following a jury trial, the defendant, Metese Hinds, was convicted of murder in violation of General Statutes § 53a-54a (a) and carrying a dangerous weapon in violation of General Statutes § 53-206 (a). On

appeal,[1] he claims that two instances of prosecutorial impropriety, which occurred during the state's closing and rebuttal arguments, deprived him of his due process right to a fair trial. We disagree and affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. In October, 2017, the defendant was staying with his childhood friend, James Cody Lewis, in a one bedroom apartment on Blackhall Street in New London. The apartment was located on the second floor of a three-story building. From the street, access to the second and third floor apartments was via a green steel fire escape that zigzagged across the front of the building.

Jacquelinnes Lopez and her infant daughter lived in the apartment above Lewis' apartment. In the early evening hours of October 24, 2017, Raheeim General (victim), Justice Rodriguez, and Lopez were together in Lopez' apartment drinking, smoking marijuana, and listening to music. All three individuals were extremely intoxicated as a result of having consumed a gallon of vodka, in addition to other alcoholic beverages, over the course of several hours. Jennifer Beard, Lopez' sister, was also present but was in the bedroom with her three year old son and Lopez' daughter. Beard was not drinking. At some point, the defendant showed up highly intoxicated and asked the victim for a shot of liquor. The victim obliged, but soon he and the defendant began arguing, prompting Lopez to kick all three men—the victim, Rodriguez, and the defendant—out of the apartment. Fifteen or twenty minutes later, someone knocked on Lopez' door to inform her that the victim—Lopez' best friend since childhood and the god-

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

father to her daughter—had been in a fight. Lopez immediately ran down the fire escape stairs to the second floor landing, where she found the victim lying there "lifeless."

Shortly before Lopez found the victim, Lewis was awakened by loud pounding on his front door. Lewis had spent the entire day sleeping after having been awake for three days straight playing video games and smoking crack cocaine. When Lewis opened the door, the defendant entered the apartment in an extremely agitated state and said, "they're touching the kids. I'm gonna kill them all." At the exact same moment, Rodriguez appeared in the doorway, and he and the defendant began to fight on the landing. After a few seconds, Rodriguez retreated up the stairs to Lopez' apartment, whereupon the defendant reentered Lewis' apartment, walked directly to the kitchen, and began rummaging through a drawer. The defendant then left the apartment through the front door.

The victim was standing on the second floor landing when the defendant came out of the apartment. Lewis watched as the two men began "tousling" and "throwing punches . . . ." He then saw the defendant thrusting his right hand back and forth "in an upward motion" into the victim's body, until the victim fell to the ground. After the victim collapsed, the defendant reentered Lewis' apartment and shut the door. It was then that Lewis observed that the defendant was holding a knife from his kitchen drawer. He also noticed that the defendant was bleeding from a wound to the back of his leg. When the police arrived, the defendant came out of Lewis' apartment and "started kicking" the victim, yelling "die, pussy, die." Later that evening, Lewis consented to a search of his apartment and provided the police with a sworn statement about the events of that evening.

At the time of the murder, Lisbeth Guzman was living at the corner of Blackhall and Belden Streets, across the street and a few buildings down from Lewis' building. On the night in question, she and her friend, Isiah Brown, were together after work when they heard loud arguing in the street. After a few minutes, the two friends stepped out onto Guzman's fire escape to see what was happening. From the fire escape, they saw a tall, skinny man, later identified as the victim, engaged in "a very intense argument" with a shorter, stockier man on the landing in front of Lewis' apartment.[2] Because it was dark and raining outside, they could not make out the face of either man. As the altercation progressed, the shorter man appeared to break a bottle over the taller man's head. He then began stabbing the taller man in the stomach with the bottle, while the taller man screamed for him to stop. This continued until Brown yelled from across the street for the men to "stop," at which point the shorter man "snapped back into, like, reality" and went inside Lewis' apartment. After the fight ended, a woman ran down the fire escape stairs from the third floor. When she reached the victim, she began pleading for help, saying, "please . . . he's unconscious. He's unconscious. He's not breathing." While she was tending to the victim, the shorter man "came back out of [Lewis'] apartment and yelled, I will kill all you," and then went back into the apartment.

When the police and paramedics arrived at the scene, they found the victim unresponsive, with multiple stab wounds to his abdomen, neck, and head. As the first officer reached the second floor landing, the defendant came out of Lewis' apartment "and started kicking [the victim]" and yelling for the police to "get [the victim]

[2] The record indicates that the victim was six feet, four inches tall and weighed 175 pounds at the time of his death, whereas the defendant was five feet, nine inches tall and weighed 175 pounds.

the fuck out of here." After the defendant was subdued, both he and the victim were transported to a hospital, where the victim was pronounced dead and the defendant was treated for two minor puncture wounds to the back of his leg. The state later theorized that the defendant had accidentally stabbed himself while assaulting the victim. A toxicology screen performed at the hospital revealed that the defendant had a blood alcohol content of 0.18. Opiates, cannabinoids, and cocaine were also detected in the defendant's blood. During a search of Lewis' apartment, the police found a knife on the kitchen floor lying next to a pool of blood. The knife was later determined to have both the defendant's and the victim's DNA on it.

The defendant agreed to be interviewed by the police on two occasions, first at the hospital where he was taken after the incident and the next day at police headquarters. An audio recording of the hospital interview and a video recording of the police station interview were entered into evidence and played for the jury. Initially, the defendant denied knowing the victim. Later, however, he admitted knowing him, stating that he saw him "[a]ll the time," and that the victim and Lopez "seem like friends or whatever," but that "[h]e's not her boyfriend . . . ." The defendant also stated that the victim was "the devil" and a "son of a bitch."

The defendant asserted that he and the victim began fighting after he confronted the victim about "fucking changing the kid." The defendant stated: "He was—it was something with powder. I know it was something with powder 'cause I came in the room . . . through the back, and I said, yo, what? . . . I almost walked past the room, and I stopped and . . . looked in, and he was changing the little girl. . . . It's not his little girl. He ain't got no business in that little girl's room." The defendant later stated, "you know what, that's my godbaby. That's my—no it's not. I told you already."

Over the course of the two interviews, the defendant repeatedly changed his story about what the victim was doing when he confronted him. What began with the victim putting powder on the baby ended with the defendant's claiming that the victim "was performing oral sex" on her.

The defendant informed the police that all he really remembered about the evening was "fighting. Everything went black, boom, and I'm fighting. That's it." The defendant claimed that, once the fight began, the victim "gave an eye to the rest of his crew," ten of whom "jumped" the defendant, forcing him to fight "like, five of them" at once. When asked whether Lopez could confirm his story or identify the men who jumped him, the defendant replied that Lopez would not be able to do so because "there was too many of them guys" and Lopez is "sort of an airhead. She's an airhead." The defendant stated that, when he left Lopez' apartment, the victim and his "crew" followed him down the fire escape stairs and that he "tried to kill all of them." He stated that he "tried to get [the victim]" but "couldn't get him [because] . . . [t]here was too many of them." When asked by the police whether he had consumed any drugs or alcohol that evening, the defendant denied having done so, asserting that he was "[s]traight, straight, straight." Although he denied stabbing the victim or being in possession of a knife during the struggle, he did admit to "kicking [the victim] when the cop came."

The defendant was charged with murder in violation of § 53a-54a (a) and carrying a dangerous weapon (a knife) in violation of § 53-206 (a). Before trial, he raised the affirmative defense of extreme emotional disturbance. During the state's closing argument, the prosecutor argued that the evidence overwhelmingly established the defendant's guilt, despite some discrepancies between Lewis' testimony and the testimony of

Brown and Guzman. He argued: "Some of the pieces of evidence are unclear . . . [or] conflict with other pieces. People's memories can change. People forget things. . . . And people can also describe the same event differently." The prosecutor emphasized, however, that, although Brown and Guzman thought that the killer had used a broken bottle to stab the victim, their testimony that there were only two men fighting on the landing outside Lewis' apartment and that the killer walked directly into Lewis' apartment and shut the door after stabbing the victim was powerful corroboration of Lewis' testimony and conclusively refuted the defendant's claim of fighting with up to ten men on the fire escape stairs. The prosecutor further argued that the defendant's repeated lies to the police in the aftermath of the murder was strong evidence of his consciousness of guilt.

During his closing argument, defense counsel argued that the state had failed to prove beyond a reasonable doubt that it was the defendant—as opposed to some other party—who murdered the victim.[3] In support of this contention, he pointed out, among other things, that neither Brown nor Guzman, who had witnessed the murder from approximately "fifty yards away," saw the perpetrator's face, and both described him as "short and stocky," a description he maintained did not match the defendant. Defense counsel further argued that Brown and Guzman both testified that the victim was stabbed with a broken bottle, whereas it was the state's contention that the killer used a knife. As for Lewis, the only witness to identify the defendant as the perpetrator, defense counsel argued that the jury should not credit his testimony given his "cooperation agreement"

[3] Defense counsel suggested to the jury that the real killer may have been a man who lived down the street, who he claimed fit Brown's and Guzman's description of the perpetrator better than the defendant did.

with the state,[4] his more than thirty year addiction to crack cocaine, the fact that he had been awake for three days straight before the murder, and because "one of the first things he did" after the murder was lie to the police about whether the defendant kept belongings at his apartment.

Finally, defense counsel argued that, as a result of the defendant's high level of intoxication, he could not possibly have formed the requisite intent to commit the murder.[5] Specifically, defense counsel argued that the defendant "wasn't in a normal state of mind" that evening and that he was in fact "delusional . . . ." He further argued: "The evidence [of his delusional state] comes from the statements that [he made to the police and others] about the kids being molested, about the gang members that were upstairs. And [the state touched on the defendant's] claims [that] he was fighting ten, then two, then four, and six individuals [at once]. That's because it was a delusion. He had no idea

[4] At trial, the state elicited testimony from Lewis that, after the victim's murder, in August, 2018, he was arrested for selling crack cocaine. In July, 2019, he reached a plea agreement with the state whereby his sentence would be suspended if he completed a drug treatment program. Lewis relapsed before completing that program and later failed to appear for sentencing. At the time of the defendant's trial, Lewis was "looking at possibly the original [sentence] recommendation, plus an additional charge for the failure to appear." Lewis testified that, although no promises were made to him, he had been told by the state that his cooperation and "truthful testimony" would be brought to the judge's attention at the time of his sentencing.

[5] With respect to the defendant's intoxication, the trial court instructed the jury in relevant part: "The statute pertaining to intoxication [provides] in pertinent part as follows: intoxication shall not be a defense to a criminal charge, but in any prosecution . . . evidence of intoxication . . . may be offered . . . whenever it is relevant to negate an element of the crime charged. . . . If you find that [the defendant] was under the influence of an intoxicant at the time of the alleged acts, you must then determine what effect, if any, this voluntary intoxication had on his ability to form the specific intent required to commit the alleged crimes. Note that intoxication is not a defense to or an excuse for the commission of a crime. It is only relevant to negate an element of the crime charged, such as intent."

what was going on. The child being molested . . . . [The victim] . . . putting powder on the baby. . . . No evidence of that. [The defendant] was . . . clearly [in] a delusional state." In support of this contention, defense counsel noted that at least one witness had described the defendant as "drugged the fuck out or bugged the fuck out," whereas another opined that he was clearly "on something."

After closing arguments, the trial court instructed the jury on the applicable law, including the presumption of innocence, the definition of reasonable doubt, and the state's burden to prove each and every element of the charged offenses beyond a reasonable doubt. After deliberating less than one day, the jury found the defendant guilty as charged. The trial court later sentenced him to a term of imprisonment of fifty-five years for murder and a concurrent sentence of three years of imprisonment for carrying a dangerous weapon.

On appeal, the defendant claims that two instances of prosecutorial impropriety, neither of which the defense objected to at trial, deprived him of his right to a fair trial. The first alleged impropriety occurred during the state's closing argument when the prosecutor argued that the jury could infer that Lewis' prior statements to the police, which were not in evidence, were consistent with his trial testimony because, otherwise, the defense would have used the statements to impeach him. The defendant contends that the prosecutor's argument was improper because it referred to facts not in evidence and impermissibly vouched for Lewis' credibility.

The second alleged impropriety occurred during the state's rebuttal argument, when the prosecutor invoked the principle of Occam's razor[6] in arguing that the jury

[6] The Oxford English Dictionary defines "Occam's razor" as "[t]he principle that in explaining anything no more assumptions should be made than are necessary." Oxford English Dictionary (3d Ed. 2004) (online version).

should credit the state's "simple, straightforward" version of events over the defendant's "unreal, complex" story about child molestation and fighting off ten men. The defendant contends that the prosecutor's reference to Occam's razor diluted the state's burden of proof and that the two improprieties together were harmful because they "struck at the heart of the case—the credibility of the only witness to claim that he saw [the defendant] stab [the victim], and the issue of reasonable doubt."

The state responds that the first argument "admittedly presents a close call" but that, ultimately, it "passes muster . . . because it was specifically based on the evidence that Lewis, Beard, and Rodriguez all had made statements to the police, but that only Beard and Rodriguez were impeached for making prior inconsistent statements . . . ." As for the second argument, the state contends that, when viewed in context of the entire trial, there is no possibility that the prosecutor's reference to Occam's razor misled or confused the jury as to the state's burden of proof. The state finally contends that, even if we assume for purposes of our analysis that the challenged arguments were improper, they did not deprive the defendant of a fair trial. We agree with the state.

The following additional facts are relevant to our resolution of the defendant's claims. At trial, the prosecutor adduced the testimony of Jorden Salas, one of the first officers to arrive at the crime scene. Salas testified that, when he reached the second floor landing, another officer on the scene was standing over the defendant and that the officer informed Salas that the defendant had just come out of Lewis' apartment. Salas stated that he and another officer immediately entered Lewis' apartment to perform a protective sweep, that the only person they encountered inside the apartment was Lewis, and that Lewis did not appear to be under

the influence of drugs or alcohol. When asked what he did after completing the protective sweep, Salas responded that he "took a signed sworn statement from [Lewis] . . . ." The prosecutor replied, "[w]ell, the rules of evidence preclude us from talking about anything that he may have told you, but I do want to ask you some . . . general questions." He then proceeded to question Salas about the procedures he followed in taking Lewis' statement, how long he spent with Lewis, and what he did afterward. Salas responded that he spent approximately fifteen minutes with Lewis, that he wrote down Lewis' exact words rather than summarize them, and that, afterward, he obtained Lewis' consent to search the apartment. The prosecutor adduced similar testimony from Sergeant Joshua Bergeson, who also took a statement from Lewis on the night in question. As he had done with Salas, the prosecutor admonished Bergeson not to disclose to the jury the contents of Lewis' statement to him.

During his closing argument, the prosecutor argued that "[t]here are three eyewitnesses to this crime, [Lewis, Brown, and Guzman]. I want to talk about [Lewis'] testimony. But, before I do, let me talk a little bit about . . . Lewis himself. You had the opportunity to watch him testify, and you will judge his credibility. . . . He has cases pending against him, and he's hoping that we will tell his sentencing judge that he testified truthfully in this case with the hope that the judge will consider that when imposing his sentence.

"His cooperation [agreement] will require you to evaluate his credibility with additional scrutiny. Please remember, however, that long before . . . Lewis picked up any criminal charges, he spoke to the police on two occasions immediately after the incident [in question], and, [on] one of those occasions, gave a sworn and written statement.

"And you saw how things work in here. If someone says something inconsistent from what they said previously, they get called out on it. That really didn't happen with . . . Lewis. I think you can conclude from your common sense that his testimony during the trial is, essentially, the same as the information he provided to the police shortly after the incident and long before he picked up any criminal charges."

Later, during his rebuttal argument, the prosecutor invoked the principle of Occam's razor when responding to an argument defense counsel had made during his closing argument: "Let me go back to the initial statement that [defense counsel] made when he began his argument. He said that the state had its version of events and that the defendant had . . . his own version of the events. I'm sure you've concluded by now that, when it comes to that scientific stuff and that math, I'm no rocket scientist. I'm no, you know, physicist of any kind.

"But there was this guy back in the, like, eleventh or twelfth century, and he was sort of a precursor to the modern physicists of today, and his name was William of Ockham. And he was trying to formulate some way to figure out when there are two competing versions of events, how do you figure out which one is correct and which one is incorrect?

"And he came up with this [theory]—and this was all in the context, obviously, of physics—and he comes up with this theory which is known as Occam's razor. And Occam's razor is, you know, when there's two competing theories of events; when there's the state's version and [the defendant's] version, how do you figure out which one is believable? Which one is credible? His theory was, you take the theory that's simple and straightforward. In other words, you take the theory

that makes common sense. What theory makes common sense?

"This story of [the defendant]—these lies of two to ten people attacking [him], and [his] fighting them off with [his] fists, and disarming people, and, you know, [he] was stabbed . . . [but doesn't] know who stabbed [him]. Somebody [else] stabbed [the victim]. It could have been somebody else. It could have been this person.

"I guess, now, it could have been this guy Dre . . . who was interviewed by the police shortly [afterward], [who] appeared calm, as you'll remember from the testimony. . . . [H]e was calm during all of [it]. He . . . called 911 himself. There's really no evidence that he was involved in this. It just so happens that he was described as somewhat short and somewhat stocky.

"Well, so do you believe that sort of unreal, complex story or do you believe the simple, straightforward story that makes common sense, which is that . . . Lewis saw the defendant attack [the victim] violently with [a] knife, repeatedly, and [kill] him."

As previously indicated, defense counsel did not object to either of the challenged arguments.[7] We address the defendant's contentions with respect to each of them in turn.

We begin by setting forth the legal principles governing our analysis. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurr-

[7] Although the defendant's claims are unpreserved, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Ortiz*, 343 Conn. 566, 579, 275 A.3d 578 (2022).

ed. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"It is well established that prosecutorial impropriety can occur during final or rebuttal argument. . . . To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 343 Conn. 566, 579–80, 275 A.3d 578 (2022).

We previously have stated that, "[w]hen making closing arguments to the jury, [counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314

Conn. 28, 37, 100 A.3d 779 (2014); see also *State* v. *Martinez*, 319 Conn. 712, 727–28, 127 A.3d 164 (2015) ("[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider" (internal quotation marks omitted)).

"As a general rule, a witness' prior consistent statements are inadmissible at trial. . . . Such statements clearly are barred by the hearsay rule if sought to be used to prove the truth of the matters asserted therein . . . . The rationale [on] which this rule is based is that the witness' story is not made more probable or more trustworthy by any number of repetitions of it. . . .

"This rule, however, is not absolute. The trial court, within its discretion, may admit a prior consistent statement if offered to rehabilitate a witness who has been impeached by a prior inconsistent statement . . . by the suggestion of bias, motive, or interest arising after the time the prior consistent statement was made . . . by a claim of recent fabrication . . . or by a claim of faulty memory. . . . When a prior consistent statement is admitted under any of these exceptions, it is admitted to affect credibility only and not to establish the truth of the statement." (Citations omitted; internal quotation marks omitted.) *State* v. *Valentine*, 240 Conn. 395, 412–413, 692 A.2d 727 (1997); see also Conn. Code Evid. § 6-11 (b) ("[i]f the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment").

Additionally, "[although a] prosecutor is permitted to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is not permitted to vouch personally for the truth or veracity of the state's witnesses." (Internal quotation marks omitted.) *State* v. *Albino*, 312 Conn. 763, 780, 97 A.3d 478 (2014). Similarly, "[i]t is axiomatic that prosecutors are not permitted to misstate the law or to distort the government's burden of proof . . . because such statements are likely to improperly mislead the jury." (Internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 357, 260 A.3d 1152 (2021).

Applying these principles to the present case, we conclude, first, that the prosecutor's argument concerning Lewis' prior statements to the police did not improperly vouch for Lewis' credibility or reference facts not in evidence. Anticipating that defense counsel would argue that Lewis' testimony should not be credited because of his cooperation agreement and knowing that the court would instruct the jury that it must scrutinize Lewis' testimony with particular care in light of that agreement,[8] the prosecutor reminded the jurors that

[8] During its final charge to the jury, the trial court instructed the jury in relevant part: "Lewis . . . testified in this case as [a] cooperating [witness]. A cooperating witness is someone who is currently incarcerated or is awaiting trial for some crime other than the crime involved in this case and who agrees to testify for the state.

"You must look with particular care at the testimony of cooperating witnesses and scrutinize it very carefully before you accept it. You should determine the credibility of that witness in light of any motive for testifying falsely and inculpating the accused.

"In considering the testimony of this witness, you may consider such things as the extent to which the cooperating [witness'] testimony is confirmed by other evidence, the specificity of the testimony . . . the cooperating [witness'] criminal record, any benefits received in exchange for the testimony . . . and the circumstances under which the cooperating witness initially provided the information to the police or the prosecutor, including whether the cooperating witness was responding to leading questions.

"Like all questions of credibility, this is a question you must decide based on all the evidence presented to you."

Lewis' cooperation agreement related to crimes he committed after he gave a sworn statement to the police about the victim's murder. The prosecutor then argued that, if Lewis had changed his account of the murder as a result of the cooperation agreement, the defense would have used his prior statements to impeach him, just as it had used Beard's and Rodriguez' prior statements to impeach them.

We are not persuaded by the defendant's assertion that this argument was based on facts not in evidence. Cf. *State* v. *Payne*, 260 Conn. 446, 456, 797 A.2d 1088 (2002) (concluding that it was improper for prosecutor to tell jury "that the defendant probably had been involved in a second robbery even though there was no evidence suggesting that to be true"). Nor did the argument directly or indirectly vouch for Lewis' credibility. Cf. *State* v. *Vazquez*, 79 Conn. App. 219, 232, 830 A.2d 261 (concluding that it was improper for prosecutor to argue that police officers "raised their hand[s] to tell the truth, and that's exactly what [they] did" (internal quotation marks omitted)), cert. denied, 266 Conn. 918, 833 A.2d 468 (2003). Three different witnesses (Lewis, Salas, and Bergeson) testified that Lewis gave statements to the police on the night of the murder. The jury was also aware that Beard and Rodriguez gave statements to the police and that the defense had used their statements to discredit them. It is this specific combination of facts—the jury's awareness of the existence of Lewis' prior statements and the defense's use of Beard's and Rodriguez' prior statements to impeach them—that convinces us that "the prosecutor's remarks [simply] underscored an inference that the jury [reasonably] could have drawn entirely on its own, based on the evidence presented [at trial]." (Internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 37, 917 A.2d 978 (2007); see also *State* v. *Courtney G.*, supra, 339 Conn. 355 ("[a]lthough a prosecutor may not express

a personal opinion as to a witness' credibility, he or she . . . may ask the jurors to draw inferences that are based on their common sense and life experience" (internal quotation marks omitted)). In other words, the prosecutor asked the jurors to infer from evidence properly before them, and from their personal experience as jurors in this case, that, if Lewis had changed his story as a result of his cooperation agreement, the defense could and would have used his prior statements to discredit him.[9] For these reasons, we conclude that the first challenged argument did not exceed the bounds of permissible argument.

We also disagree with the defendant that the prosecutor's reference to Occam's razor—the principle that " 'the simplest of competing theories should be preferred over more complex and subtle ones' "; *Brodie* v. *Workers' Compensation Appeals Board*, 40 Cal. 4th 1313, 1328 n.10, 156 P.3d 1100, 57 Cal. Rptr. 3d 644 (2007);—diluted the state's burden of proof or other-

[9] The defendant contends that the prosecutor's argument was an attempt to "bypass" the rules of evidence during closing arguments. He argues that, if the prosecutor wanted to introduce the contents of Lewis' prior statements to rebut an inference that he had changed his story because he hoped for consideration in connection with pending charges, then he could have asked the trial court to allow it to do so under § 6-11 (b) of the Connecticut Code of Evidence, which permits the court, in its discretion, to admit a witness' prior consistent statement to rebut "a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or . . . a suggestion of recent contrivance . . . ." Conn. Code Evid. § 6-11 (b). Under slightly different facts, the defendant's argument might be persuasive, and we recommend that prosecutors seek admission of a prior consistent statement whenever they want to use it for one of the purposes sanctioned by § 6-11 (b) of the Connecticut Code of Evidence. Although the prosecutor in this case chose not to request admission of Lewis' prior statements, it is fair to assume that the prosecutor believed that the argument could be made without them on the basis of evidence already in the record. In reaching our decision, we are mindful that the prior consistent statements in this case would have been admissible to rebut the suggestion that Lewis had falsely implicated the defendant, presumably to gain favor with the state, and there has been no suggestion that the statements did not, in fact, support that inference.

wise misled the jury as to the nature of that burden. "[W]e do not review the propriety of a prosecutor's statements in a vacuum but, rather . . . in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 351. In reviewing those statements, we are also mindful that the prosecutor is allowed some rhetorical leeway in making his closing argument. See, e.g., *State* v. *Gibson*, 302 Conn. 653, 659, 31 A.3d 346 (2011) ("[I]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Internal quotation marks omitted.)).

In the present case, it is evident that the prosecutor's reference to Occam's razor was used as a rhetorical device in response to the defense counsel's closing argument that the jury must choose between the state's and the defendant's competing "versions" of events. The prosecutor responded to defense counsel's argument, first by arguing that the defendant's constantly changing story to the police belied his claim of extreme emotional disturbance precipitated by a delusion about Lopez' daughter having been sexually abused. The prosecutor then addressed defense counsel's assertion that inconsistences in the testimony of the state's witnesses created a reasonable doubt.[10] Finally, it is clear from our review of the record that the prosecutor invoked Occam's razor in an effort to address the absurdity of defense counsel's assertion that there were "two different versions of what . . . happened that night"

[10] For example, with respect to Rodriguez' testimony, the prosecutor argued: "We put him on the [witness] stand because we believe it is our obligation to provide you with all of the potentially relevant information regarding this homicide. We offered that information with the understanding that there were going to be these inconsistences in what he said . . . in comparison to what . . . other people said . . . . But we were confident . . . that you can sort through [these] differences and figure out what the facts . . . are."

and that both were worthy of consideration. Specifically, the prosecutor argued that the jury should choose the version "that makes common sense" rather than the "unreal, complex story" that defense counsel himself had labeled "delusional" and entirely lacking in evidentiary support. Nothing in the prosecutor's argument expressly or implicitly suggested to the jurors that they *must* choose the simpler version of events, even if they did not find it proven beyond a reasonable doubt. See *State* v. *Murray*, Docket No. A16-2053, 2017 WL 6567651, *9 (Minn. App. December 26, 2017) (by invoking Occam's razor, "[t]he prosecutor did not make a statement that [was] contrary to the state's burden of proof or contrary to the jury's task of weighing conflicting evidence"), review denied, Minnesota Supreme Court, Docket No. A16-2053 (March 20, 2018); *State* v. *McGovern*, Docket No. 36328-7-III, 2020 WL 3468197, *5 (Wn. App. June 25, 2020) (decision without published opinion, 13 Wn. App. 2d 1114) ("In context, the prosecutor's comments about Occam's [r]azor amounted to an argument about how to assess circumstantial evidence, not the burden of proof. The prosecutor's point was that the simplest explanation for the circumstantial evidence pointing to [the defendant's] guilt was that [the defendant] in fact stole the money. This perspective contrasted with [the defendant's] theory of the case, which was that he was the victim of an unfortunate combination of circumstances . . . ."), review denied, 196 Wn. 2d 1023, 474 P.3d 1043 (2020). Nor do we believe that the jury could have interpreted the prosecutor's argument in such a manner or ignored the trial court's explicit instructions to the contrary. See, e.g., *State* v. *Williams*, 258 Conn. 1, 15 n.14, 778 A.2d 186 (2001) ("[i]t is a fundamental principle that jurors are presumed to follow the instructions given by the judge" (internal quotation marks omitted)). We therefore reject the defendant's claim that the prosecutor's argument

diluted or misled the jury as to the state's burden of proof.[11]

We note, finally, our agreement with the state that, even if the prosecutor's remarks were improper, there is no possibility that they deprived the defendant of a fair trial. "To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different [in the absence of] the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 37, 975 A.2d 660 (2009).

To aid us in determining whether prosecutorial impropriety so infected the proceedings with unfairness as to deprive a defendant of a fair trial, this court applies the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). "These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative mea-

[11] We note that our decision is based on the specific facts of this case. In another case, the prosecutor's use of Occam's razor may run the risk of misleading the jury as to the state's burden of proof. To avoid any such confusion, we think it prudent for prosecutors to refrain from using Occam's razor as a rhetorical device, as there are better ways to convey to a jury that the defense's version of events is unworthy of belief.

sures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 343 Conn. 580. Applying these factors here, we conclude that it is manifestly clear that the two alleged improprieties did not deprive the defendant of a fair trial. Each occurred only once, and neither was perceived by defense counsel as being so severe as to warrant an objection. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 558, 212 A.3d 208 (2019) (defense counsel's failure to object to allegedly improper comments is "a strong indication that they did not carry substantial weight in the course of the trial as a whole and were not so egregious that they caused the defendant harm"); *State* v. *Ceballos*, 266 Conn. 364, 414, 832 A.2d 14 (2003) ("[defense] counsel's failure to object at trial, [although] not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error" (emphasis omitted)). Nor do we perceive them as severe. Furthermore, although no curative measures were adopted, "the absence of such measures is attributable to [defense counsel's] failure to object or request any curative instruction from the court." *State* v. *Ortiz*, supra, 581. Despite defense counsel's failure to request such an instruction, however, we are persuaded that the trial court's instructions pertaining to the jurors' exclusive role as the arbiters of credibility, the state's burden of proof, and the bedrock rule that jurors must confine themselves to the evidence in the record were more than adequate to counteract any harm resulting from the alleged improprieties. With respect to the strength of the state's case, we conclude that the state's evidence identifying the defendant as the victim's killer was compelling.[12] Although some of the witnesses' testi-

[12] The defendant asserts that the state's case was weak, arguing that "[t]here are several different versions of [the victim's] death—none of which agree with each other." Defense counsel made a similar argument at trial, asserting that slight deviations in the timelines or factual recalls of the state's eyewitnesses (Lewis, Lopez, Rodriguez, Guzman, and Brown) were

mony conflicted in certain details, their testimony coincided in all material respects and, together with the forensic evidence, established the defendant's guilt beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other justices concurred.

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sufficient to raise reasonable doubt. To be sure, there were discrepancies and gaps in the testimony of these five witnesses, the inevitable result of the chaos, darkness, and rain, and the extreme intoxication of two of them, Lopez and Rodriguez. Notwithstanding these inconsistencies, we believe that there was considerable overlap in their testimony and that, when their accounts were combined with the forensic evidence and the defendant's highly incriminating statements and conduct, it left no doubt as to the defendant's culpability for the victim's murder.

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Murder; assault first degree; attempt to commit assault first degree; claim that trial court improperly denied defendant's motion to suppress certain evidence seized by police officers as result of their warrantless entry into his home; whether officers' warrantless entry into defendant's home was justified under emergency exception to warrant requirement of fourth amendment to United States constitution; whether, under totality of circumstances, it was reasonably objective for officers to conclude that there was emergency justifying their initial entry into defendant's home; applicability of emergency exception in light of United States Supreme Court's decision in Caniglia *v.* Strom *(141 S. Ct. 1596), discussed.*

State *v.* Schimanski 435
Operating motor vehicle with suspended license; conditional plea of nolo contendere; certification from Appellate Court; whether Appellate Court improperly upheld trial court's denial of defendant's motion to dismiss charge of operating motor

vehicle with suspended license; claim that Appellate Court incorrectly interpreted relevant statute (§ 14-227b (i) (1)) as extending suspension of person's license under statute beyond specified forty-five day period until motor vehicle operator subject to suspension has installed ignition interlock device; whether Appellate Court incorrectly determined that analysis and rationale of State *v.* Jacobson *(31 Conn. App. 797), and* State *v.* Cook *(36 Conn. App. 710), were inapplicable to present case; whether defendant's interpretation of § 14-227b (i) (1) would yield absurd result.*

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Robbery first degree; conspiracy to commit robbery first degree; assault first degree; arson second degree; conspiracy to commit arson second degree; attempt to commit murder; conspiracy to commit murder; larceny third degree; interfering with officer; claim that trial court improperly denied defendant's motion to suppress evidence discovered during search of his cell phone and evidence obtained from his cell phone provider; whether warrants authorizing searches were supported by probable cause; whether warrants were sufficiently particular to comport with fourth amendment to United States constitution; whether any error in denial of defendant's motion to suppress was harmless beyond reasonable doubt.

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Tax appeal; appeal from assessment of real property taxes on basis that property was overvalued and overassessed; claim that assessor of defendant town improperly classified plaintiff's wind turbines and associated equipment as real property pursuant to statute (§ 12-64 (a)) rather than as personal property pursuant to statute (§ 12-41 (c)); whether trial court correctly concluded that wind turbines constitute "buildings" or "structures" pursuant to § 12-64 (a); whether wind turbines and their associated equipment were taxable under "fixtures of . . . electric . . . companies" provision of § 12-41 (c); whether trial court correctly concluded that plaintiff did not establish its allegations of overvaluation and overassessment.

Vogue *v.* Administrator, Unemployment Compensation Act 321

Unemployment compensation; certification from Appellate Court; appeal from trial court's judgment dismissing appeal from decision of Employment Security Board of Review; whether Appellate Court correctly concluded that plaintiff was liable for unpaid unemployment compensation contributions under Unemployment Compensation Act (§ 31-222 et seq.) on ground that tattoo artist who worked on plaintiff's premises was employee rather than independent contractor; whether tattoo artist was plaintiff's employee under part B of ABC test under § 31-222 (a) (1) (B) (ii) (II) insofar as record contained substantial evidence that provision of tattoo services was within plaintiff's usual course of business.

CONNECTICUT APPELLATE REPORTS

Vol. 214

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE DELILAH G.*
(AC 45058)

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

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor daughter, D. The petitioner father and the mother had married while he was in the United States Navy in California. After his deployment to the east coast, he and the mother divorced in 2014, and the mother was granted physical custody of D and the father was granted visitation rights. After a separate custody trial in the District of Columbia, the court granted the father physical custody of D and visitation rights to the mother. In 2015, after the father married S, a court in Maryland modified the custody and visitation order, permitting the father to move to Connecticut. The mother's last visit with D occurred in 2017, before the father moved to Connecticut and the mother moved back to California. Twice while the father, S and D lived in Connecticut, the Navy deployed him for periods of approximately six months at sea, which the mother claimed interfered with her ability to establish a relationship with D. In 2018, D began behavioral health treatment with L, an advanced practice registered nurse. In March, 2018, the Superior Court in Norwich held a hearing on a motion the father had filed to modify the Maryland custody and visitation order. After a hearing, which the mother did not attend, the court ordered that the father would maintain sole legal and physical custody of D and that the mother would be permitted to visit D at the father's discretion upon proof of substance abuse counseling, completion of a parenting course and reunification therapy. The father then filed a petition to terminate the mother's parental rights with respect to D on, inter alia, the statutory (§ 45a-717 (g) (2) (C)) ground that she had no ongoing parent-child relationship with D. Prior to trial, the Department of Children and Families completed a social study in which it recommended termination of the mother's parental rights. The trial court, in terminating the mother's parental rights, found that D, who was nine years old at the time of the termination hearing, did not have any present positive memories of her mother, whom she referred to at times as her "other mother," her grandmother and her father's sister, and that D's memories of her mother did not involve pleasant things,

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

which included her memory that the mother had pushed the father down some stairs. The trial court further concluded that the interference exception to the ongoing parent-child relationship ground for termination of parental rights was inapplicable and that the mother had made minimal efforts to maintain a relationship with D. On appeal, the mother claimed, inter alia, that the trial court, in concluding that she had no ongoing parent-child relationship with D, failed to consider the father's interference with the development of that relationship and D's positive feelings toward her. *Held*:

1. The respondent mother could not prevail on her claim that the trial court improperly concluded that the petitioner father had established the ground of no ongoing parent-child relationship by clear and convincing evidence: the cumulative effect of the evidence was sufficient to justify the trial court's determinations that D had no present, positive memories of the respondent mother and, thus, that there was no ongoing parent-child relationship between them; moreover, contrary to the mother's assertion that D had many present, positive memories of her, including that D referred to the mother as her other mother, that she spoke with the mother on S's phone when she was six years old, that D sometimes discussed with L her memories of the mother, but with no contexts or time frames, and that D stated that one time the mother gave her a lot of toys, that evidence could not be construed as evidence of present memories or feelings that was positive in nature, especially as there was evidence that the mother gave D the toys after she had hit D in the mouth with a hairbrush.
2. The trial court properly determined that the respondent mother failed to establish that the actions of the petitioner father rendered inevitable her lack of a relationship with D: contrary to the mother's contention, the 2018 court order did not bar her from visiting with D but, rather, permitted visitation at the father's discretion upon proof that she had completed substance abuse counseling, a parenting course and reunification therapy, the court order did not preclude the mother from speaking with D by phone or mailing her letters or gifts, and the mother produced no credible evidence that she had engaged in the services prescribed in the court's order or that she sought to modify the court order before the filing of the termination of parental rights petition; moreover, the father's insistence that she abide by the court's orders, his refusal to let her visit D when she did not adhere to the court-ordered visitation schedule, and his deployments at sea and their effects on the mother's ability to visit with D, which the court considered, did not constitute interference with her relationship with D; furthermore, the mother presented no evidence regarding the quality and nature of her relationship with D before the father's alleged interference, and she made minimal effort to maintain a relationship with D, as she had custody of her for the first three years of her life, court-ordered visitation in the years since the original judgment transferred custody to the father, and the

opportunity to maintain contact and a relationship with D through phone calls, letters and gifts.

3. The evidence was sufficient to support the trial court's conclusion that allowing further time for the reestablishment of a parent-child relationship between D and the respondent mother would be detrimental to D's best interests: the court did not improperly rely on L's statement, as the mother claimed, that D could experience emotional distress if she had contact with her mother, as the court was entitled to give great weight to the statements of professionals such as L, other evidence such as the department's social study supported the court's determination, and the court already had found that D had no relationship with her mother; moreover, D had negative memories of or feelings toward her mother, who presented no evidence that she ever engaged in the services prescribed in the court's 2018 visitation order or sought to modify that order and the evidence showed that the mother had hit D and pushed the petitioner father down some stairs; furthermore, the evidence showed that D had lived with her father and S since they married, and that her father and S, whom D referred to as her mother, were meeting her needs.

Argued February 28—officially released August 24, 2022**

Procedural History

Petition by the father to terminate the parental rights of the respondent mother with respect to their minor child, brought to the New London Regional Children's Probate Court and transferred to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Hoffman, J.*; judgment terminating the respondent mother's parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

Matthew C. Eagan, assigned counsel, for the appellee (petitioner).

** August 24, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ELGO, J. The respondent mother, Amanda L., appeals from the judgment of the trial court granting the petition of the petitioner father, Juan G., to terminate her parental rights with respect to her minor daughter, Delilah G. On appeal, the respondent claims that the court improperly determined that (1) there was no ongoing parent-child relationship between her and Delilah pursuant to General Statutes § 45a-717 (g) (2) (C)[1] and (2) she had abandoned Delilah pursuant to § 45a-717 (g) (2) (A). We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the respondent's appeal. The petitioner and the respondent met in 2010 in Norfolk, Virginia. In the spring of 2011, the petitioner learned that the respondent was pregnant with Delilah. At the time, the petitioner, who had enlisted in the United States Navy in November, 2007, was preparing to move to California due to a military relocation. In August, 2011, the petitioner moved to San Diego, California, in accordance with the orders he had received from the Navy. Delilah was born in December, 2011, in Oregon while the petitioner was deployed. When the petitioner completed his deployment in March, 2012, he visited the respondent and Delilah in Oregon. Shortly thereafter, in May, 2012, the respondent[2] and the petitioner married.[3] The respondent and Delilah then moved to San Diego to live with the petitioner. When the petitioner was deployed to the east coast in August, 2013, the family relocated to the Washington, D.C., area.

[1] Although § 45a-717 (g) was the subject of technical amendments in 2019; see Public Acts 2019, No. 19-189, § 10; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] The respondent also has two children from a previous marriage.

[3] Delilah is the only child born of the petitioner and the respondent's relationship.

Throughout their marriage, the respondent and the petitioner's relationship was filled with ongoing problems and domestic violence. In May, 2014, the parties divorced. At that time, Delilah was approximately two and one-half years old. While the divorce was pending, the respondent had physical custody of Delilah and the petitioner had visitation time with Delilah. Later in 2014, a separate custody trial took place. The Superior Court of the District of Columbia issued a custody order on November 14, 2014, granting the petitioner physical custody of Delilah and providing the respondent with visitation rights. At the time the petitioner was granted physical custody of Delilah, she was almost three years old.

Thereafter, on October 9, 2015, both parties agreed to modify the custody and visitation order. Pursuant to the parties' agreement, and based on the evidence presented, on October 14, 2015, the Superior Court of the District of Columbia ordered that "the [respondent] shall have visitation with the minor child on alternate weekends. [The respondent] shall pick up the minor child from her school at the end of the school day on Fridays and drop off the minor child on Sundays at 6 p.m. at the visitor's center on [the] base . . . . [I]f [the respondent's] visitation with the minor child coincides with a Monday holiday, the minor child shall remain with [the respondent] during the Monday holiday. [The respondent] shall drop off the minor child on Monday at 6 p.m. at the visitor's center on [the] base . . . ." (Footnote omitted.) At the time this order was issued, Delilah was almost four years old.

In 2015, the petitioner married Sara G., who has four children from a previous marriage. The petitioner and Sara G. also have two children from their marriage.

On September 29, 2016, when Delilah was almost five years old, the Circuit Court for Prince George's County, Maryland, modified the previous visitation order. The

order prescribed that, "during every even number of years, [the respondent] will have the child during Thanksgiving, and Thanksgiving will be defined as Tuesday evening to Sunday evening . . . . [D]uring every odd number of years, [the respondent] will have the child from December 23 to December 30 . . . . [D]uring the summer, the [respondent] will have the child from the last week of June until the second week of August . . . . [T]he [petitioner] shall have the child on Father's Day weekend, and the [respondent] shall have the child on Mother's Day weekend . . . ." The order also permitted the petitioner to relocate to Connecticut. Specifically, the court order provided that the petitioner "shall have permission to relocate to Connecticut, and after [he] has relocated, the [respondent] will have visitation with the minor child, Delilah . . . any three day weekend (no school) . . . ." The order also stated that, "[u]ntil the [petitioner] deploys or relocates out of state, the [respondent] will maintain every other weekend visitation . . . . [A]fter relocation, the [respondent] is responsible for the pickup of the child and the [petitioner] is responsible for the return of the child . . . ." Thus, the petitioner maintained custody of Delilah while the respondent maintained visitation rights.

The respondent's last in-person visit with Delilah occurred in February, 2017, before the petitioner moved to Connecticut in March of that year. At the time of that last in-person visit, Delilah was five years old. The respondent continued to live in the Washington, D.C., area until the spring of 2018, at which point she moved back to California.

Delilah currently resides with the petitioner, her stepmother, Sara G., and her seven siblings in Connecticut. She has received behavioral health treatment from Amy Lane, an advanced practice registered nurse, since 2018. Since moving to Connecticut, the petitioner has been

deployed twice—once in 2017 and once in 2019—both times for a period of approximately six months.

In February, 2018, the petitioner filed a motion in Connecticut for modification of the custody and visitation order. A hearing on the motion was held at the Superior Court in the judicial district of New London at Norwich on March 29, 2018,[4] at which the respondent was not present.[5] In a written order, the court found that the respondent had actual notice of the proceeding but had elected not to appear. The court ordered that "[the petitioner] shall maintain sole legal and physical custody of the minor child Delilah . . . . [The respondent] shall have access at the [petitioner's] discretion following proof of substance abuse counseling, completion of a parenting course and reunification therapy." When this court order was issued, Delilah was six years old.

On March 25, 2019, the petitioner filed the petition to terminate the parental rights of the respondent in the New London Regional Children's Probate Court. At the time the petition was filed, Delilah was seven years old. In the petition, the petitioner alleged: (1) no ongoing parent-child relationship existed between the respondent and Delilah pursuant to § 45a-717 (g) (2) (C); (2) the respondent had abandoned Delilah pursuant to § 45a-717 (g) (2) (A); and (3) the respondent had failed

[4] Neither the respondent nor the petitioner was represented by counsel during the March 29, 2018 hearing.

[5] At the trial on the petition to terminate the respondent's parental rights, the respondent testified that she was not aware of the March 29, 2018 court date and had learned of the scheduled hearing only after it already had occurred. According to the respondent, she was in Connecticut the week of March 29, 2018, but only to visit Delilah.

In its memorandum of decision, the court found that the respondent's testimony that she was unaware of the court date was not credible given the fact that she " 'just happened' " to be in Connecticut at the time of the hearing. On appeal, the respondent does not contest the propriety of this finding.

to rehabilitate herself pursuant to § 45a-717 (g) (2) (D) (i).

A Probate Court study for termination of parental rights (study) was completed on June 13, 2019, by Marcus Hilario, a social worker for the Department of Children and Families (department). The study recommended that the parental rights of the respondent be terminated with respect to Delilah. On January 14, 2020, Hilario completed an addendum to the study (addendum). The addendum also recommended that the respondent's parental rights be terminated.

The petition was transferred to the Superior Court for Juvenile Matters at Waterford. The respondent contested the petition, and a trial was held on April 1, 2021.[6] Delilah was nine years old at the time of trial. At the start of trial, counsel for the petitioner withdrew the failure to rehabilitate ground. The court then heard testimony from the petitioner, the respondent, Sara G., and Hilario. Six exhibits were entered into evidence by the petitioner, and five exhibits were entered into evidence by the respondent.[7]

In its memorandum of decision dated July 28, 2021, the court found that the petitioner had proven, by clear and convincing evidence, the grounds of no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C) and abandonment pursuant to § 45a-717 (g) (2) (A). The court, thus, terminated the parental rights of the respondent as to Delilah, and this appeal followed.

On appeal, the respondent claims that the court improperly determined that (1) there was no ongoing

[6] Both the petitioner and the respondent were represented by counsel during the trial on the petition to terminate the parental rights of the respondent.

[7] The court also took judicial notice of the New London Regional Children's Probate Court file.

parent-child relationship between her and Delilah pursuant to § 45a-717 (g) (2) (C); and (2) she had abandoned Delilah pursuant to § 45a-717 (g) (2) (A).

Before considering those claims, we begin by setting forth the legal principles and standards of review that govern our analysis. "[Section] 45a-715 (a) (2) permits a child's guardian, among others, to petition the Probate Court to terminate the parental rights of that child's parent(s). In order to terminate a parent's parental rights under § 45a-717, the petitioner is required to prove, by clear and convincing evidence, that any one of the seven grounds for termination delineated in § 45a-717 (g) (2) exists and that termination is in the best interest of the child. . . . Those seven grounds are: abandonment, acts of parental commission or omission, no ongoing parent-child relationship, neglect/abuse, failure to rehabilitate, causing the death of another child, or committing a sexual assault that results in the conception of the child." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Jacob W.*, 178 Conn. App. 195, 203–204, 172 A.3d 1274 (2017), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019).

"Nonconsensual termination proceedings involve a two step process: an adjudicatory phase and a dispositional phase. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether the termination of parental rights is in the best interests of the child. . . . The dispositional phase, like its adjudicatory cousin, also must be supported on the basis of clear and convincing evidence." (Citations omitted; internal quotation marks omitted.) *In re Alissa N.*, 56 Conn. App. 203, 207–208, 742 A.2d 415 (1999), cert. denied,

252 Conn. 932, 746 A.2d 791 (2000). Section 45a-717 (i) requires the court, in all cases except those in which termination is based on consent, in determining whether termination is in the child's best interest, to consider and make written findings regarding six separate factors.[8]

Our Supreme Court has cautioned that, "[i]n interpreting the parameters of [§ 45a-717 (g)], we must be mindful of what is at stake. [T]he termination of parental rights is defined, in [what is now General Statutes § 45a-707 (8)], as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and [the] parent . . . . It is, accordingly, a most serious and sensitive judicial action. . . . Although the severance of the parent-child relationship may be required under some circumstances, the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and,

[8] The court must consider: "(1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by a child-placing agency to facilitate the reunion of the child with the parent; (2) the terms of any applicable court order entered into and agreed upon by any individual or child-placing agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (3) the feelings and emotional ties of the child with respect to the child's parents, any guardian of the child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (4) the age of the child; (5) the efforts the parent has made to adjust such parent's circumstances, conduct or conditions to make it in the best interest of the child to return the child to the parent's home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (6) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent." General Statutes § 45a-717 (i).

absent a powerful countervailing interest, protection." (Internal quotation marks omitted.) *In re Jacob W.*, 330 Conn. 744, 756, 200 A.3d 1091 (2019); see also *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 295, 455 A.2d 1313 (1983) (noting that "it is both a fundamental right and the policy of this state to maintain the integrity of the family"). "Termination of parental rights does not follow automatically from parental conduct justifying the removal of custody. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the [s]tate. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." (Internal quotation marks omitted.) *In re Jessica M.*, 217 Conn. 459, 465, 586 A.2d 597 (1991).

"Section [45a-717 (g)] carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent." (Internal quotation marks omitted.) *In re Oreoluwa O.*, 321 Conn. 523, 532, 139 A.3d 674 (2016). "[The petitioner], in petitioning to terminate those rights, must allege and prove [by clear and convincing evidence] one or more of the statutory grounds." (Internal quotation marks omitted.) *In re Michael M.*, 29 Conn. App. 112, 118, 614 A.2d 832 (1992). "Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than

the probability that they are false or do not exist." (Internal quotation marks omitted.) *In re Carla C.*, 167 Conn. App. 248, 258, 143 A.3d 677 (2016). "In contrast to custody proceedings, in which the best interests of the child are always the paramount consideration and in fact usually dictate the outcome, in termination proceedings the statutory criteria must be met before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Michael M.*, supra, 118.

On appeal, we review the court's conclusion that a ground for termination of parental rights has been proven for sufficiency of the evidence. See, e.g., *In re Tresin J.*, 334 Conn. 314, 322, 222 A.3d 83 (2019) ("Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.)); see also *In re Mariana A.*, 181 Conn. App. 415, 428, 186 A.3d 83 (2018) ("In an appeal from the granting of a petition [to terminate parental rights], our Supreme Court has indicated that the court's ultimate conclusion as to whether a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . Thus,

in reviewing the granting of a petition, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion].'' (Citations omitted; internal quotation marks omitted.)).

To the extent we are required to construe the terms of a ground for termination of parental rights or its applicability to the facts of the case, however, our review is plenary. See, e.g., *In re Tresin J.*, supra, 334 Conn. 322; see also *In re November H.*, 202 Conn. App. 106, 132, 243 A.3d 839 (2020) (''[t]he applicability of the interference exception under the facts of this case presents a question of law over which we exercise plenary review'').

Last, to the extent that we are required to review the court's subordinate factual findings, we apply the clearly erroneous standard of review. See, e.g., *In re Jacob W.*, supra, 330 Conn. 754 (explaining that applicable standard of review for subordinate factual findings is clear error). ''A [subordinate factual] finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [G]reat weight is given to the judgment of the trial court because of [the trial court's] opportunity to observe the parties and the evidence. . . . [An appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling.'' (Internal quotation marks omitted.) *In re November H.*, supra, 202 Conn. App. 123. With these legal principles in mind, we turn to the respondent's claims.

The respondent claims that there is insufficient evidence in the record to support the court's conclusion that there was no ongoing parent-child relationship between her and Delilah pursuant to § 45a-717 (g) (2) (C). Specifically, the respondent claims that the court improperly concluded that the petitioner had established the ground of no ongoing parent-child relationship by clear and convincing evidence because (1) Delilah has present positive memories of her, (2) the petitioner interfered with her relationship with Delilah, and (3) allowing additional time for the reestablishment of the parent-child relationship would not be detrimental to Delilah's best interests. We address each of the respondent's claims in turn.[9]

I

We begin with the respondent's claim that the court improperly granted the petition to terminate her parental rights pursuant to § 45a-717 (g) (2) (C) because Delilah has present positive memories of her.

The following additional procedural history is relevant to our resolution of the respondent's claim. Evidence relating to whether Delilah has present positive memories of the respondent was presented at trial. This evidence includes the testimony of Hilario, the petitioner, Sara G., and two exhibits—the study and addendum—both composed by Hilario.

[9] The respondent also claims that the court improperly determined, pursuant to § 45a-717 (g) (2) (A), that she had abandoned Delilah. We note that, "[i]n the present case, for the respondent to prevail, [she] must successfully challenge both of the bases of the judgment terminating [her] parental rights. . . . If either of the grounds on which the trial court relied are upheld on appeal, the termination of parental rights must stand." (Citation omitted; internal quotation marks omitted.) *In re Lukas K.*, 120 Conn. App. 465, 484 n.11, 992 A.2d 1142 (2010), aff'd, 300 Conn. 463, 14 A.3d 990 (2011). Because we conclude that the court did not err in terminating the respondent's parental rights based on the lack of an ongoing parent-child relationship between her and Delilah, we do not address whether the court erred in terminating her parental rights based on abandonment.

At trial, Hilario testified as to his interactions with Delilah. Hilario had interviewed Delilah alone on two separate occasions—once in preparation for composing the study and again in preparation for composing the addendum. According to Hilario, Delilah "had very few memories of [the respondent]." At trial, when asked whether Delilah had made any statements regarding any positive memories of the respondent, Hilario responded, "[n]o."

In the study, Hilario reported that he conducted a visit to Delilah's home on May 29, 2019. During this visit, he conducted an interview of Delilah alone. Consistent with his trial testimony, Hilario noted in his study that, during the interview, "Delilah referred to [the respondent] as her father's sister. Delilah reported that she saw [the respondent] a long time ago, but could not remember a time frame. Delilah indicated that [the respondent] was mean and one time pushed [the petitioner] down some stairs. Delilah stated that she could not remember other mean things that [the respondent] did." Hilario also had spoken with Delilah's counselor, Lane, on June 10, 2019, in preparation for composing the study. According to the study, "Lane indicated that Delilah briefly stated that [the respondent] hit her in the face with a hairbrush, however, Delilah did not disclose any further details and did not have a time frame as to when this happened." Hilario testified at trial that Lane had informed him that "Delilah had some memories of [the respondent], I believe, like getting hit in the face with a brush . . . ."

During Hilario's second interview with Delilah, the two again discussed the respondent. When Hilario asked Delilah if she knew who the respondent was, the addendum notes that Delilah stated that "[the respondent] is my other mother." (Internal quotation marks omitted.) Hilario wrote in the addendum, "Delilah reported that [the respondent] pushed [the petitioner]

down a flight of stairs but did not have a time frame as to when this incident occurred. Delilah also stated that [the respondent] gave her a lot of toys and a bloody something when she was a baby. Delilah did not provide further details as to what the bloody something was. Delilah stated that she last spoke to [the respondent] when she was six years old on mommy's phone (referring to [Sara G.]). Delilah did not have a time frame as to when she last visited with [the respondent] but indicated that [she] lived in another state." (Internal quotation marks omitted.) Hilario testified at trial that Delilah "remembered [the respondent] giving her a bloody something but then had no details after that." The addendum further stated that Lane had reported to Hilario that Delilah does not discuss the respondent with her. According to Hilario's testimony, "[Lane] reported that the topic of [the respondent] was not discussed."

The petitioner also testified at trial. According to his testimony, while he and the respondent were living in San Diego, the respondent had pushed him down a flight of stairs in the presence of Delilah. Sara G. also testified at trial. She averred that, during one therapy session in which she was present, Delilah told her therapist that "[the respondent] was mean to her, and that [the respondent] had hit her in the mouth with [a] hairbrush and made her mouth bleed and then took her to the store to buy her toys. And then, after that incident, she refused to talk about anything related to [the respondent]."

The petitioner further testified that, after he moved with Delilah to Connecticut in 2017, "[t]here was one phone call in which [the respondent] spoke with Delilah, and it was for approximately thirty seconds." At the time, the petitioner was on deployment, and so the phone call was facilitated by Sara G. The petitioner testified that, while he was deployed, he would leave

a cell phone at his home and Sara G. would check the phone at least once a week. The petitioner testified that, on one occasion, Sara G. had allowed the respondent to speak by phone with Delilah in a call that lasted for thirty seconds. The petitioner testified that the call lasted only thirty seconds because "Delilah did not know who she was talking to and, after a brief conversation, said okay, goodbye grandma or I love you, too, grandma." Sara G. similarly reported that, after the respondent had sent a text message to the petitioner's phone on Delilah's birthday requesting to speak with Delilah, the respondent and Delilah spoke by phone for thirty seconds. When asked why the phone call was so short, Sara G. testified: "I couldn't tell you why. I gave the phone to Delilah. [The respondent] told her happy birthday and that she loved her, and—then Delilah said goodbye, and at the end of the phone call she said, I love you, grandma, and handed the phone back."

On the basis of the evidence presented at trial, the court found the following facts in its memorandum of decision: "Delilah refers to [the respondent] as her 'other mother.' Delilah reported [that] she remembers [the respondent] pushing [the petitioner] down a flight of stairs but does not have a time frame and that [the respondent] gave her a lot of toys and a 'bloody something' when she was a baby. Delilah also remembers talking to [the respondent] on 'mommy's phone,' referring to Sara G.'s phone, when she was six years old. Delilah ended the call saying goodbye to 'grammy.' . . . Delilah has not had an in-person visit with [the respondent] since 2017, and therefore no relationship that ordinarily develops as a result of the parent having met the physical, emotional, moral and educational needs of the child. Delilah does not recognize [the respondent's] voice on the phone and refers to her as her 'other mother.' Delilah has no relationship with [the respondent]." On the basis of these factual findings, the court

concluded that "Delilah has no present positive memories of [the respondent], and her memories are not of pleasant things."

On appeal, the respondent contends that there is insufficient evidence in the record to support the court's conclusion that Delilah does not have present positive memories of the respondent. We disagree.

Section 45a-717 (g) provides in relevant part: "[T]he court may approve a petition terminating the parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child . . . ." Our Supreme Court has "explained that the inquiry under § 45a-717 (g) (2) (C) is a two step process. First, the court must determine whether the petitioner has proven the lack of an ongoing parent-child relationship. Only if the court answers that question in the affirmative may it turn to the second part of the inquiry, namely, whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests." (Internal quotation marks omitted.) *In re Jacob W.*, supra, 330 Conn. 755.

This statutory ground for termination of an individual's parental rights was created via No. 74-164, § 6, of the 1974 Public Acts (P.A. 74-164) and was intended to be a "no-fault" statutory ground for termination. See *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 669, 420 A.2d 875 (1979) (referring to no ongoing parent-child relationship ground for termination of parental

rights as " 'no-fault' statutory ground"); see also *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 645, 436 A.2d 290 (1980) ("[i]t is clear that the legislature intended that even without fault on the part of the parent a child should be able to be freed for adoption where there is no ongoing child-parent relationship and where the period of time predictably necessary to establish or reestablish a parent-child relationship with the natural parent would be detrimental to the child's best interest"). The prior version of the statute, enacted into law by No. 73-156, § 7, of the 1973 Public Acts, allowed petitions for the termination of parental rights to be filed in the Probate Court, in the absence of consent, based only on certain "fault" grounds such as abandonment, neglect, or physical or mental disability. Probate Judge Glenn Knierim, head of the committee of probate judges and clerks, and a representative of the then Welfare Department, drafted P.A. 74-164. Judge Knierim explained at the March 19, 1974 hearing before the legislature's Joint Standing Committee on the Judiciary that the no ongoing parent-child relationship ground for termination "allows [a] judge to terminate parental rights if [the court] believes that no parent/child relationship exists and [that] to allow time to [develop] such a relationship would be detrimental [to] the child." Conn. Joint Standing Committee Hearings, Judiciary, 1974 Sess., p. 195, remarks of Judge Knierim.

Since its creation in 1974, this statutory ground for termination "has evolved in light of a sparse legislative history . . . ." (Internal quotation marks omitted.) *In re Jacob W.*, supra, 178 Conn. App. 208. "In its interpretation of the language of § 45a-717 (g) (2) (C), this court has been careful to avoid placing insurmountable burden[s] on noncustodial parents. . . . Because of that concern, [our Supreme Court has] explicitly rejected a literal interpretation of the statute, which defines the relationship as one that ordinarily develops as a result

of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child . . . .” (Internal quotation marks omitted.) *In re Jacob W.*, supra, 330 Conn. 757. Rather, our Supreme Court has explained that “[i]t is reasonable to read the language of ‘no ongoing parent-child relationship’ to contemplate a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. In either case the . . . question is whether the child has no present memories or feelings for the natural parent.”[10] *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 670.

The term “for,” as used in the phrase “present memories or feelings for the natural parent,” has been interpreted to mean “what is said or felt in favor of someone or something: pro.” (Internal quotation marks omitted.)

[10] Although *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 648, concerned General Statutes § 17-43a, the predecessor of General Statutes § 17a-112, rather than § 45a-717, it and other cases concerning § 17a-112 are pertinent to our understanding of § 45a-717. “Because the provisions governing the termination of parental rights under § 17a-112, which governs petitions regarding children previously committed to the custody of the department, and § 45a-717, which is the correspondent statute for proceedings in the Probate Court that governs such petitions brought by private parties . . . are virtually identical, case law applying either statute is instructive in termination of parental rights cases.” (Citation omitted; internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 324 n.8; see also *In re Jessica M.*, supra, 217 Conn. 468 n.6 (explaining that prior cases construing no ongoing parent-child relationship ground for termination found within § 17-43a were applicable to no ongoing parent-child relationship ground for termination found within General Statutes § 45-61f, now codified at § 45a-717, as statutory language is identical and each statute “was enacted by [P.A. 74-164], and nothing in the legislative history suggests that they should be construed differently”); *In re Carla C.*, supra, 167 Conn. App. 257 n.12 (“[t]his court has applied the same analytical framework to petitions to terminate parental rights pursuant to §§ 17a-112 and 45a-717, the relevant language of which is nearly identical” (internal quotation marks omitted)).

In re Juvenile Appeal (84-6), 2 Conn. App. 705, 709, 483 A.2d 1101 (1984), cert. denied, 195 Conn. 801, 487 A.2d 564 (1985). Thus, "the phrase 'feelings for the natural parent' refers to feelings of a positive nature. It does not encompass . . . extreme, psychologically corrosive and destructive feelings . . . ." Id.; see also *In re Jessica M.*, supra, 217 Conn. 470 ("[T]he standard contemplates a relationship that has some positive attributes. It is not unlikely that most parent-child relationships in which state intervention is required, including custody disputes incidental to divorce, will exhibit signs of strain. While evidence of a child's ambivalent feelings toward a noncustodial parent would not alone justify a finding that no ongoing parent-child relationship exists, it is nevertheless reasonable to construe this statutory ground for termination to require a finding that no positive emotional aspects of the relationship survive." (Internal quotation marks omitted.)).

Thus, our case law makes clear that the test for determining whether an ongoing parent-child relationship exists is whether the "child [has] some present memories or feelings for the natural parent that are positive in nature." (Internal quotation marks omitted.) Id., 469; see also *In re Tresin J.*, supra, 334 Conn. 325 ("[t]he ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature" (emphasis omitted; internal quotation marks omitted)); *In re Jacob W.*, supra, 330 Conn. 757 (same); *In re Emily S.*, Superior Court, judicial district of New Britain, Juvenile Matters, Docket No. CP-18-012507-A (April 22, 2001) (same) (reprinted at 210 Conn. App. 585, 613, 270 A.3d 819), aff'd, 210 Conn. App. 581, 270 A.3d 797, cert. denied, 342 Conn. 911, 271 A.3d 1039 (2022). "[T]he . . . question is whether the child has no present [positive] memories

or feelings for the natural parent." (Internal quotation marks omitted.) *In re Carla C.*, supra, 167 Conn. App. 266; see also *In re Jonathon G.*, 63 Conn. App. 516, 525, 777 A.2d 695 (2001) ("[f]eelings for the natural parent connotes feelings of a positive nature only" (internal quotation marks omitted)); *In re John G.*, 56 Conn. App. 12, 23, 740 A.2d 496 (1999) (same); *In re Tabitha T.*, 51 Conn. App. 595, 602, 722 A.2d 1232 (1999) (same); *In re Kezia M.*, 33 Conn. App. 12, 21, 632 A.2d 1122 (same), cert. denied, 228 Conn. 915, 636 A.2d 847 (1993).

Our Supreme Court has also clarified that "[d]ay-to-day absence alone . . . is insufficient to support a finding of no ongoing parent-child relationship" and has "rejected the notion that termination may be predicated on the lack of a *meaningful* relationship, [because] the statute requires that there be *no* relationship." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Jacob W.*, supra, 330 Conn. 757–58. It thus follows that, "evidence of a troubled parent-child relationship [is], without more, insufficient to justify termination on the basis of no ongoing parent-child relationship . . . ." (Internal quotation marks omitted.) *In re Jessica M.*, supra, 217 Conn. 469–70; see also *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 671 ("[t]he statute does not authorize the termination of parental rights upon a showing of a troubled relationship, but only upon a showing of no relationship").

The statute also does not authorize a court to terminate parental rights simply because the biological parent is not the "psychological parent" of the child, as such authorization would place an insurmountable burden on noncustodial parents. See *In re Jessica M.*, supra, 217 Conn. 470 ("If a court were authorized to find that day-to-day absence alone proved that no ongoing

parent child relationship existed, a parent whose child needed a temporary placement would otherwise have to consider the risk that his or her parental rights might be terminated if the guardian subsequently wished to adopt. Such a standard for termination would create an incentive for a parent to yield temporary custody to a stranger rather than to an interested relative who might develop a strong bond with the child. Creating a disincentive for a parent to choose the guardian most likely to love and protect the child while the parent was unable to provide daily care would contravene the state's interests in protecting both family integrity and the best interests of the child." (Footnote omitted; internal quotation marks omitted.)); *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675 ("The fact that the child may have established a loving relationship with someone besides [the parent] does not prove the absence of a [parent-child] relationship. It is insufficient to prove that the child has developed emotional ties with another person. Certainly children from two-parent homes may have two psychological parents; even children whose parents are divorced may retain close emotional ties to both, although the relationship to one is maintained solely through visitation. . . . The statute, however, quite clearly does not authorize termination upon a showing of no meaningful relationship, but rather requires that there be no relationship." (Emphasis omitted; internal quotation marks omitted.)).

As to noncustodial parents, our Supreme Court has emphasized that "[t]he evidence regarding the nature of the respondent's relationship with [the] child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation had been permitted." *In re Jessica M.*, supra, 217 Conn. 473. The fact that a noncustodial parent has had some contact with the child, however, does not "preclude a determination that there [is] no ongoing parent-child relationship . . . ." *In re Juvenile Appeal (Anonymous)*, supra, 181 Conn. 646.

In the present case, the respondent argues that the court's conclusion that Delilah has no present positive memories of her is "belied by the substantial record evidence that Delilah has many present positive memories of [her]."[11] In support of this contention, the respondent relies on the following evidence: (1) when asked by Hilario if she knew who the respondent was, Delilah stated that the respondent was her " 'other mother,' " (2) Delilah did not have a time frame as to when she last visited with the respondent but indicated that they lived in another state, (3) Delilah stated that she last spoke with the respondent when she was six years old on " 'mommy's phone' " (referring to Sara G.), (4) Delilah sometimes discusses her memories of the respondent with Lane but with no contexts or time frames, and (5) Delilah stated that the respondent gave her a lot of toys. We address each piece of evidence in turn.

[11] The respondent also contends that, by noting that "Delilah has not had an in-person visit with [the respondent] since 2017, and therefore no relationship that ordinarily develops as a result of the parent having met the physical, emotional, moral and educational needs of the child," the trial court ignored our Supreme Court's holding in *In re Jacob W.*, supra, 330 Conn. 757, which explained that the court had "explicitly rejected a literal interpretation of the statute, which defines the relationship as one that ordinarily develops as a result of a parent having met on a continuing day-to-day basis the physical, emotional, moral and educational needs of the child . . . ." (Internal quotation marks omitted.) We disagree.

Although the trial court noted that "no relationship that ordinarily develops as a result of the parent having met the physical, emotional, moral and educational needs of the child" existed between Delilah and the respondent, it went on to conclude in its memorandum of decision that "Delilah has no present positive memories of [the respondent], and her memories are not of pleasant things." Thus, the trial court clearly did not ignore the holding of our Supreme Court in *In re Jacob W.*, as the respondent suggests. See *In re Jacob W.*, supra, 330 Conn. 757 ("The ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature. . . . [W]e have explicitly rejected a literal interpretation of the statute, which defines the relationship as one that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child." (Citations omitted; internal quotation marks omitted.)).

As previously explained, in his addendum, Hilario reported that, during his second interview with Delilah, he had asked her if she knew who the respondent was, and she stated that "[the respondent] is my other mother." (Internal quotation marks omitted.) The respondent asserts that this evidence supports the conclusion that Delilah has present positive memories of her. We are unpersuaded.

That Delilah may recognize the respondent as her " 'other mother' " is not evidence of a present positive memory of the respondent. The statement simply indicates that Delilah may recognize who the respondent is, not that she has any present memories of the respondent that are positive in nature. Our case law instructs that "[t]he ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature."[12] (Emphasis omitted; internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 325. Thus, the respondent's reliance on Delilah's statement that the respondent is her " 'other

[12] The respondent contends that "positive" means "explicitly laid down; express; direct; explicit; precise; specific" or "absolute; real; existing in fact or by the presence of something and not by its absence." We disagree. "Positive," as used in the context of our cases concerning the no ongoing parent-child relationship ground for termination, means "having a good effect . . . favorable" or "marked by optimism." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/positive (last visited August 19, 2022). For example, in *In re Juvenile Appeal (84-6)*, supra, 2 Conn. App. 709, this court explained that the term "for," as used in the phrase "no present memories or feelings for the natural parent," means "what is said or felt *in favor* of someone or something: pro." (Emphasis added; internal quotation marks omitted.) This court went on to explain that "the phrase 'feelings for the natural parent' refers to feelings of a positive nature. It does not encompass . . . extreme, psychologically corrosive and destructive feelings." Id. Thus, if "positive" meant "express," "absolute," or "real" as the respondent contends, then "positive feelings" would encompass even psychologically corrosive and destructive feelings. Because this court previously has made clear that such feelings cannot properly be characterized as "positive feelings" necessary to show an ongoing parent-child relationship, we decline to apply the definition of "positive" that the respondent suggests.

mother' " does not support her assertion that Delilah has present positive memories of her.[13]

The addendum composed by Hilario also provided that "Delilah did not have a time frame as to when she had last visited with [the respondent] but indicated that they lived in another state." This evidence likewise cannot reasonably be construed to be a present positive memory. The evidence merely suggests that Delilah could not remember when the respondent had visited her last but that Delilah knew that the respondent lived in a different state. Nothing in this evidence indicates that Delilah has some present memories or feelings toward the respondent that are positive in nature. We, therefore, find the respondent's reliance on this evidence misplaced.

Hilario also reported in his addendum that Delilah stated that she last spoke with the respondent when she was six years old on " 'mommy's phone' " (referring to Sara G.).[14] Again, there is no evidence in the record that this memory is positive in nature. We, thus, find unavailing the respondent's contention that Delilah has

[13] The respondent also notes that "there is no evidence that Delilah had any difficulty with the notion that she has two mother figures in her life: [the respondent], her biological mother, and Sara G., her custodial mother. See *In re Caleb P.*, [53 Conn. Supp. 329, 346, 113 A.3d 507 (2014)] (finding that [respondent] father maintained an ongoing parent-child relationship with his child where the child 'did not have any difficulty in the notion that he has two daddies')."

In *In re Caleb P.*, which is not binding precedent on this court, the trial court concluded that the child "ha[d] present memories or feelings for his father. He did not have any difficulty in the notion that he has two daddies." *In re Caleb P.*, supra, 53 Conn. Supp. 346. In the present case, evidence that Delilah acknowledges two mother figures in her life does not obviate the court's conclusion that she has no present positive memories or feelings for the respondent. We, thus, find the respondent's reliance on *In re Caleb P.* unavailing.

[14] Evidence was presented at trial as to a phone conversation between the respondent and Delilah. Sara G. testified that the phone call lasted only thirty seconds and that, at its conclusion, Delilah referred to the respondent as her grandmother.

a present positive memory of her last phone call with the respondent.

Similarly, evidence that Delilah "sometimes discusses her memories of [the respondent] with [Lane] but with no contexts or time frames" does not support the respondent's contention that Delilah has present positive memories of her because there is no evidence in the record as to whether these memories are positive in nature.

Last, the respondent relies on evidence that "Delilah also stated that [the respondent] gave her a lot of toys . . . ." The respondent argues that "Delilah reveals that she has a present memory that [the respondent] gave her a lot of toys" and that, "[u]ndoubtedly, this is a present positive memory of [the respondent]." The respondent acknowledges, however, that "in this same sentence, Delilah also recalled that [the respondent] gave her a 'bloody something,' although the child did not provide any clarifying details regarding this memory." The respondent isolates Delilah's statements and argues that "some of Delilah's memories of [the respondent] are positive while others are ambiguous or negative. The mere fact that some of Delilah's memories of [the respondent] are ambiguous or negative does not vitiate the fact that she has many present positive memories of [the respondent]."

Although we agree with the respondent's contention that not all of a child's memories of the parent must be positive in order for the court to conclude that there is an ongoing parent-child relationship, we emphasize that at least some of the child's present memories or feelings of the parent must be positive in nature. See, e.g., *In re Jessica M.*, supra, 217 Conn. 470 ("[T]he standard contemplates a relationship that has some positive attributes. It is not unlikely that most parent-child relationships in which state intervention is

required, including custody disputes incidental to divorce, will exhibit signs of strain. While evidence of a child's ambivalent feelings toward a noncustodial parent would not alone justify a finding that no ongoing parent-child relationship exists, it is nevertheless reasonable to construe this statutory ground for termination to require a finding that no positive emotional aspects of the relationship survive." (Internal quotation marks omitted.)).

When we review in context Delilah's statement that "[the respondent] gave her a lot of toys and a 'bloody something' when she was a baby," we conclude that it cannot reasonably be construed as a positive memory. Hilario testified that Lane told him that "Delilah had some memories of [the respondent], I believe, like getting hit in the face with a brush . . . ." Sara G. likewise averred that, during one therapy session in which she was present, Delilah told her therapist that "[the respondent] was mean to her, and that [the respondent] had hit her in the mouth with [a] hairbrush and made her mouth bleed and then took her to the store to buy her toys. And then, after that incident, she refused to talk about anything related to [the respondent]." Hilario also reported in both his study and addendum that Delilah indicated that the respondent was mean, and, at some point, had pushed the petitioner down some stairs. The petitioner also testified that, while he and the respondent were living in San Diego, the respondent had pushed him down a flight of stairs in the presence of Delilah. We, therefore, conclude that this evidence does not demonstrate that Delilah has a present positive memory of the respondent.

Our careful review of the record leads us to conclude that the court could have reasonably concluded, on the basis of the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its conclusion

that Delilah has no present positive memories of the respondent. Accordingly, we will not disturb this conclusion.

II

The respondent next claims that the court erred in concluding that the interference exception did not apply to preclude the petitioner from relying on § 45a-717 (g) (2) (C) as a ground for termination. We disagree.

The following additional procedural history is pertinent to our analysis of this claim. At the trial on the petition to terminate the respondent's parental rights, the respondent argued that the interference exception should apply and prohibit the petitioner from relying on the lack of an ongoing parent-child relationship between her and Delilah. In support of this argument, the respondent relied on certain evidence presented at trial. For example, evidence was presented that the petitioner had filed a motion to modify the visitation order, resulting in a court order, dated March 29, 2018, providing that the respondent would be permitted to visit Delilah "at the [petitioner's] discretion following proof of substance abuse counseling, completion of a parenting course and reunification therapy." Evidence also was presented regarding a request made by the respondent to visit with Delilah in March, 2018, and the petitioner's corresponding refusal to permit such a visit based on his contention that it was not the respondent's visitation time. Testimony was heard regarding the petitioner's deployments and the respondent's ability to contact Delilah during those deployments. Evidence also was admitted concerning whether the respondent had the petitioner's address in Connecticut in order to send cards and gifts to Delilah and whether the petitioner refused to provide the respondent with his address. In his closing argument, the respondent's counsel argued that this evidence showed that the petitioner

had interfered with the respondent's relationship with Delilah.

In its memorandum of decision, the court concluded that the interference exception did not apply to the facts of the case. The court found that the respondent's claims that the petitioner had interfered with her ability to maintain an ongoing relationship with Delilah were not credible. The court noted that it had taken into consideration the petitioner's 2017 and 2019 deployments and the effect that they may have had on the respondent's ability to visit with Delilah. The court also pointed out that it had considered the respondent's assertion that she did not have the petitioner's address, which, she claimed, prevented her from contacting Delilah and filing anything with the court. The court found that this assertion was not credible and determined that the respondent had been provided the petitioner's new address in 2017. Last, the court concluded that "the fact that [the petitioner] has taken a hard line, requiring [the respondent] to abide by the court orders does not rise to the level of interference. The exchange of text messages between [the respondent] and [the petitioner] in 2018 . . . highlights [the petitioner's] frustration and concerns of accommodating the respondent's efforts to see her child. The text messages indicate [that the respondent] had previously indicated she had planned to see the child but did not follow through. [The petitioner] expressed his concerns over [the respondent's] not having a [driver's] license and the possible exposure of his child to a stranger. [The petitioner's] insisting [that the respondent] follow the court-ordered visitation schedule under these circumstances was not unreasonable. . . . [The respondent] has done nothing to comply with the court orders or seek to change the orders to be in a position to see her daughter." (Citation omitted.)

We begin our analysis by briefly setting forth the case law regarding what has become known as the

"interference exception" to the no ongoing parent-child relationship ground for termination. Recently, in *In re Jacob W.*, supra, 330 Conn. 754–69, our Supreme Court clarified the parameters of the interference exception. The interference exception, the court explained, "applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination. Under these circumstances, even if neither the respondent parent nor the child has present positive feelings for the other and, even if the child lacks any present memories of the respondent parent, the petitioner is precluded from relying on § 45a-717 (g) (2) (C) as a basis for termination." *In re Jacob W.*, supra, 763–64. The "inquiry properly focuses not on the petitioner's intent in engaging in the conduct at issue, but on the consequences of that conduct. In other words, the question is whether the petitioner engaged in conduct that inevitably led to a noncustodial parent's lack of an ongoing parent-child relationship. If the answer to that question is yes, the petitioner will be precluded from relying on the ground of no ongoing parent-child relationship as a basis for termination regardless of the petitioner's intent—or not—to interfere." (Internal quotation marks omitted.) Id., 762.

Further clarification of the interference exception was provided in *In re Tresin J.*, supra, 334 Conn. 331–33. The court in that case opined that "the interference exception is akin to the equitable doctrine of clean hands . . . ." (Internal quotation marks omitted.) Id., 332. It also made clear that the interference exception "is triggered only by the conduct of the petitioner rather than that of a third party or some other external factor that occasioned the separation." Id. Then, the court

explained that "[t]he interference exception . . . applies when the actions of the petitioner rendered inevitable the initial lack of a relationship . . . ." (Emphasis omitted.) Id., 332 n.12.

Our cases involving the interference exception demonstrate that the exception does not apply if the actions of the petitioner do not inevitably lead to the lack of a relationship between the respondent and the child. Compare id. (interference exception was inapplicable where actions of petitioner did not render inevitable lack of relationship between incarcerated respondent father and child because lack of relationship occurred several years before alleged interference by petitioner), and *In re November H.*, supra, 202 Conn. App. 134 (same), and *In re Alexander C.*, 67 Conn. App. 417, 424–25, 787 A.2d 608 (2001) (interference exception was inapplicable because, although child was placed in foster care within days of birth, incarcerated respondent father, rather than petitioner, created circumstances that caused and perpetuated lack of ongoing parent-child relationship and because respondent made no attempt to modify protective order barring contact with child, which did not require extraordinary and heroic efforts by respondent), aff'd, 262 Conn. 308, 813 A.2d 87 (2003), with *In re Valerie D.*, 223 Conn. 492, 531–35, 613 A.2d 748 (1992) (interference exception was applicable where department took temporary custody of child essentially upon birth and termination hearing took place only few months later because finding of lack of ongoing parent-child relationship was inevitable in absence of extraordinary and heroic efforts by incarcerated respondent mother), and *In re Carla C.*, supra, 167 Conn. App. 276 (interference exception was applicable because, short of extraordinary and heroic efforts by incarcerated respondent father, who had filed numerous contempt motions in attempt to enforce visits with child, petitioner mother was able to

completely deny father access to child by obtaining order from prison precluding him from initiating communication with her and child, discarding letters he sent to child and filing motion to suspend child's visitation with father). Consequently, the respondent has the burden of proving that the *petitioner's* interference and conduct *caused* her initial lack of relationship with her child.

In the present case, the respondent contends that the interference exception should apply to preclude the petitioner from relying on the ground of no ongoing parent-child relationship to terminate her parental rights because, according to the respondent, the petitioner engaged in conduct that inevitably led to her lack of an ongoing parent-child relationship with Delilah. Specifically, the respondent contends that the petitioner interfered with her relationship with Delilah by (1) obtaining the March 29, 2018 court order effectively barring her from having any visits with Delilah,[15] (2)

[15] The respondent also contends that the petitioner obtained the March 29, 2018 visitation order "by means of his fraud upon the court." Specifically, the respondent argues that, during the hearing, the petitioner made several material misrepresentations to the court on which the court relied. According to the respondent, the petitioner's false and misleading statements are relevant to the issue of interference because "the interference exception is akin to the equitable doctrine of clean hands . . . ." (Internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 332.

The respondent, however, never filed a timely appeal from the March 29, 2018 postjudgment order modifying visitation that she now alleges was obtained by fraud. Nor did she file a motion to open the order within the requisite four month period. See General Statutes § 52-212a; Practice Book § 17-4 (a). As a result, the respondent cannot now mount a collateral attack on the March 29, 2018 order. See *In re Teagan K.-O.*, 212 Conn. App. 161, 182, 274 A.3d 985 (explaining that failure to appeal from order precluded respondent from launching collateral attack on order in later proceedings), cert. denied, 343 Conn. 934, 276 A.3d 974 (2022), and cert. denied, 343 Conn. 934, 276 A.3d 974 (2022); see also *In re Ja'Maire M.*, 201 Conn. App. 498, 505, 242 A.3d 747 (2020) ("We will not . . . review claims that are collateral attacks on prior judgments. With regard to the statutory scheme set forth in § [45a-717], the child's need for stability places an emphasis on the need for litigants to follow proper procedural avenues in order to obtain review."), cert. denied, 336 Conn. 911, 244 A.3d 563 (2021); *In re Stephen M.*, 109 Conn.

refusing to allow the respondent to visit Delilah when she traveled to Connecticut in March, 2018, (3) leaving the respondent with "virtually no way to contact [the petitioner] to arrange visits or speak with Delilah" during the petitioner's 2017 and 2019 deployments, and (4) refusing to provide the respondent with his address.[16]

App. 644, 664, 953 A.2d 668 (2008) ("[t]he best interests of the children, especially their interests in family stability and permanency, support the conclusion that findings in earlier child welfare proceedings cannot be attacked collaterally in later proceedings").

As our precedent recognizes, the relationship between a parent and child is premised on a parent, including a noncustodial parent, exercising her right and responsibility to cultivate and nurture that relationship. That includes taking a timely appeal of or filing a timely motion to open and/or modify an adverse judgment precisely because of the long established principle that time is of the essence in the life of a child. In the absence of a modification of an otherwise valid judgment that presumably was premised on the finding that it was in the best interests of the child, it was incumbent upon the respondent to comply with whatever orders were required for her to cultivate, maintain, and nurture that relationship. As such, a collateral attack on a prior judgment as a defense to the termination petition is not only impermissible but does not remedy the time lost in the life of the child and the relationship that could and should have been developed due to the failure to seek a timely modification of an allegedly fraudulent judgment.

[16] The respondent also argues that the court applied an incorrect legal test in determining whether the interference exception should apply. According to the respondent, "[t]he trial court's memorandum of decision improperly focuse[s] on the [petitioner's] intentions in refusing [to] allow the [respondent] to visit with Delilah and, thus, erred as a matter of law."

Although the court noted in its memorandum of decision that "[the petitioner's] insisting [that the respondent] follow the court-ordered visitation schedule under these circumstances was not unreasonable," the court also noted that "[the respondent's] last in-person visit with Delilah was in February of 2017. The court note[d] that [the petitioner's] and [the respondent's] relationship [was] difficult, but the fact that [the petitioner] ha[d] taken a hard line, requiring [the respondent] to abide by the court orders does not rise to the level of interference."

Whether the court applied an incorrect legal test is a question of law over which we exercise plenary review. See *In re Jacob W.*, supra, 330 Conn. 754 ("We first consider whether . . . the trial court applied an incorrect legal test to determine whether the petitioner had proven by clear and convincing evidence the lack of an ongoing parent-child relationship. Because that question presents a question of law, our review is plenary."). "[W]e read an ambiguous trial court record so as to support, rather than contradict, its judgment. . . . We have repeatedly stated that it is the appel-

We address each instance of alleged interference in turn and conclude that the actions of the petitioner did not inevitably lead to the lack of an ongoing parent-child relationship between the respondent and Delilah. Cf. *In re Jacob W.*, supra, 330 Conn. 763 ("[t]he [interference] exception . . . applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child").

The respondent first contends that the petitioner's procurement of the March 29, 2018 court order inevitably led to the lack of an ongoing parent-child relationship between her and Delilah. As previously described, the March 29, 2018 court order provides that "[the petitioner] shall maintain sole legal and physical custody of the minor child Delilah . . . . [The respondent] shall have access at the [petitioner's] discretion following proof of substance abuse counseling, completion of a parenting course and reunification therapy." According to the respondent, the order "effectively barred [her] from having *any* visits with Delilah" because, "even if [she] completed these services, the [petitioner] would still have unfettered discretion to deny visitation . . . for any reason, or for no reason at all." (Emphasis added.) We are not persuaded that the March 29, 2018

lant's responsibility to provide an adequate record for review. . . . [W]here the factual or legal basis of the trial court's decision is unclear, the appellant should file a motion for articulation pursuant to Practice Book § [66-5]. . . . In the absence of such action by the [appellant], we must presume that the trial court considered all the facts before it and applied the appropriate legal standards to those facts." (Citations omitted; internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 164–65, 612 A.2d 1153 (1992). Although the court characterized the reasonableness of the petitioner's conduct, it did so in reference to the court orders governing the parameters of the respondent's visitation rights, suggesting its acknowledgment of the inapplicability of the interference exception in the context of third-party actions as well as the respondent's own conduct in needing to comply with those orders. Given that record, we presume that the court applied the appropriate legal standard.

court order required " 'extraordinary and heroic efforts' " by the respondent in order to maintain an ongoing parent-child relationship with Delilah. *In re Carla C.*, supra, 167 Conn. App. 273. We find it significant that, unlike in *In re Carla C.*, the order did not bar the respondent from visiting with Delilah, speaking with her by phone, or sending her letters or gifts in the mail. See id., 253–56 (lack of ongoing parent-child relationship was inevitable where petitioner mother obtained order from prison in which respondent father was incarcerated barring him from all oral or written communication with her and child, discarded cards and letters he sent to child and obtained court order suspending his visitation with child pending outcome of proceedings on petition to terminate father's parental rights). Furthermore, the respondent produced no credible evidence that she engaged in the services prescribed by the court order or sought to modify the order prior to the filing of the termination petition. Compare id., 273 (interference exception applied where respondent filed number of motions for contempt against petitioner seeking to enforce his visitation time with child because, "short of extraordinary and heroic efforts by the respondent . . . petitioner was able to completely deny him access to [child]" (internal quotation marks omitted)), with *In re Alexander C.*, supra, 67 Conn. App. 425 (interference exception did not apply where respondent made no attempt to modify court order prohibiting him from contacting child to one of supervised visitation, as it did not require extraordinary and heroic effort to take affirmative step of attempting to modify protective order). We are also unpersuaded by the respondent's attempt to equate the petitioner's insistence that the respondent abide by the court order with the respondent's actions in *In re Carla C.*, supra, 273. In *In re Carla C.*, the respondent refused to facilitate

visits with the petitioner as required by the court's custody order and never told the minor child that the petitioner was her father or showed her photographs of the petitioner. See id. There is no evidence in the present case that the petitioner engaged in any such conduct.

We also disagree with the respondent's assertion that the petitioner interfered with her relationship with Delilah by refusing to let her visit with Delilah when she was in Connecticut in March, 2018. The court, in its memorandum of decision, found that, in refusing to permit visitation on this particular occasion, it was not unreasonable for the petitioner to insist that the respondent follow the court-ordered visitation schedule that was in place at the time. In so doing, the court specifically acknowledged the petitioner's concerns and frustrations over the respondent's failure to follow through with previously planned visits, her lack of a driver's license and possible exposure of his child to a stranger. Because she failed to follow the court-ordered visitation schedule, we find unavailing the respondent's assertion that the petitioner interfered with her ability to have and maintain a relationship with Delilah.

The respondent also contends that the petitioner interfered with her relationship with Delilah because, "when the [petitioner] was deployed at sea for six months in 2017 and again in 2019, [she] had virtually no way to contact the [petitioner] to arrange visits or speak with Delilah." The court specifically noted that it had taken into consideration the petitioner's 2017 and 2019 deployments and the effect they may or may not have had on her ability to visit with Delilah and found that her claims were not credible.

Last, the respondent argues that, by refusing to provide her with his address, the petitioner interfered with her ability to maintain an ongoing parent-child relationship with Delilah. In her reply brief, the respondent

contends that "the trial court's finding that [the respondent] lacked credibility when she testified that the [petitioner] refused to provide her with his address is clearly erroneous." The court, however, explained that it had "considered the [respondent's] claim that she did not have [the petitioner's] address in order to contact the child or the ability to file anything in court concerning the child and further finds those claims not creditable. [The respondent] was provided with [the petitioner's] new address in 2017." An email from the petitioner to the respondent, dated July 14, 2017, was entered into evidence at trial. In the email, the petitioner informed the respondent of his new address. Thus, because there is evidence in the record to support the court's factual finding, we will not disturb this finding on appeal. See *In re Jacob W.*, supra, 330 Conn. 770 ("Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.)).

While we reiterate that the court did not find credible the evidence the respondent proffered in support of her interference claims, we also observe that the respondent presented no evidence whatsoever with respect to the quality and nature of her relationship with Delilah *before* the petitioner allegedly sought to interfere with it. Unlike the respondents in *In re Valerie D.* and *In re Carla C.*, who did not have a fair opportunity to begin and develop a relationship with their child, the respondent had custody of Delilah for the first three years of her life, had court-ordered visitation in the years since the original judgment transferred custody

to the petitioner and the opportunity to maintain contact and a relationship through telephone calls, letters and gifts, even after she moved to California in 2018. Moreover, the court specifically found that the respondent made minimal effort to maintain a relationship with Delilah, a finding that is supported by the petitioner's testimony that the respondent had failed to follow through with scheduled visitations and, by 2018, had attempted only once to schedule a visit with Delilah.

We conclude that the respondent has failed to meet her burden of showing that the actions of the petitioner rendered inevitable the lack of a relationship between her and Delilah. As the court found by clear and convincing evidence, there was minimal effort on the respondent's part to maintain a relationship with the child. See *In re Alexander C.*, supra, 67 Conn. App. 424 ("[T]he respondent, rather than the [petitioner], created the circumstances that caused and perpetuated the lack of an ongoing relationship between the respondent and [the child]. . . . It was the respondent's action, which resulted in his incarceration, that occasioned his separation from the child." (Citation omitted.)).

In light of the court's conclusion that the respondent made minimal efforts to maintain a relationship with Delilah and because the respondent failed to prove that the petitioner's conduct, rather than her own conduct, rendered inevitable the lack of a relationship between her and Delilah, we conclude that the court properly determined that the interference exception was inapplicable in the present case.

III

The respondent also argues that the court improperly concluded that allowing additional time for the reestablishment of the parent-child relationship would be detrimental to Delilah's best interests. We disagree.

In its memorandum of decision, the court concluded that further time for the reestablishment of a parent-child relationship between Delilah and the respondent would be detrimental to Delilah's best interests. The court explained: "Delilah has no present positive memories of [the respondent], and her memories are not of pleasant things. Delilah has not had an in-person visit with [the respondent] since 2017, and therefore no relationship that ordinarily develops as a result of the parent having met the physical, emotional, moral and educational needs of the child. Delilah does not recognize [the respondent's] voice on the phone and refers to her as her 'other mother.' Delilah has no relationship with [the respondent]. The [advanced practice registered nurse, Lane], with whom Delilah has received her behavioral treatment since 2018, stated [that] Delilah could experience emotional distress if there is contact between [the respondent] and Delilah because it has been so long since they have seen each other. Therefore, the court also finds by clear and convincing evidence that to allow further time for the reestablishment of the parent-child relationship would be detrimental to the best interests of Delilah."

As previously noted, termination of parental rights pursuant to § 45a-717 (g) (2) (C) requires the court to find that "there is no ongoing parent-child relationship . . . and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child . . . ." Thus, this ground for termination "requires the trial court to make a two-pronged determination. First, there must be a determination that no parent-child relationship exists; and second, the court must look into the future and determine whether it would be detrimental to the child's best interests to allow time for such a

relationship to develop."[17] *In re Juvenile Appeal (84-3)*, 1 Conn. App. 463, 479, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984). "Although a petitioner must establish both prongs by clear and convincing evidence, and, accordingly, a petition may fail under either prong, the inquiries under the two prongs are intertwined. That is, logic dictates that the question of whether it would be detrimental to the children's interests to allow further time for the development of a parent-child relationship will depend to some extent on the findings made and reasoning employed by the trial court in resolving whether there was an ongoing parent-child relationship." *In re Jacob W.*, supra, 330 Conn. 769–70.

In the present case, the respondent argues that the court, in concluding that to allow further time for the reestablishment of the parent-child relationship would be detrimental to Delilah's best interests, improperly relied on Lane's statement that "Delilah could experience emotional distress if there is contact between [her and the respondent] because it has been so long since they have seen each other." Specifically, the respondent contends that Lane's "statement that visitation *could* result in emotional distress is entirely speculative and

[17] Although our Supreme Court in *In re Tresin J.* did not say so explicitly, it clarified that the second prong—whether it would be detrimental to the child's best interests to allow time for such a relationship to develop—is part of the adjudicatory phase rather than the dispositional phase. See *In re Tresin J.*, supra, 334 Conn. 326–27 ("[T]he proper legal test to apply when a petitioner seeks to terminate a parent's rights on the basis of no ongoing parent-child relationship . . . is a two step process. In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. . . . If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. *Only then may the court proceed to the disposition phase.*" (Emphasis added; internal quotation marks omitted.)).

lacks any probative value. . . . Lane's statement means only that there is a *possibility*, rather than a *probability*, that the child *could* experience distress if she has contact with [the respondent]—in other words, less than a 50-50 chance. . . . Thus, Lane's statement is insufficient to support the trial court's finding that additional time is contrary to Delilah's best interests *by clear and convincing evidence*."[18] (Emphasis in original.) In support of this argument, the respondent relies on *Aspiazu* v. *Orgera*, 205 Conn. 623, 632, 535 A.2d 338 (1987), for the proposition that "[a]ny expert opinion that describes a condition as possible or merely fifty-fifty is based on pure speculation." (Internal quotation marks omitted.)

We note that "[c]ourts are entitled to give great weight to professionals in parental termination cases." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 590, 122 A.3d 1247 (2015). We also note that, in addition to Lane's statement that "Delilah could experience emotional distress if there is contact between [the respondent] and Delilah because it has been so long since they have seen each other," other evidence was admitted at trial that supports the court's conclusion that allowing further time for the development of a parent-child relationship would be contrary to Delilah's best interests. For example, both the study and the addendum prepared by the department, which were admitted into evidence at trial, recommended that the parental rights of the respondent as to Delilah be terminated and that Sara G. be allowed to adopt Delilah.

Evidence also was presented at trial that Delilah has negative memories of or feelings toward the respondent. See *In re Jacob W.*, supra, 330 Conn. 771–72 (deeming negative feelings that children had expressed

[18] The respondent also contends that "the fact that Delilah has many present positive memories of [the respondent] indicates that allowing additional time is not contrary to Delilah's best interests." In part I of this opinion, we concluded that the court did not err in determining that Delilah

toward respondent relevant in determining whether allowing more time to reestablish parent-child relationship would be detrimental to best interests of children). Specifically, evidence was admitted at trial that Delilah had stated that the respondent was mean to her and, at one point, had pushed the petitioner down some stairs. Further evidence indicated that Delilah had reported that the respondent had hit her in the face with a hairbrush and had given her a " 'bloody something' . . . ." According to Sara G.'s testimony, during one therapy session in which she was present, Delilah told her therapist that "[the respondent] was mean to her, and that she had hit her in the mouth with [a] hairbrush and made her mouth bleed . . . ."

The respondent has not claimed or presented evidence that she ever attempted to have the March 29, 2018 order modified, nor has she presented evidence that she sought to comply with the order by engaging in substance abuse counseling, a parenting course, or reunification therapy.[19] See *In re Jacob W.*, supra, 330 Conn. 773 (deeming whether respondent has attempted to modify protective order precluding respondent from visiting children relevant to whether additional time to reestablish parent-child relationship would be detrimental to best interests of children).

Evidence also was presented that, at various times, Delilah has referred to the respondent as her father's sister, her " 'other mother,' " and her grandmother.[20]

had no present positive memories of the respondent. We, therefore, are unpersuaded by the respondent's contention.

[19] In her appellate brief, the respondent notes that she will not be allowed to visit with Delilah until and unless she successfully moves to modify the March 29, 2018 court order. As previously noted, however, no evidence was presented that the respondent has sought to challenge the order since its issuance.

[20] The respondent also contends that, "even if [she] is eventually allowed to resume her visits with Delilah, and these visits result in some emotional distress for Delilah, this is not enough, standing alone, to establish that allowing further time for the reestablishment of the parent-child relationship would not be in Delilah's best interests." The respondent relies on *In re*

The court found that Delilah has no relationship with the respondent. Additional evidence was presented that Delilah has resided with the petitioner, Sara G., and her siblings since 2015. Evidence was admitted at trial that the petitioner and Sara G. are meeting Delilah's needs. The court found that Delilah refers to Sara G. as her mother. See *In re Juvenile Appeal (Anonymous)*, supra, 181 Conn. 646 (explaining that because best interests of child are controlling in determining whether to allow time for development of ongoing parent-child relationship, evidence as to child's relationship with foster parents and their availability and suitability as adoptive parents is clearly relevant); see also *In re Jonathon G.*, supra, 63 Conn. App. 526 (deeming fact that child had bonded with his maternal grandparents and was making progress with them relevant in concluding whether it was in child's best interest to allow further time to establish parent-child relationship). Furthermore, "[t]his court has repeatedly recognized that stability and permanence are necessary for a young child's healthy development." (Internal quotation marks omitted.) *In re Jacob W.*, supra, 330 Conn. 774.

We thus conclude, on the basis of our thorough review of the record, that there is sufficient evidence in the record to support the trial court's conclusion that to allow further time for the reestablishment of the

Zakai F., 336 Conn. 272, 306 n.21, 255 A.3d 767 (2020), which, she argues, "strongly suggested that such evidence would not be sufficient, by itself, to show that reinstatement is not in the child's best interests."

We find the respondent's reliance on *In re Zakai F.* unavailing. The present case is procedurally distinct from *In re Zakai F.*, which involved a motion for reinstatement of guardianship rights. See id., 275. The present case involves a petition for the termination of parental rights. Thus, unlike *In re Zakai F.*, in the present case, there is no presumption regarding what is in the best interests of the child. See id., 306 ("we conclude that a third party seeking to rebut the presumption that reinstatement of guardianship rights to a parent who has never been found to be unfit is in the best interests of the child must do so by clear and convincing evidence").

parent-child relationship would be detrimental to Delilah's best interests.

The judgment is affirmed.

In this opinion the other judges concurred.

KONOVER DEVELOPMENT CORPORATION *v.* WATERBURY OMEGA, LLC
(AC 44537)

Alvord, Clark and Harper, Js.

Syllabus

The plaintiff, inter alia, sought to recover damages from the defendant property owner for breach of contract. The parties had entered into an oral management agreement for an unspecified term, pursuant to which the plaintiff agreed to act as the defendant's exclusive agent for the licensing of rooftop telecommunications equipment to be located at the defendant's property in exchange for a percentage of the monthly receipts generated by any licenses. The plaintiff procured two contracts for the placement of wireless telecommunications equipment on top of the building on the property and collected the commissions due in connection therewith for approximately eleven years. Thereafter, the defendant only intermittently remitted the commissions to the plaintiff. Additionally, unbeknownst to the plaintiff, the defendant had entered into similar contracts for the placement of wireless telecommunications equipment on the building with three other parties and had not remitted any commissions to the plaintiff in connection with those contracts. After commencing this action, the plaintiff filed an application for a prejudgment remedy, inter alia, to secure an amount equal to the amounts allegedly due to it with respect to the two original contracts and with respect to the commissions that it should have received in connection with the three additional contracts. In response, the defendant asserted special defenses, including that the plaintiff had violated the applicable statute (§ 20-325a), which barred the recovery of certain real estate commissions, and that enforcement of the oral management agreement was barred by the statute of frauds and the rule against perpetuities. The trial court granted the plaintiff's application for a prejudgment remedy with respect to its breach of contract count, determining that the plaintiff had established probable cause that the parties had entered into a valid and enforceable oral management agreement and that the defendant had breached that agreement by failing to

remit to the plaintiff the commissions relating to the three additional contracts, and the defendant appealed to this court. *Held*:

1. The trial court properly rejected the defendant's special defense that the plaintiff's claims were barred by § 20-325a because the plaintiff was exempt from its prerequisites pursuant to the applicable statute (§ 20-329 (9)), which provided an exception for leases or licenses of space on buildings for unattended personal wireless services facilities, related devices, and ancillary equipment used to operate such devices in an area not to exceed 360 square feet for any one service: it was not improper for the trial court to rely on the testimony of the plaintiff's expert, A, in determining the meaning of the language of the § 20-329 (9) exception because, pursuant to the applicable statute (§ 1-1 (a)), the undefined, technical statutory terms relating to the calculation of the square footage requirement of the exception were to be accorded the meaning that they would convey to an informed person in the applicable field, and, having worked in the wireless industry for nineteen years, A was an informed person in the applicable field; moreover, the defendant's argument that the definitions contained in the applicable federal statute (47 U.S.C. § 332) and regulation (47 C.F.R. § 1.6002) required the conclusion that the space occupied by antennas must be included within the square footage calculation for purposes of determining the applicability of the exception was unavailing because those definitions did not relate to measurement; furthermore, the defendant's proposed construction of the exception, which would limit its applicability to a single wireless facility, was unreasonable because it ignored the context of the phrase at issue, which suggested that the square footage limitation applied to each such facility; additionally, the defendant's argument that A improperly added together the square footage of certain components of the installation, rather than measuring the entire area in which the components were contained, was unavailing.
2. The trial court properly determined that the defendant's defense with respect to the rule against perpetuities did not defeat the finding of probable cause because such rule concerned only the rights to property, the oral management agreement did not create or transfer any right in property, and the plaintiff did not claim any interest in the defendant's property.
3. The trial court properly determined that the defendant's defense with respect to the statute of frauds did not defeat the finding of probable cause: the defendant's argument that the oral management agreement was unenforceable pursuant to statute (§ 52-550 (a) (4)) because the plaintiff's claims concerned real property was unavailing because the trial court correctly determined that the agreement was for services and did not confer any rights to an interest in real property; moreover, the defendant's argument that the oral management agreement was unenforceable pursuant to § 52-550 (a) (5) because it was not to be performed within one year from the making thereof was also unavailing

because the trial court determined that the agreement was one of indefinite duration, and, accordingly, it was outside of the proscriptive force of § 52-550 (a) (5) regardless of how long it would actually take to complete performance.

Argued March 1—officially released August 30, 2022

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble, J.*, granted the plaintiff's application for a prejudgment remedy, from which the named defendant appealed and the plaintiff cross appealed to this court; thereafter, the plaintiff withdrew its cross appeal. *Affirmed.*

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

Richard F. Wareing, with whom were *Angela M. Vickery* and, on the brief, *Anthony J. Natale*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant Waterbury Omega, LLC[1] appeals from the judgment of the trial court granting the application for a prejudgment remedy in favor of the plaintiff, Konover Development Corporation, upon a finding of probable cause that the defendant had breached an oral agreement for the plaintiff's procurement, management and accounting of building/rooftop wireless telecommunications agreements on behalf of the defendant. On appeal, the defendant claims that the court improperly concluded that the plaintiff had established probable cause in light of its defenses that

[1] Moishe Schwartz, a member of Waterbury Omega, LLC, also is named as a defendant in this action. Schwartz is not participating in this appeal, and we therefore refer in this opinion to Waterbury Omega, LLC, as the defendant.

enforcement of the oral agreement was barred by (1) General Statutes § 20-325a, (2) the rule against perpetuities, and (3) the statute of frauds. We affirm the judgment of the court.

The court found the following facts, which are undisputed.[2] "[The defendant] is the owner of property located at 330 Bishop Street, Waterbury (property), on which is present a multistory building (building). In 2005, [the parties] entered into an oral contract, for no specified term, in which [the plaintiff] agreed to act as the property's exclusive telecommunications managing agent for the licensing of rooftop telecommunication[s] equipment including antennas ([oral management] agreement).[3] Pursuant to the terms of the [oral management] agreement, [the plaintiff] was to market, license and collect usage payments in exchange for a commission of 30 percent of monthly receipts generated by any license.

"In 2005, [the plaintiff] procured two contracts for the placement of wireless telecommunications equipment on the building's rooftop [collectively, the two original leases]. The first was dated March 3, 2005, with Nextel Communications of Mid-Atlantic, Inc. [(Nextel), later Sprint] and the second was dated July 20, 2005, with New Cingular Wireless PCS, LLC [(New Cingular), later AT&T] . . . . In the two original leases, [the defendant] acknowledged that '[the plaintiff] has been appointed as [the defendant's] telecommunications managing agent[4] for the [p]roperty and is compensated

[2] The defendant states in its principal appellate brief that it is not contesting on appeal the existence of the oral management agreement. Its only claims on appeal relate to its contention that such agreement is unenforceable.

[3] "While the parties contemplated the execution of a written management contract, none of them were able to locate an executed copy."

[4] "The New Cingular lease provides that [the plaintiff] is the 'exclusive telecommunications managing agent' while the Nextel lease omits the word 'exclusive' and provides only that [the plaintiff] has been 'appointed as [the defendant's] telecommunications managing agent.' "

by [the defendant] based on a percentage of the revenue generated by this [l]ease and any future telecommunications leases pertaining to the [p]roperty.' [The plaintiff] was identified specifically as the third-party beneficiary of the two [original leases], each identified as an 'Antenna Facility Lease.' The [two original leases] differed, pertinently, in that the contract with New Cingular included an equipment shelter adjacent to the building on the ground. . . .

"Unbeknownst to [the plaintiff], [the defendant] entered into additional, similar [building/rooftop wireless telecommunications agreements], with [Omnipoint Communications, Inc., now known as T-Mobile (Omnipoint)] in 2006, with [Youghiogheny Communications-Northeast, LLC, doing business as Pocket Communications (Pocket)] in 2009 and with [Cellco Partnership, doing business as Verizon Wireless (Verizon)] in 2015. At no time did [the defendant] pay [the plaintiff] a commission for these additional contracts.[5] From 2005 through 2016, [the plaintiff], without interruption, collected the rent from the two original leases, remitted 70 percent to [the defendant] and reserved for itself the 30 percent commission. In August of 2016, [the defendant] began to collect the monthly payments for the two original leases as a consequence of a freeze on [the plaintiff's] banking account that prevented [the plaintiff] from issuing payments from its bank. Thereafter, between August of 2016 and February of 2018, [the defendant] only intermittently remitted the 30 percent commission from the two original leases to [the plaintiff]. Repeated communications between [Matthew Guglielmo, an agent of the plaintiff] and [the defendant's] representatives took place, in which payment of the commissions was requested. The present action

[5] "These three agreements and the [two original leases] are collectively referred to as the building/rooftop wireless telecommunication[s] agreements."

was commenced on April 9, 2018. Ultimately, the commissions due pursuant to the two original leases were paid through April of 2018. No further payment has been made." (Footnotes in original.)

The following procedural history is also relevant. The plaintiff commenced this action in April, 2018, by way of a complaint seeking a declaratory judgment. In the complaint, the plaintiff alleged that the defendant had made required payments "only under the threat of legal action and only after counsel was engaged for both parties . . . ." The plaintiff alleged that the defendant had "repudiated its obligations under the [two original] leases." The plaintiff additionally alleged that, "[g]iven [the defendant's] repudiation of the parties' [oral management] agreement, there is an actual bona fide and substantial question or issue in dispute, which requires settlement between the parties."

The plaintiff filed its third amended complaint in August, 2019.[6] In the nine count complaint, the plaintiff alleged, inter alia, that the defendant had "not made any payments to [the plaintiff] since April of 2018." The defendant filed an answer and asserted several special defenses, including that the plaintiff had violated § 20-325a and that enforcement of the oral management agreement was barred by the statute of frauds and the rule against perpetuities.

On August 2, 2019, the plaintiff filed an application for a prejudgment remedy to "secure the sum of at least $351,184," which was accompanied by an affidavit of the plaintiff's president, Michael Konover.[7] The court,

[6] The complaint subsequently has been amended twice more, and the defendant has filed an answer to the fifth amended complaint. The amendments do not affect this court's analysis with respect to the propriety of the prejudgment remedy on the plaintiff's breach of contract claim.

[7] In the affidavit accompanying the application for a prejudgment remedy, Konover averred: "The total amount that [the plaintiff] seeks in this prejudgment remedy is $351,184 in addition to reasonable attorney's fees. That number is based on (1) the 30 percent share that [the plaintiff] is entitled to receive from the [two original leases] from May of 2018 through December

Noble, *J.*, held a hearing on the application on August 20 and 21, 2020. The court heard the testimony of Guglielmo, an agent of the plaintiff; Brian Allen, a wireless and telecommunications consultant/expert for the plaintiff; and Moishe Schwartz, a member of the defendant.

The parties filed posthearing briefs. The defendant argued therein: "First, the plaintiff's claims are barred by [§] 20-325a because [General Statutes §] 20-329 (9) provides that [§] 20-325a is applicable and there can be no dispute that the plaintiff did not have a written agreement with [the defendant] that would fulfill the requirements of such statute. Second, considering that the plaintiff claims the purported oral management agreement is perpetual (and in fact is seeking an order that it is entitled to a percentage of revenue from *any future* telecommunications agreements), enforcement of the purported oral management agreement is barred by the rule against perpetuities. Finally, the purported oral management agreement is unenforceable pursuant to the statute of frauds because the terms put forth by the plaintiff (even if they could be proven) are inconsistent with completion of the agreement within one year such that the statute of frauds requires a written agreement. Because all of the plaintiff's claims (regardless of the cause of action) are barred as a matter of law by [§] 20-325a, the rule against perpetuities, and/or the statute of frauds, the plaintiff is not entitled to a prejudgment remedy even under the more lenient 'probable cause' standard applicable thereto." (Emphasis in original.) The plaintiff argued that the defendant's special defenses with respect to § 20-325a and the statute of

of 2020, (2) the 30 percent share that [the plaintiff] would have received from the [agreements with Omnipoint and Verizon] from the date each such agreement became effective through December of 2020; and (3) simple interest at a rate of 10 percent per year through December of 2020, on all amounts [the plaintiff] would have received as set forth in (1) and (2)."

frauds both failed and that the trial court already had rejected the defendant's special defense regarding the rule against perpetuities in its memorandum of decision denying the parties' cross motions for summary judgment.[8]

In its February 9, 2021 memorandum of decision, the court granted the application for a prejudgment remedy on the plaintiff's breach of contract count. The court determined that the plaintiff had "proven probable cause that the parties entered into a valid and enforceable oral agreement for [the plaintiff] to provide the exclusive marketing, licensing and management of accounts for the placement of wireless telecommunication[s] equipment on the property and building in exchange for payment of 30 percent of monthly receipts therefrom. [The plaintiff] has also proved that the [oral management agreement] was breached by [the defendant's] failure to remit the contracted for commission from the subsequently obtained agreements with Omnipoint, Pocket, and Verizon." The court expressly considered and rejected the defendant's special defenses, concluding that § 20-325a, the rule against perpetuities, and the statute of frauds did not bar the plaintiff's action.

The court then turned to the question of the amount of damages that had been established by probable

[8] In January, 2019, the defendant filed a motion for summary judgment, arguing that the plaintiff's claims were barred by § 20-325a on the basis that there was no written agreement between the parties. In April, 2019, the plaintiff filed a cross motion for summary judgment, arguing that the requirements in § 20-325a were not applicable because the building/rooftop wireless telecommunications agreements were licenses and not leases, that even if the agreements were considered leases, the exception contained in § 20-329 (9) applied, and that the rule against perpetuities did not bar the plaintiff's claims. On April 23, 2020, the court issued a memorandum of decision in which it denied both motions for summary judgment. The court determined that the agreements were not barred by the rule against perpetuities but found that there were genuine issues of material fact "as to whether the agreements [fell] within the exception articulated in § 20-329."

cause. The court rejected the plaintiff's contention that it was entitled to recover not only past damages but also "future damages extending throughout the life of the Omnipoint, Verizon, and Pocket agreements." The court determined that the oral management agreement, which was of indefinite duration, was terminable at will and found that it was terminated by the defendant no later than April, 2018. The court noted that it had been presented with "no evidence of an express termination" but had determined that termination was evident "by the conduct of [the defendant] inconsistent with its perpetuation." The court found that "[n]o payments of any sort have been made by [the defendant] since April of 2018, the date this action was commenced, and there was no evidence received to indicate that [the defendant] asked [the plaintiff] to perform any obligations under the [oral management] agreement, all indicative of an implicit termination of the [oral management] agreement."

The court found that the plaintiff had proven probable cause that it would recover damages based on its breach of contract claim[9] in the amount of $107,400.07, which amount consisted of payments made to the defendant from Omnipoint, Verizon, and Pocket through March 31, 2018, in the amount of $354,007.26, multiplied by the commission rate of 30 percent. The court found that no commissions were due for the two original leases because they were paid through April, 2018. Accordingly, the court ordered that the plaintiff may attach the assets of the defendant in the amount of $107,400.07. This appeal followed. On the same day that the appeal was commenced, the plaintiff filed a motion

[9] The court determined that the plaintiff had not established probable cause that it would recover under a theory of negligent misrepresentation against the defendant or Schwartz. The plaintiff filed a cross appeal as to the denial, in part, of its application for a prejudgment remedy, but it subsequently withdrew the cross appeal.

to reargue, reconsider, or correct the judgment, alleging an error in the computation of damages, and the defendant and Schwartz filed an objection. The court granted the motion and corrected its previous order to reflect that the plaintiff may attach the defendant's assets in the amount of $157,075.96.

Before turning to the claims on appeal, we first set forth the law governing prejudgment remedies and our limited role on review. "A prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment . . . . General Statutes § 52-278a (d). A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff . . . . General Statutes § 52-278d (a) (1). . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence. . . . The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false. . . . Under this standard, the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits." (Citations omitted; internal

quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 136–37, 943 A.2d 406 (2008).

"Section 52-278d (a) explicitly requires that a trial court's determination of probable cause in granting a prejudgment remedy include the court's *taking into account* any defenses, counterclaims or set-offs . . . . Therefore, it is well settled that, in determining whether to grant a prejudgment remedy, the trial court must evaluate both parties' evidence as well as any defenses, counterclaims and setoffs. . . . Such consideration is significant because a valid defense has the ability to defeat a finding of probable cause." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 141.

As for our standard of review, our Supreme Court has stated that an appellate "court's role on review of the granting of a prejudgment remedy is very circumscribed. . . . In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error. . . . Since *Augeri* [v. *C. F. Wooding Co.*, 173 Conn. 426, 429, 378 A.2d 538 (1977)] . . . we have consistently enunciated our standard of review in these matters. In the absence of clear error, this court should not overrule the thoughtful decision of the trial court, which has had an opportunity to assess the legal issues which may be raised and to weigh the credibility of at least some of the witnesses. . . . [On appeal], therefore, we need only decide whether the trial court's conclusions were reasonable under the clear error standard." (Citations omitted; internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 137–38. Additionally, "we do not conduct a plenary review of the merits of defenses . . . raised, but rather our review is confined to a determination of whether the trial court's finding of probable cause constitutes clear error." Id., 140 n.8.

I

We first consider the defendant's claim on appeal related to the court's rejection of its special defense that the plaintiff's action was barred for its failure to satisfy the requirements contained in § 20-325a. Specifically, § 20-325a bars the recovery of real estate commissions unless certain requirements are satisfied, including the requirement that the agreement be in writing. Section 20-329, however, provides exceptions to the bar against the recovery of commissions imposed by § 20-325a. Specifically, § 20-329 (9) (A) provides an exception for leases or licenses of space on buildings of unattended " 'personal wireless services facilities,' " related devices and "ancillary equipment used to operate such devices and equipment shelters therefor, in an area not to exceed [360] square feet for any one service . . . ." The defendant claims that the court improperly determined that the exception set forth in § 20-329 (9) applies and, therefore, that the plaintiff's action is not barred by § 20-325a. We agree with the trial court that the plaintiff was exempt, pursuant to § 20-329 (9), from the prerequisites set forth in § 20-325a. Accordingly, we conclude that the court properly rejected the defendant's special defense.

The following procedural history is relevant. At the hearing on the plaintiff's application for a prejudgment remedy, the plaintiff introduced the testimony of Allen, a wireless and telecommunications consultant/expert. Allen testified, inter alia, as to his physical examination and measurement of the wireless installations at the property. He further testified as to the industry standard in measuring wireless installations. He testified that each of the installations at issue were less than 360 square feet.

As background, Allen testified as to the components of a wireless installation. Specifically, he testified:

"Essentially, the cell tower consists of equipment—which they may refer to as either ground equipment or rooftop equipment—that's placed either in a concrete bunker or a metal bunker or placed on a concrete pad. It would have things that look like refrigerators, which are called equipment cabinets, or it could be in a room in the basement of a building or on the top floor of a building or it could be placed on a metal platform on the roof. So those are just four examples of where the base station equipment would be, or ground equipment, or equipment room or equipment shelter, they're all synonymous. And then they would have antennas, which would be located high in the air, so they can provide coverage. And along with the antennas they may have little boxes."

Allen further testified as to which components of a wireless installation typically and customarily are considered for purposes of calculating the square footage of the installation. He testified that landlords and tenants "consider the ground equipment or base station equipment, which would consist of radio cabinets and various other ancillary cabinets, like a power cabinet or a telephone cabinet, and those are all contained on either the concrete pad or within the concrete building or on top of the platform on the roof or in the room, the equipment room in the basement or top floor of a building."

Allen testified that they do not "count the antennas," "the wires that connect the antennas to the equipment," or cable trays and explained why the industry custom and practice is to exclude these items from the computation of square footage.[10] Allen testified that antennas

[10] Allen also testified that radio heads typically are not counted toward square footage. He described a radio head as "a small box about half the size of a carry-on suitcase which works with the antennas. It's a new technology that came up after the leases existed." With respect to the New Cingular installation, Allen testified: "I measured the RRUs, which are remote radio heads; they sat on ballast mounted sleds on the roof. They're typically not counted because they're considered antenna articles. So I measured them

are separately enumerated in wireless agreements. For example, the Verizon agreement states that the defendant would provide "approximately [40] square feet of space . . . and approximately [170] square feet on the roof" for its wireless installation. The agreement also provides for "such additional space on the roof of the [b]uilding" for the installation of antennas, which are identified in exhibit B to the Verizon agreement only by the number of antennas. Allen explained: "[I]n exhibit B, it shows two sections of the roof and says 'proposed . . . lessee alpha sector panel antennas typical total of four mounted within proposed concealment tubes atop building roof,' and it has another section where it refers to beta [sector panel antennas] with another four. So they have rights to eight antennas." With respect to the Nextel antennas, Allen testified that they were "facade mounted," meaning that the antennas "hang on the side of the penthouse like a picture hanging on the wall."

Allen explained that "cable trays on a rooftop site serve to cover the cables so the landlord can walk on the roof or walk on top of it or . . . [t]hey can put other wires on top and we don't damage the wires for AT&T or Verizon or whoever." For example, Allen testified with respect to the Omnipoint installation that "[a]ll the wires were contained underneath the platform" and that "there were cable trays for Verizon and AT&T underneath the Omnipoint . . . equipment."

With respect to wires, Allen testified that, "[i]n the lease, we don't count the square footage of wires because wires don't have square footage." He also testified that "the lease is always silent on . . . wires

because they were there, but I would not have counted them in the lease. If you go into the lease documents, there's a consent letter that allows for the placement of them there, which has no reference to any square footage that they take up, just that they exist." Allen testified generally that even when including radio heads in his square footage calculation, each installation still occupied less than 360 square feet.

because the landlord has the ability to control the location of the equipment shelter." Specifically, Allen testified that, had the Nextel shelter been located on the roof, the wires would have been attached in a similar manner as the Omnipoint installation. Allen testified, however, that Nextel was "forced to go on the ground, so now they have some wires." Thus, Allen did not measure the wires running from the roof to the equipment shelter located on the ground.

In its memorandum of decision, the court expressly credited Allen's testimony in determining that the plaintiff had "proven probable cause that the building/rooftop wireless telecommunications agreements at issue were for unattended personal wireless services facilities, related services and ancillary equipment that did not exceed 360 square feet for any one service." Accordingly, the court concluded that the exception set forth in § 20-329 (9) applies, and, therefore, the plaintiff's action is not barred by § 20-325a.[11]

[11] In its appellate brief, the plaintiff contends that the defendant's claim regarding the applicability of § 20-329 (9) is moot because it challenged only one of two independent bases for the court's determination that § 20-325a was inapplicable. Specifically, the plaintiff maintains that the court's decision rested on two separate bases: (1) that the plaintiff's action was not barred by § 20-325a because the building/rooftop wireless telecommunications agreements at issue relate to licenses rather than interests in real estate, and (2) that if § 20-325a applies, the exception contained in § 20-329 (9) also applies. We disagree with this construction of the court's decision.

In its memorandum of decision on the application for a prejudgment remedy, the court referenced its decision on the parties' cross motions for summary judgment; see footnote 8 of this opinion; and stated: "In brief, the court concluded, therein, that the plaintiff's action is not barred by § 20-325a because the agreements at issue relate to licenses, an interest that is not an 'estate' or an 'interest in real estate,' which are the objects of that statute. . . . Moreover . . . § 20-329 (9) expressly provides an exception to the bar imposed by § 20-325a for leases or licenses of space on buildings of unattended 'personal wireless services facilities,' related devices and ancillary equipment, including equipment shelters in an area not to exceed 360 square feet for any one service. In the [summary judgment] decision, the court found a question of material fact existed as to the size of the facilities, devices and ancillary equipment involved. . . . As of the [prejudgment remedy] application, however, the court credits the testimony of Allen

We first set forth the relevant statutes. Pursuant to § 20-325a, a licensed real estate broker or salesperson may not institute an action to recover "any commission, compensation or other payment" unless such broker or salesperson acted pursuant to a written agreement.[12] Section 20-329 provides in relevant part: "The provisions of this chapter concerning the licensure of real estate brokers and real estate salespersons shall not apply to . . . (9) any person or such person's regular employee who, as owner, lessor, licensor, manager, representative or agent manages, leases, or licenses space on or in a tower, building or other structure for (A) 'personal wireless services facilities' or facilities for 'private mobile service' as those terms are defined in 47 USC 332, which facilities shall be unattended, and

and finds that [the plaintiff] has proven probable cause that the building/rooftop wireless telecommunications agreements at issue were for unattended personal wireless services facilities, related services and ancillary equipment that did not exceed 360 square feet for any one service. Accordingly, § 20-325a does not bar this action." (Citations omitted; footnote omitted.)

We do not construe the court's reference to its prior decision as constituting an independent basis for its decision on the application for a prejudgment remedy. Accordingly, we reject the plaintiff's contention that the defendant's claim is moot.

[12] General Statutes § 20-325a provides in relevant part: "(b) No person, licensed under the provisions of this chapter, shall commence or bring any action with respect to any acts done or services rendered . . . as set forth in subsection (a), unless the acts or services were rendered pursuant to a contract or authorization from the person for whom the acts were done or services rendered. To satisfy the requirements of this subsection any contract or authorization shall: (1) Be in writing, (2) contain the names and addresses of the real estate broker performing the services and the name of the person or persons for whom the acts were done or services rendered, (3) show the date on which such contract was entered into or such authorization given, (4) contain the conditions of such contract or authorization, (5) be signed by the real estate broker or the real estate broker's authorized agent, (6) if such contract or authorization pertains to any real property, include the following statement: 'THE REAL ESTATE BROKER MAY BE ENTITLED TO CERTAIN LIEN RIGHTS PURSUANT TO SECTION 20-325a OF THE CONNECTICUT GENERAL STATUTES', and (7) be signed by the person or persons for whom the acts were done or services rendered or by an agent authorized to act on behalf of such person or persons . . . ."

the installation and maintenance of related devices authorized by the Federal Communications Commission, and ancillary equipment used to operate such devices and equipment shelters therefor, in an area not to exceed [360] square feet for any one service established by the Federal Communications Commission in 47 CFR, as amended from time to time, by a provider of any such service, and (B) any right appropriate to access such facilities and connect or use utilities in connection with such facilities."

Analysis of the defendant's claim requires us to construe § 20-329 (9). Ordinarily, we review a trial court's actions with respect to an application for a prejudgment remedy for clear error. "In this case, however, the issue raised by the defendant presents a question of statutory interpretation requiring plenary review. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Citation omitted; internal quotation marks omitted.) *A1Z7, LLC* v. *Dombek*, 188 Conn. App. 714, 718–19, 205 A.3d 740 (2019).

We first consider the defendant's two related arguments with respect to the admission of Allen's testimony as to the meaning of the statutory phrases "related devices" and "ancillary equipment used to operate such

devices and equipment shelters therefor"; General Statutes § 20-329 (9) (A); as used in the wireless telecommunications industry. First, the defendant argues that Allen's testimony improperly contravened the plain language of the statute and that "a purported 'industry standard' cannot be used to override and undermine express statutory terms." Second, the defendant argues that Allen's testimony was irrelevant because "[t]he legislature, in dealing with its policy determination to except certain functions from licensing requirements, is not dealing with a telecommunications issue that requires expert testimony, but a consumer protection issue." We disagree with both arguments and conclude that the court properly admitted into evidence and relied on Allen's testimony in construing the statutory language.

We note that the terms "related devices," "ancillary equipment," and "equipment shelters" are not defined in the statute. See General Statutes § 20-329. In the absence of a statutory definition, we turn to General Statutes § 1-1 (a), which provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." Our appellate courts have stated that "[t]echnical terms can be legal terms as well as terms associated with the trade or business with which a given statute is concerned, and the terms in question should be accorded the meaning which they would convey to an informed person in the [applicable] trade or business." (Internal quotation marks omitted.) *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 411, 246 A.3d 470 (2020); see also *Berger, Lehman Associates, Inc.* v. *State*, 178 Conn. 352, 355–57, 422 A.2d 268 (1979) (word

"design," which was not defined in statute waiving sovereign immunity for actions against state pursuant to contracts for design of public works, would be read by persons in field of engineering, who would "read the statute's words in their engineering sense," and trial court "concluded that the word 'design' has, in the engineer's lexicon, the same narrow definition" our Supreme Court determined using dictionary); *Manchester* v. *Manchester Police Union, Local 1495, Council 15, AFSCME*, 3 Conn. App. 1, 9, 484 A.2d 455 (1984) (phrase " 'normal retirement age,' while not having a universally accepted definition, does have a commonly accepted meaning which it would convey to an informed person in the pension field" and such understanding is relevant to informing court's determination of meaning of synonymous and undefined statutory phrase, " 'normal retirement date' ").

The defendant's arguments also implicate the standard for admissibility of expert testimony. Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." "It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . . Implicit in this standard is the requirement . . . that the expert's knowledge or experience must be directly applicable to the matter specifically

in issue." (Citations omitted; internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 158–59, 971 A.2d 676 (2009). "The court's decision [as to the admissibility of an expert's opinion] is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *Caciopoli* v. *Lebowitz*, 131 Conn. App. 306, 322, 26 A.3d 136 (2011), aff'd, 309 Conn. 62, 68 A.3d 1150 (2013).

In the present case, the court was called on to construe and apply the undefined, technical terms present in the statute, and, pursuant to § 1-1 (a), the terms were to be accorded the meaning that they would convey to an informed person in the applicable trade.[13] It was reasonable for the court to accept Allen, who had worked in the wireless industry for nineteen years, as an informed person in the applicable trade. Thus, Allen's testimony as to the wireless industry's custom and practice appropriately aided the court in determining the meaning of the technical terms within the statute, and the defendant has not shown that the court abused its discretion. Accordingly, we conclude that it was not improper for the court to rely on Allen's testimony in determining the meaning of the statutory language.

Having determined that the court did not abuse its discretion in admitting and relying on Allen's testimony, we turn to the defendant's arguments concerning the

[13] We note that the defendant does not argue broadly on appeal that expert testimony is inadmissible generally to aid the court in defining technical terms contained within statutes, and courts in other jurisdictions have recognized that "[r]eliance on expert definitions of terms of art is a sound general rule of construction . . . ." (Internal quotation marks omitted.) *Shell Petroleum, Inc.* v. *United States*, 182 F.3d 212, 220 (3d Cir. 1999); see also *Dynacon, Inc.* v. *D & S Contracting, Inc.*, 120 N.M. 170, 177, 899 P.2d 613 (1995) (recognizing that "interpretation of technical language in a statute can and should be informed by evidence concerning how those technical terms are interpreted by experts in the pertinent field").

court's interpretation of the statute. The defendant points to federal law to support its argument that "the area occupied by any antennas and any equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with an antenna must be included in the square footage calculation of 'personal wireless services facilities' set forth in [§] 20-329 (9)." The defendant argues that "[t]he [federal] statutory definition of 'antennas' and other related terms, makes clear that they are a component of 'personal wireless services facilities' and thus would be required to be included in any square footage calculation under [§] 20-329 (9)." The defendant directs this court's attention to 47 U.S.C. § 332 (c) (7) (C), which defines " 'personal wireless service facilities' " as "facilities for the provision of personal wireless services" and " 'personal wireless services' " as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services . . . ." The defendant emphasizes that 47 U.S.C. § 332 contains additional definitions of services and equipment, which it contends "advances the point that these facilities each contain multiple components that are required for the facilities to function."[14] The defendant further points to title 47

[14] The defendant cites the following definitions contained in 47 U.S.C. § 332 (d): "For purposes of this section—

"(1) the term 'commercial mobile service' means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

"(2) the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c) (1) (B) . . . ."

The defendant also cites 47 U.S.C. § 153, which provides in relevant part: "For the purposes of this chapter, unless the context otherwise requires . . .

* * *

"(29) The term 'land station' means a station, other than a mobile station, used for radio communication with mobile stations.

of the Code of Federal Regulations, § 1.6002 (b), which provides that "[a]ntenna, consistent with § 1.1320 (d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this chapter." The defendant also relies on the additional definitions of "antenna equipment," "antenna facility," and "facility"[15]

* * *

"(33) The term 'mobile service' means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

"(34) The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move.

* * *

"(40) The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. . . ."

[15] Title 47 of the 2021 edition of the Code of Federal Regulations, § 1.6002, provides in relevant part: "(c) Antenna equipment, consistent with § 1.1320 (d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

"(d) Antenna facility means an antenna and associated antenna equipment.

* * *

"(i) Facility or personal wireless service facility means an antenna facility or a structure that is used for the provision of personal wireless service,

as demonstrating that "the terms are components of, and not merely ancillary to, personal wireless service facilities" and, thus, the area occupied by such components must be included in the square footage calculation pursuant to § 20-329 (9).

We disagree with the defendant that the definitions contained within 47 U.S.C. § 332 and the Code of Federal Regulations necessitate a conclusion that the space occupied by antennas is required to be included within the square footage calculation for purposes of § 20-329 (9). Section 20-329 (9) (A) refers to 47 U.S.C. § 332 for its definitions of the terms " 'personal wireless services facilities' " and facilities for " 'private mobile service' . . . ." Neither of those definitions, however, relates to the measurement of any physical structures. Moreover, the reference contained in § 20-329 (9) (A) to title 47 of the Code of Federal Regulations is to "any one service" as established by the Federal Communications Commission in the federal regulations. Again, the reference to the federal regulations does not relate to measurement. Thus, we reject the defendant's challenge rooted in the federal definitions.

We find persuasive the plaintiff's contention in its appellate brief that Allen's testimony was consistent with the building/rooftop wireless telecommunications agreements. For example, the Omnipoint agreement indicated a "proposed 15' x 15' lease area and equipment platform," and the antenna was not included within that area. The Nextel agreement indicated an equipment shelter measuring twelve feet by twenty feet located on the roof. Similarly, the Verizon agreement states that the defendant would provide "approximately [40] square feet of space . . . and approximately [170] square feet on the roof" for its wireless installation and

whether such service is provided on a stand-alone basis or commingled with other wireless communications services. . . ."

separately enumerates the number of antennas. The New Cingular agreement indicates a proposed equipment shelter measuring twelve feet by twenty feet. As to Pocket, Allen testified that the lease did not give an indication of the size of the installation at the property, and there was no installation at the property when Allen visited. However, Allen previously had worked as a leasing agent for Pocket and testified that Pocket "typically leased for a small concrete pad, at least six feet by ten feet at a maximum."

The defendant next argues that the court improperly failed to acknowledge that § 20-329 (9) "provides for an exception for a single wireless facility while there are multiple wireless facilities at issue here." The defendant contends that the phrase "for any one service" contained in § 20-329 (9) logically "refers to the role of the broker (i.e., the person that the statutory scheme seeks to regulate) such that a person acting in such role 'for any one service' is exempted from licensing requirements while a person acting in such role for multiple providers is not."

We disagree with the defendant's proposed construction, which is unreasonable in that it wholly ignores the context of the phrase at issue. The larger clause provides in relevant part: "[I]n an area not to exceed [360] square feet for any one service established by the Federal Communications Commission . . . by a provider of any such service . . . ." General Statutes § 20-329 (9) (A). Thus, the logical reading of this phrase is that the 360 square foot limitation applies to each "service established by the Federal Communications Commission . . . ." General Statutes § 20-329 (9) (A). "We will not torture the words or sentence structure of a statute to import an ambiguity where the ordinary meaning of the language leaves no room for it." (Internal quotation marks omitted.) *Mosby* v. *Board of Education*, 191 Conn. App. 280, 286, 214 A.3d 400 (2019), cert.

denied, 335 Conn. 939, 237 A.3d 1 (2020). Accordingly, we reject the defendant's proposed interpretation.

The defendant's final argument is that the court improperly determined that the exception set forth in § 20-329 (9) applied because it failed to give meaning to the statutory language providing that the wireless facilities were required to be "in an area not to exceed [360] square feet . . . ." General Statutes § 20-329 (9) (A). The defendant contends that Allen improperly added together the square footage of certain components rather than measuring the area in which the components were contained. Specifically, the defendant points to the Verizon installation, which was comprised of a forty square foot generator on the ground and a seventy square foot equipment platform on the roof. The defendant poses the following question: "If one part of a wireless installation is 1000 feet from the other part, how can one say that the two parts are contained in an area of less than 360 square feet?" We are not persuaded by the defendant's argument that, because certain components of the installation are separated between the ground and the roof, the installation cannot be considered to be within an area not to exceed 360 square feet.

Accordingly, we conclude that the court properly considered the defendant's special defense that the plaintiff's claims are barred by § 20-325a and properly determined that such defense did not defeat a finding of probable cause.

II

The defendant's second claim on appeal is that the court improperly determined that enforcement of the oral management agreement is not barred by the rule against perpetuities.

The following additional procedural history is relevant to our resolution of this claim. In its memorandum

of decision on the application for a prejudgment remedy, the court referenced its previous summary judgment decision as holding "that neither the common-law nor the statutory rules against perpetuities applied because the [oral management] agreement provided an immediate fixed right to a present or future enjoyment of a lease or license related contract." In the summary judgment decision, the court considered both the common-law and statutory rules, noting that both rules "implicate only interests that are not vested at the time of creation. Where a party has an immediate fixed right to a present or future enjoyment, the rule is inapplicable even where the right extends in apparent perpetuity." The court stated that, "[i]n the present case, whatever rights [the plaintiff] possessed vested upon execution of the agreements. Thus, neither the common-law [n]or statutory rule of perpetuit[ies] bars the present action."[16]

The defendant argues on appeal that only the common-law rule is applicable to the present case. The defendant argues that the plaintiff's rights vested not at the time of the oral management agreement, but when the defendant later entered into the building/rooftop wireless telecommunications agreements. According to the defendant, the plaintiff had no rights with respect to the defendant's property until the building/rooftop wireless telecommunications agreements came into existence, and the plaintiff's claim to a percentage of revenue from "any future telecommunications leases"; (emphasis omitted); is "just the sort of perpetual interest that the rule against perpetuities is intended to prevent." The plaintiff responds that the rule against perpetuities does not apply because the trial court's order

[16] In considering the rule against perpetuities at the summary judgment stage, the court's decision rested on its determination that the plaintiff's rights "vested upon execution of the agreements." As both parties recognize, the prejudgment remedy was limited to the plaintiff's claim of breach of the oral management agreement. Thus, the agreement under which the

with respect to the prejudgment remedy addressed only whether the plaintiff had shown probable cause that it could prove breach of contract under the oral management agreement. Because the oral management agreement created no property rights in the plaintiff, the plaintiff contends that it is outside the scope of the rule against perpetuities.[17]

"The rule against perpetuities states that [n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." (Internal quotation marks omitted.) *Tolland Enterprises* v. *Commissioner of Transportation*, 36 Conn. App. 49, 53 n.2, 647 A.2d 1045 (1994). "The underlying and fundamental purpose of the common law rule against perpetuities is the protection of society by allowing full utilization of land. As commonly noted, [t]he rule [against perpetuities] evolved to prevent . . . property from being fettered with future interests so remote that the alienability of the land and its marketability would be impaired, preventing its full utilization for the benefit of society at large as well as of its current owners." (Internal quotation marks omitted.) Id., 54. "The rule against perpetuities concerns rights of property only, and does not affect the making of contracts which do not create rights of property." (Internal quotation marks omitted.) *H. J. Lewis Oyster Co.* v. *West*,

court determined that the plaintiff had vested rights in connection with the prejudgment remedy application is the oral management agreement.

[17] Although the trial court did not reject the defendant's special defense on this basis, we consider the plaintiff's argument on appeal because the defendant had an adequate opportunity to respond in its reply brief and because the argument was preserved in the trial court, where the plaintiff argued in posthearing briefing that the interest at issue constituted 30 percent of the revenue generated from the wireless providers at the property and did not concern any restraints on the alienation of property, and, thus, the rule against perpetuities did not apply.

Moreover, in rejecting the defendant's statute of frauds special defense, the court rejected the defendant's argument that the oral management agreement is an agreement " 'for any interest in or concerning real property' " and found that the agreement was one for services.

93 Conn. 518, 529, 107 A. 138 (1919); see also 61 Am. Jur. 2d 63, Perpetuities, Etc. § 53 (1981) (same); 70 C.J.S. 385–86, Perpetuities § 10 (2005) ("[t]he rule against perpetuities is a restriction on the right of the disposition of property, and is by far the most important restraint which the law places on the right to create future interests" (footnote omitted)).

In the present case, the oral management agreement at issue does not create or transfer any right in property, and the plaintiff does not claim any interest in the defendant's property.[18] The rights at issue are illustrated by the plaintiff's requested recovery, which is limited to the portion of the monthly rent it claims it was entitled to under the oral management agreement. The defendant has not directed this court to any authority supporting the applicability of the rule against perpetuities to the type of agreement at issue in the present case. Accordingly, we conclude that the court properly determined that the defendant's defense with respect to the rule against perpetuities did not defeat a finding of probable cause.

III

The defendant's final claim on appeal is that the court improperly determined that the statute of frauds did not bar enforcement of the oral management agreement. First, it contends that General Statutes § 52-550 (a) (4) applies on the basis that the plaintiff's claims "concern real property . . . ." Second, it contends that "[t]he trial court also erroneously held that the statute of frauds did not apply because the [oral] management agreement was of indefinite duration and, thus, was not

[18] When asked during oral argument before this court whether the plaintiff had taken the position before the trial court that the oral management agreement runs with the land, the plaintiff's counsel represented that it had not taken that position.

a contract not to be performed within one year." We examine each argument in turn.

The following additional facts and procedural history are relevant to our resolution of this claim. In its memorandum of decision on the application for a prejudgment remedy, the court concluded that the defendant's reliance on the statute of frauds as a special defense was unavailing. It stated that the defendant's "assertion, without citation to authority, that the [oral management] agreement falls within the purview of the statute of frauds because it is an agreement 'for any interest in or concerning real property,' ignores that what is at issue is an agreement for services that is not within the purview of § 52-550 (a) (4)." It next determined that § 52-550 (a) (5) likewise did not bar enforcement of the oral management agreement on the basis that the agreement is a contract of indefinite duration.

Section 52-550 (a) provides in relevant part: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property; [or] (5) upon any agreement that is not to be performed within one year from the making thereof . . . ." "Under Connecticut law, the statute of frauds operates as a special defense to a civil action. . . . Its function is evidentiary, to prevent enforcement through fraud or perjury of contracts never in fact made." (Citation omitted; internal quotation marks omitted.) *Patrowicz* v. *Peloquin*, 190 Conn. App. 124, 138, 209 A.3d 1233, cert. denied, 333 Conn. 915, 216 A.3d 651 (2019). "The primary purpose of the statute of frauds is to provide reliable evidence of the existence and the terms of the contract . . . ." (Internal quotation marks omitted.) *Reid & Riege, P.C.* v. *Bulakites*,

132 Conn. App. 209, 217, 31 A.3d 406 (2011), cert. denied, 303 Conn. 926, 35 A.3d 1076 (2012).

The defendant first argues that the plaintiff claims an interest in the building/rooftop wireless telecommunications agreements, "as well as claiming an interest in any future agreements with any cellular providers. Because the cellular agreements convey an interest in land (albeit only as to a portion of the premises), the plaintiff's claims here concern real property and, thus, the statute of frauds applies pursuant to [§] 52-550 (a) (4)."

This argument is unpersuasive, as it is premised on the defendant's assertion that the plaintiff's claims "concern real property . . . ." In determining that the plaintiff had shown probable cause with respect to its breach of contract claim, the court correctly noted that the oral management agreement is one for services. Specifically, the court stated that, pursuant to the oral management agreement, the plaintiff was "to market, license and collect usage payments in exchange for a commission of 30 percent of monthly receipts generated by any license." The oral management agreement did not confer on the plaintiff any rights to an interest in or concerning real property. See *Pagano* v. *Ippoliti*, 245 Conn. 640, 645, 647, 716 A.2d 848 (1998) (contract claims as formulated by plaintiff were for damages arising out of loss of financial, rather than real property, interests in development project, and, as such, contracts did not violate § 52-550 (a) (4)). Accordingly, we conclude that the court properly determined that the defendant's defense with respect to § 52-550 (a) (4) did not defeat a finding of probable cause.

With respect to the defendant's argument that the oral management agreement was unenforceable because it was not to be performed within one year from the making thereof; see General Statutes § 52-550 (a) (5);

we conclude that the court properly relied on *C. R. Klewin, Inc.* v. *Flagship Properties, Inc.*, 220 Conn. 569, 583–84, 600 A.2d 772 (1991). In that case, our Supreme Court held that "an oral contract that does not say, in express terms, that performance is to have a specific duration beyond one year is, as a matter of law, the functional equivalent of a contract of indefinite duration for the purposes of the statute of frauds. Like a contract of indefinite duration, such a contract is enforceable because it is outside the proscriptive force of the statute regardless of how long completion of performance will actually take." Id.[19] In the present case, the court determined that the oral management agreement was of indefinite duration.[20] Accordingly, we conclude that the court properly determined that the defendant's defense with respect to § 52-550 (a) (5) did not defeat a finding of probable cause.

[19] Outside of a discussion of *C. R. Klewin, Inc.* v. *Flagship Properties, Inc.*, supra, 220 Conn. 583–84, the defendant's only citation to authority in support of its argument with respect to § 52-550 (a) (5) is to *Redgate* v. *Fairfield University*, 862 F. Supp. 724, 729–30 (D. Conn. 1994), in which the United States District Court for the District of Connecticut determined that a former employee's breach of contract claims did not meet the requirements of the statute of frauds when he allegedly had been assured employment for ten or twenty years. This decision is distinguishable on its facts.

[20] The defendant indirectly attacks the trial court's finding that the oral management agreement was of indefinite duration by asserting that its enforcement is barred by the statute of frauds because (1) an unsigned draft management agreement provided for a two year term with two, two year extensions; and (2) "the [building/rooftop wireless telecommunications] agreements as to which the plaintiff claims an interest all include express terms of more than one year." First, we do not find clear error in the court's determination that the oral management agreement was of indefinite duration on the basis of the terms of the unsigned draft agreement. "Weighing the evidence and judging the credibility of the witnesses is the function of the trier of fact and this court will not usurp that role." (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 143. Second, the court expressly declined to address the plaintiff's contention that it was a third-party beneficiary under the two original leases. The court concluded only that the plaintiff had proven probable cause of recovery pursuant to the oral management agreement. Accordingly, we reject the defendant's statute of frauds arguments premised on the unsigned agreement and the two original leases.

Therefore, we conclude that the court's finding of probable cause did not constitute clear error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DEREK R. SWEET (AC 44427)

Alvord, Cradle and Suarez, Js.

Syllabus

Convicted, after a jury trial, of the crimes of larceny in the third degree and identify theft in the third degree, and, under a part B information, on a plea of guilty, of being a persistent serious felony offender, the defendant appealed to this court. The defendant stole a wallet, belonging to his father, M, and used the credit cards, a debit card and his father's driver's license contained within to make several purchases from various stores, totaling in excess of $2000. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to prove that the defendant had appropriated in excess of $2000 from M to himself and that certain documentary evidence was improperly admitted in violation of the defendant's constitutional right to confrontation and the rule against hearsay. *Held*:

1. The defendant could not prevail on his claim that, because the state presented evidence that M suffered only a loss of credit through the defendant's use of the stolen credit cards and that the state failed to prove that credit is money, the evidence was insufficient to prove that the defendant appropriated in excess of $2000 from M to himself: contrary to the defendant's assumption that the state's theory of the case at trial with respect to the use of the credit cards was that the defendant stole money, the state's theory of the case was that the defendant stole credit from M, and it was sufficient to present evidence of the transactions, the credit card statements posting the transactions and M's efforts to remove those transactions from his credit card statements, and the record clearly demonstrated that the defendant used M's credit cards to purchase items without authorization to do so, those items were charged to M, and M's credit card issuers billed him for those charges, and the defendant failed to provide other facts that the state could have produced to prove that unauthorized use of a credit card results in a taking of credit; moreover, although the credit card issuers eventually did not hold M responsible for the debt that the defendant incurred, the defendant's actions resulted in a reduction of M's available credit at the time of the unauthorized purchases; furthermore, although M's

loss of credit was not permanent, it did not mean that his credit was not stolen.

2. The defendant could not prevail on his unpreserved claim that both a property report, created by the investigating police officer that detailed the fraudulent transactions made by the defendant, and M's statement to the police, constituted testimonial hearsay that was improperly admitted into evidence in violation of his sixth amendment right to confrontation, as the record clearly demonstrated that defense counsel waived any objection to the admission of the property report and M's statement.

3. The defendant could not prevail on his unpreserved claim that letters from two card issuers regarding the fraudulent charges, which were admitted into evidence as past recollections recorded under a provision (§ 8-3 (6)) of the Connecticut Code of Evidence, constituted testimonial hearsay that was admitted in violation of his sixth amendment right to confrontation, as any error in admitting these letters was harmless beyond a reasonable doubt; these letters were admitted to show that the fraudulent charges occurred and that M reported that he was not involved in those transactions, and, contrary to the defendant's claim that the other exhibits were all evidence of the same facts and, therefore, the letters were corroborative, the record demonstrated that the letters were cumulative.

4. The defendant could not prevail on his unpreserved claim that two statements from M's credit card issuers were improperly admitted as past recollections recorded under § 8-3 (6) of the Connecticut Code of Evidence, on the ground that the information contained therein was never personally known to M, through whom the statements were presented, as any such error did not substantially affect the verdict; the record demonstrated that M's statement to the police established the dates and values of the fraudulent transactions and, therefore, the statements, admitted only to prove those values, were merely cumulative, the testimony of M and the investigating police officer regarding the charges established the amounts listed on the property report and in M's statement to the police, and, accordingly, the two statements were not needed to corroborate the information presented.

Argued April 12—officially released August 30, 2022

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of larceny in the third degree and identify theft in the third degree, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the first part of the information was tried

to the jury before *Oliver*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *Oliver*, *J.*, on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Adele V. Patterson, former senior assistant public defender, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, former state's attorney, and *David Clifton*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Derek R. Sweet, appeals from the judgment of conviction, rendered after a jury trial, of one count of larceny in the third degree in violation of General Statutes § 53a-124 (a) (2),[1] and one count of identity theft in the third degree in violation of General Statutes § 53a-129d (a).[2] On appeal, the

[1] General Statutes § 53a-124 provides in relevant part: "(a) A person is guilty of larceny in the third degree when he commits larceny, as defined in [§] 53a-119, and . . . (2) the value of the property or service exceeds two thousand dollars . . . ."

General Statues § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ."

[2] General Statutes § 53a-129d (a) provides: "A person is guilty of identity theft in the third degree when such person commits identity theft, as defined in [§] 53a-129a."

General Statutes § 53a-129a provides: "(a) A person commits identity theft when such person knowingly uses personal identifying information of another person to obtain or attempt to obtain money, credit, goods, services, property or medical information without the consent of such other person.

"(b) As used in this section, 'personal identifying information' means any name, number or other information that may be used, alone or in conjunction with any other information, to identify a specific individual including, but not limited to, such individual's name, date of birth, mother's maiden name, motor vehicle operator's license number, Social Security number, employee identification number, employer or taxpayer identification number, alien registration number, government passport number, health insurance identifi-

defendant claims that (1) there was insufficient evidence to sustain the jury's verdict of guilty of larceny in the third degree and (2) the court erred in admitting certain hearsay evidence. We disagree and, accordingly, affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. On or about November 19, 2017, the defendant took a wallet, belonging to his father, Martin Sweet (Martin), which contained a People's United Bank debit card, an American Express credit card, a Chase credit card, an Old Navy credit card, a Home Depot credit card,[3] a Social Security card, and a driver's license. On November 19, the defendant used the cards to make a variety of purchases at local stores, including Walmart, Stop and Shop, and Family Dollar. The purchases totaled $2373.94.[4] On or around December 28, 2017, the defendant made three purchases, totaling $2628.91, using Martin's Home Depot credit card in three separate transactions at a West Hartford Home Depot.[5] Martin reported the theft of the

cation number, demand deposit account number, savings account number, credit card number, debit card number or unique biometric data such as fingerprint, voice print, retina or iris image, or unique physical representation."

[3] A "dispute claim request" from People's United Bank regarding the fraudulent charges asked Martin whether "[his] Debit Card or ATM Card" was or was not in his possession at the time of the disputed transactions. Further, Martin testified that his "debit card" was in his wallet when the wallet went missing. See part II A 2 of this opinion. Thus, in this opinion we refer to the People's United Bank card as a debit card. We refer to the People's United Bank debit card, the American Express credit card, the Old Navy credit card, and the Home Depot credit collectively as cards and to the issuers of those cards as card issuers. When we refer to credit cards and credit card issuers, we are not referencing the People's United Bank debit card.

[4] Of the $2373.94 total, $377.93 applied to Martin's People's United Bank debit card.

[5] Martin testified at trial that he had cancelled all of his credit cards following the first round of fraudulent charges on November 19 and was surprised when his Home Depot credit card bill included additional charges

wallet and the subsequent fraudulent charges to the card issuers, and, after taking the several steps required to dispute the charges, he did not have to pay any of the fraudulent charges.

Following an investigation, the defendant was arrested and charged, by way of a substitute information, with one count of larceny in the third degree in violation of § 53a-124 (a) (2), and one count of identity theft in the third degree in violation of § 53a-129d (a). After one day of evidence, the state rested, and the defendant filed a motion for judgment of acquittal, which the court, *Oliver*, *J.*, denied.[6] On January 23, 2020, the jury found the defendant guilty on both counts. The defendant then pleaded guilty to a part B information, which charged him as a persistent serious felony offender in violation of General Statutes § 53a-40 (c).[7]

that he had not made. He further testified that "[t]he Home Depot when I called them up because I'm like how could you possibly let more charges go up? Because I cancelled the card and that's when they told me, well, we also just accept driver's licenses to make charges."

[6] The defendant argued in support of his motion for judgment of acquittal that "the state is required to prove that [the defendant] had appropriated property from Mr. Martin Sweet valued at over $2000. Although the state did introduce some evidence of transactions that took place, it looks like those transactions were all related to losses by the Home Depot, losses by other businesses, but no losses over $2000 to Mr. [Martin] Sweet directly." The defendant relied on the fact that Martin's credit card issuers did not ultimately bill him for the fraudulent charges. The state responded that it "[did] not need to prove [that] the ultimate loss rested on Mr. Martin Sweet, simply that when the defendant made those charges, he was taking that property from Martin Sweet, in that, using his credit cards." The court determined that the state had presented evidence that could support both a theory that the defendant took Martin's credit and a theory that the defendant took the items purchased with the credit cards, to which Martin had a superior property right.

[7] General Statutes § 53a-40 (c) provides in relevant part: "A persistent serious felony offender is a person who (1) stands convicted of a felony, and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. . . ."

Following the verdict, the defendant renewed his motion for judgment of acquittal, which was also denied. On August 17, 2020, the court sentenced the defendant to a total effective sentence of ten years of incarceration, execution suspended after forty-two months, followed by five years of probation. This appeal followed.

I

The defendant's first claim on appeal is that the evidence was insufficient to prove that he appropriated in excess of $2000 from Martin to himself. Although the defendant admits that "the jury reasonably could find that the state proved its theory that the defendant stole his father's credit cards and used them to make unauthorized purchases," he contends that there was no "evidence or law to support its contention that using the [credit] cards took money from Martin." Specifically, the defendant asserts that "[t]he state's articulation of its theory of the crime to the trial court and to the jury assumed that the use of a person's credit card results in taking his money, but no evidence was offered to support that factual premise." In sum, the defendant's argument is that the state's theory of the case with respect to the credit cards was that the defendant stole *money* from Martin and, therefore, because the evidence made clear that Martin ultimately only suffered a loss of credit, the state further had to prove that credit is money. In response, the state argues that its theory of the case at trial with respect to the credit cards was that the defendant stole *credit* from Martin and, therefore, it was sufficient to present evidence of the transactions, the credit card statements posting the transactions, and Martin's efforts to remove those transactions from his credit card statements to establish that the defendant took credit worth more than $2000 from Martin. We agree with the state.[8]

[8] The defendant takes issue only with the sufficiency of the evidence with respect to his use of Martin's *credit* cards. He makes no argument that

The following procedural history is relevant to our resolution of this claim. In count one of the operative long form information, the state charged the defendant with larceny in the third degree in violation of § 53a-124 (a) (2), alleging as follows: "on or about diverse dates between November 19, 2017, and December 28, 2017, beginning in the town of Newington and continuing throughout the state, the defendant . . . with intent to deprive another of property and appropriate the same to himself and a third person, did wrongfully take, obtain, and withhold such property from its owner, the value of which exceeds two thousand dollars, to wit: the defendant did wrongfully appropriate in excess of $2000 from Martin Sweet to himself."

At trial, Martin testified that, once he realized his wallet was missing, he reported that issue to his credit card issuers. He further testified that, upon reporting the missing cards, he was informed that the cards were being used. Accordingly, he cancelled his credit cards and reported the situation to the Newington Police Department. He also testified about the credit card bills he received listing charges he did not make and the process through which he reported the fraudulent transactions to the card issuers. During Martin's testimony, the state introduced into evidence credit card statements that listed the various disputed charges and letters from the credit card issuers that detailed the reported fraudulent charges.[9]

Officer Reza Abbassi of the Newington Police Department testified about his investigation into the matter.

the state produced insufficient evidence to prove that the defendant took something from Martin when he used his debit card. Therefore, our review of this claim relates only to the state's theory of the case with respect to the use of Martin's credit cards and the sufficiency of the evidence to prove that the defendant took Martin's credit.

[9] These exhibits, and others, are the subject of the defendant's second claim. See part II of this opinion.

He testified that Martin filled out a lost/stolen property report (property report) listing all of the charges made to his credit cards[10] following the theft of his wallet, along with the times and locations of each transaction, and the property report was entered into evidence as a full exhibit.[11] Officer Abbassi testified that he used the property report to follow up with the stores to investigate who had made the various charges. Officer Abbassi also testified that, after viewing surveillance video, reviewing receipts, and meeting with Martin, he was able to confirm that the defendant had made the charges that Martin had reported as fraudulent.

In closing arguments, the prosecutor emphasized the timing of the larceny, asserting that there were "[nineteen] charges in just under [thirteen] hours. Over $2300 taken in that [thirteen] hours. . . . That tells you that the defendant is trying to rack up as much money as he can before those cards get cancelled. He wants to get the value while he can." The prosecutor then addressed the fact that Martin never had to pay for the defendant's charges: "Now the defense asked some questions about the bank covering [Martin's] loss. . . . That is legally irrelevant to your inquiry here.[12] What we do in criminal law is we punish conduct based upon the time that it occurs. We look at what the defendant did, not six months from now, not years from now to see who's left holding the bag; when he made those

[10] The property report also included a list of purchases made using Martin's People's United Bank debit card.

[11] The property report is also the subject of the defendant's second claim. See part II of this opinion.

[12] The defendant disputes the state's position that the card issuers' coverage of the losses is irrelevant. The defendant asserts that the state's position was that "it did not need to prove any loss to Martin." The defendant misstates the state's position. The state actually advocated that whether or not Martin *ultimately* lost funds was irrelevant because the state had shown that the defendant took credit from Martin at the time he made the transactions.

charges, it's Martin Sweet on the hook. Martin Sweet owes that money to the credit card [issuers]. When the defendant makes those charges, he doesn't know the credit card [issuers] are going to do the right thing and reimburse him. If they decided not to, Martin Sweet is the one with the debt. When he makes those charges, it's Martin Sweet, that's whose money he's taking." (Footnote added.) The prosecutor then referred to the credit card statements and argued that those charges represented the value of the credit taken from Martin.

In closing arguments, defense counsel stated, inter alia, that "[t]he state has to prove that there was property taken from [Martin] and with intent to deprive him of it. What is that property? When was [it] taken? Why was it deprived? So I'll ask you to consider those things when you go in to deliberate." In rebuttal, the prosecutor again emphasized the timing of the larceny, stating, "[a]gain, it's the time, the conduct at the time those cards are swiped. We don't look six months down the line to see who ends up holding the bag. The banks did the right thing here, that doesn't matter, Martin Sweet could have been out the money, and at that time, the defendant made those charges Martin Sweet was out that money."

We begin by setting forth the well established standard of review for claims of insufficient evidence.[13] "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

[13] The defendant advocates that a plenary standard of review applies to this claim because "[w]hen the question is whether the criminal statute of conviction applies on the facts of the case, the question is one of statutory interpretation . . . ." We disagree that the defendant's claim requires analysis of whether § 53a-124 applies on the facts of this case, and, therefore, we do not afford his claim plenary review.

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. . . . We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . 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. *Edwards*, 202 Conn. App. 384, 389–90, 245 A.3d 866, cert. denied, 336 Conn. 920, 246 A.3d 3 (2021). "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 [trier's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Tony O.*, 211 Conn. App. 496, 509, 272 A.3d 659, cert. denied, 343 Conn. 921, 275 A.3d 214 (2022).

The following legal principles guide our analysis. Section 53a-124 (a) (2) provides: "A person is guilty of larceny in the third degree when he commits larceny, as defined in [§] 53a-119, and . . . the value of the property or services exceeds two thousand dollars. . . ." General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains

or withholds such property from an owner. . . .'' General Statutes § 53a-118 (a) (1) defines property as ''any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind.'' ''[T]he essential elements of larceny are: (1) the wrongful taking or carrying away of the . . . property of another; (2) the existence of a felonious intent in the taker to deprive the owner of [the property] permanently; and (3) the lack of consent of the owner.'' (Internal quotation marks omitted.) *State* v. *Adams*, 327 Conn. 297, 305–306, 173 A.3d 943 (2017).

The defendant argues that the state was required to prove that credit is money but failed to present evidence that credit is money; this argument is premised on an assumption that the state's theory of the case with respect to the use of the credit cards was that the defendant stole *money*. The state, however, correctly points out that the theory it presented at trial was that the defendant stole *credit* when he used Martin's credit cards and that, therefore, there is no evidentiary missing link—it properly proved that the defendant stole credit.[14] After review of the substitute information,[15] the

[14] At trial, the state offered an alternative theory that the items the defendant purchased with Martin's credit cards constituted the property taken from Martin because Martin had superior rights to the property as it was purchased with his credit cards. The court agreed with the state that this was a viable theory. See footnote 5 of this opinion. On appeal, the state offers this as an alternative basis to support the jury's determination of guilt. Because we conclude that there was sufficient evidence with which the jury could have determined that the defendant took Martin's credit, we need not consider this alternative argument.

[15] We note that, ''[g]enerally speaking, the state is limited to proving that the defendant has committed the offense in substantially the manner described in the information. . . . Despite this general principle, however, both this court and our Supreme Court have made clear that [t]he inclusion in the state's pleading of additional details concerning the offense does not make such allegations essential elements of the crime, upon which the jury must be instructed. . . . Our case law makes clear that the requirement that the state be limited to proving an offense in substantially the manner described in the information is meant to assure that the defendant is provided with sufficient notice of the crimes against which he must defend. As long

state's evidence, and the prosecutor's closing arguments, it is clear that, with respect to the defendant's use of Martin's credit cards, the state sought to prove that the defendant took property in the form of *credit* valued at more than $2000 from Martin on November 19 and December 28, 2017.[16] As the defendant aptly summarized in his principal appellate brief, "[t]he state's theory was that a taking from Martin occurred when his credit accounts were used to make unauthorized purchases from merchants totaling over $2000. The state expressly did not attempt to prove that the defendant's [use of Martin's credit cards] actually cost Martin any money." The state did not attempt to offer such proof because it presented evidence that the defendant took property in the form of *credit* when he made purchases with Martin's credit cards.[17] Therefore, the state did not need to show that credit is money, it needed only to present evidence that the defendant took property in the form of *credit*.[18]

Further, after considering the evidence in the light most favorable to sustaining the jury's verdict, we conclude that there was sufficient evidence presented for

as this notice requirement is satisfied, however, the inclusion of additional details in the charge does not place on the state the obligation to prove more than the essential elements of the crime." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Vere C.*, 152 Conn. App. 486, 527, 98 A.3d 884, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014).

[16] Although the defendant makes suggestions, interspersed throughout his appellate briefing, that he does not believe that credit is considered property for the purposes of § 53a-124 (a) (2), he does not raise such a claim on appeal.

[17] We note that the state, in its argument in opposition to the defendant's motion for judgment of acquittal, also argued that the defendant, in making the unauthorized charges, "was taking that property from Martin Sweet, in that, using his credit cards." This argument is consistent with the state's theory of the case with respect to the defendant's use of Martin's credit cards as the defendant having taken property in the form of credit. See footnote 5 of this opinion.

[18] We acknowledge that the state referred to "a taking of money" at various points during the trial; however, viewing the state's presentation of its case in its totality, the state's theory was that the defendant took credit from Martin.

the jury to find that the defendant took credit totaling in excess of $2000 from Martin. The state presented evidence that established that the defendant took Martin's credit cards and used them without his consent. The state also presented evidence that the defendant's unauthorized purchases resulted in excess of $2000 being charged to Martin's credit accounts.

Responding to the state's position, the defendant argues that, "even if credit is property, the law does not deem every unauthorized use of a credit card to be a criminal taking without proof of that result . . . . It is not enough for a prosecutor to say that every use of a credit card imposes a financial obligation on the card owner: that is an assertion of fact essential to the state's case which it had to prove, with evidence, in order to convict in this case."

The defendant does not make clear, however, how the state failed to present proof of theft of credit. As discussed herein, the state presented evidence that the defendant used Martin's credit cards to purchase items without authorization to do so, that those items were charged to Martin, and that Martin's credit card issuers billed him for the defendant's charges. The defendant fails to provide other facts the state could have produced to prove that unauthorized use of a credit card results in a taking of credit. It is common knowledge that the holder of a credit card has a certain amount of credit, with which they may purchase goods and services. As the credit card holder makes purchases with that credit, the amount of available credit is reduced. Common sense dictates that when another takes credit without authorization, the credit holder has less credit available and has therefore lost something of value. See *State* v. *Henderson*, 47 Conn. App. 542, 554, 706 A.2d 480, cert. denied, 244 Conn. 908, 713 A.2d 829 (1998) ("[I]t is a reasonable and logical inference for a juror to conclude that a card referred to as a credit

card enables one to receive things on credit. It is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom." (Footnote omitted; internal quotation marks omitted.)); see also *State* v. *Otto*, 305 Conn. 51, 70 n.17, 43 A.3d 629 (2012) ("[i]n deciding cases . . . [j]urors are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion" (internal quotation marks omitted)).

The fact that the credit card issuers eventually did not hold him responsible for the debt that the defendant incurred does not alter the fact that the defendant's actions resulted in a reduction of Martin's available credit at the time of the unauthorized purchases. In fact, Martin testified that when he contacted the credit card issuers they informed him that several transactions had gone through and that, subsequently, he had to take several steps to ensure that he ultimately was not responsible for the defendant's charges. The fact that "everything was written off" does not mean that Martin's credit was not stolen, even though the loss was not permanent.

In light of the foregoing, we reject the defendant's claim that the evidence was insufficient to prove that the defendant took property valued in excess of $2000 from Martin.

II

The defendant next argues the court improperly admitted into evidence certain documents in violation of the defendant's constitutional right to confrontation and the rule against hearsay. We disagree.

A

We first address the defendant's claim that certain documents were admitted into evidence in violation

of his sixth amendment right to confrontation. Those documents include the property report that Martin filled out and gave to Officer Abbassi, a letter from People's United Bank regarding the fraudulent charges on that card (People's letter), a letter from Chase Bank Card Services regarding the fraudulent charges on that card (Chase letter), and a statement that Martin gave to the police regarding the second round of charges at Home Depot in December, 2017 (statement).

The defendant concedes that this claim was not preserved and, consequently, requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "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 reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. "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." (Internal quotation marks omitted.) *State* v. *Tyus*, 342 Conn. 784, 803, 272 A.3d 132 (2022). "[T]he inability to meet any one prong requires a determination that the defendant's claim must fail. . . . The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Citation omitted; internal quotation marks omitted.)

State v. *Soto*, 175 Conn. App. 739, 755, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017).

On appeal, the state argues, inter alia, that (1) the defendant waived any sixth amendment claim concerning both the property report and the statement Martin gave to the police, and, therefore, with respect to these exhibits, the defendant's claim fails under the third prong of *Golding*, and (2) any error in admitting the People's letter and the Chase letter was harmless, and, therefore, with respect to these exhibits, the defendant's claim fails *Golding*'s fourth prong. We agree with the state.

1

We first address the property report and the statement that Martin gave to the police. The defendant argues that these two exhibits were admitted in violation of his sixth amendment right to confrontation because the two documents were "made under circumstances which would lead an objective witness reasonably to believe that the [documents] would be available for use at a later trial by available entities, which the defendant had no opportunity to confront." The state responds that the defendant's claim is waived with respect to these two exhibits because defense counsel affirmatively stated that there was "no objection" to either exhibit when each was offered as a full exhibit. We agree with the state and, therefore, conclude that the defendant's claim fails *Golding*'s third prong.

The following additional procedural history is relevant to our analysis of this claim. When the state offered the property report as a full exhibit, defense counsel conducted a brief voir dire of the witness through which the exhibit was offered. During the voir dire, the prosecutor objected to the line of questioning as going beyond the scope of voir dire, and the court stated in agreement that "[t]his is voir dire [of] the document as [opposed]

to cross, counsel." Defense counsel then concluded questioning, stating: "Very good, Your Honor. No objection with that." Similarly, when the state offered Martin's statement as a full exhibit, defense counsel conducted a brief voir dire of the witness and informed the court that there was "no objection" to the exhibit.

"It is well settled that a criminal defendant may waive rights guaranteed to him under the constitution. . . . [T]he definition of a valid waiver of a constitutional right . . . [is] the intentional relinquishment or abandonment of a known right. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Additionally, it is well settled that defense counsel may waive a defendant's sixth amendment right to confrontation." (Citations omitted; internal quotation marks omitted.) *State* v. *Luna*, 208 Conn. App. 45, 68–69, 262 A.3d 942, cert. denied, 340 Conn. 917, 266 A.3d 146 (2021); see also *State* v. *Castro*, 200 Conn. App. 450, 457–58, 238 A.3d 813, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020). We note also that "waiver of a fundamental right may not be presumed from a silent record." *State* v. *Smith*, 289 Conn. 598, 621, 960 A.2d 993 (2008).

"[A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . . To reach a contrary conclusion would result in an ambush of the trial court by permitting the defendant to raise a claim on appeal that his or her counsel expressly had abandoned in the trial court." (Internal quotation marks omitted.) *State* v. *Luna*, supra, 208 Conn. App. 70.

In *Luna*, defense counsel had no objection to marking a contested exhibit for identification and, when the

state offered the exhibit in full, objected to the evidence only on the basis that it was more prejudicial than probative and specifically stated that there were no further objections to the exhibit. Id., 69. On appeal, the defendant claimed that the evidence was admitted in violation of his sixth amendment right to confrontation. Id., 67. Given the nature of defense counsel's statements, the court concluded that there had been "a valid, express waiver of the defendant's sixth amendment confrontation clause claim." (Internal quotation marks omitted.) Id., 69–70. Therefore, the defendant's claim failed under the third prong of *Golding*. Id., 70.

Additionally, in *State* v. *Castro*, supra, 200 Conn. App. 462, this court determined that defense counsel expressly waived the defendant's right to confront the author of an exhibit because defense counsel indicated "that he had 'absolutely no objection' to the admission of the [exhibit], or to [a witness] testifying to the contents of [the exhibit]."

In the present case, it is clear from the record that defense counsel waived any objection to the admission of the property report and Martin's statement. The record indicates that defense counsel noted that he had "no objection" to both the property report and Martin's statement. These statements are similar to those made in *State* v. *Luna*, supra, 208 Conn. App. 69, and *State* v. *Castro*, supra, 200 Conn. App. 462, as defense counsel expressly stated, after voir dire, that he had no objection to the admission of the property report and statement as full exhibits. Therefore, defense counsel's statements "constituted a valid, express waiver of the defendant's sixth amendment confrontation clause claim."[19] See id.

[19] The defendant argues that we should not construe defense counsel's actions as waiving this claim because "defense counsel already had repeatedly, but unsuccessfully, attempted to exclude the hearsay evidence that was repeated by [Martin] on [the property report]. The failure to object to admission of that document when offered through [Officer] Abbassi should not be construed as an affirmative expression of satisfaction . . . ." The defendant, however, misrepresents the record. Defense counsel did not "fail

Consequently, with respect to the property report and Martin's statement to the police, *Golding*'s third prong is not satisfied.

2

We next address the defendant's claim that the People's letter and the Chase letter constituted testimonial hearsay that was admitted in violation of his sixth amendment right to confrontation. The defendant argues that "[t]he formality of these documents . . . reasonably would lead the declarants to believe that their statements would be used in a subsequent prosecution" and, therefore, their admittance violated his sixth amendment right to confrontation. The state argues, inter alia, that "any error in admitting [these exhibits] would be harmless beyond a reasonable doubt because they are cumulative to [the property report and Martin's statement to the police]." We agree with the state.

The defendant raises a claim under the sixth amendment and the record is adequate to review whether or not the admission of the evidence was harmful.[20] Accordingly, we turn to *Golding*'s fourth prong. On review, we conclude that the state has sustained its burden of demonstrating that any claimed error was harmless beyond a reasonable doubt. "[Our Supreme] Court has long recognized that a violation of the defendant's right to confront witnesses is subject to harmless error analysis . . . . In undertaking this analysis, the test for determining whether a constitutional [error] is

to object" to the exhibits, he explicitly stated that there was "no objection" to either exhibit. Therefore, this argument is unavailing.

[20] We note that the state argues that the record is not adequate to consider whether the defendant established a constitutional violation. We need not, however, resolve this argument as we are able to dispose of this claim on *Golding*'s fourth prong.

harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained. . . . In addition, [w]hen an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors that we have considered in determining whether an error is harmless in a particular case include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony." (Citations omitted; internal quotation marks omitted.) *State* v. *Edwards*, 334 Conn. 688, 706–707, 224 A.3d 504 (2020).

We must determine, then, whether the state has demonstrated beyond a reasonable doubt that the introduction of the People's letter and the Chase letter contributed to the defendant's conviction. The credit card issuers prepared the letters in response to Martin's reports to those issuers that various charges made on the accounts were fraudulent. The People's letter listed the charges from November 19 to that account that Martin reported as fraudulent and included an affidavit for Martin to sign verifying that he did not make the listed charges. The Chase letter also listed the charges from November 19 that Martin reported as fraudulent

and provided that, following investigation, Martin would not be responsible for the fraudulent charges. Both exhibits were admitted, over defense counsel's objections, as past recollections recorded.[21]

In addition to these exhibits, the state admitted the property report that Martin completed and gave to Officer Abbassi. The property report, admitted without objection, lists every purchase the defendant made on November 19 and includes the time of each purchase. Martin testified that he completed the property report after his initial meeting with Officer Abbassi in order to help with the investigation. He testified that he called each card issuer, asked for each charge made since his wallet went missing, and wrote down the information provided. The charges listed on the People's letter and the Chase letter are all listed on the property report.

At trial, Officer Abbassi testified as to the details of his investigation. First, he visited each of the stores listed on the property report to verify the charges. He was able to verify many of the charges listed on the property report. In addition, he reviewed surveillance video of the defendant making the purchases. Further, Martin testified at length that he initially was charged for the listed transactions, that he never made those transactions, and that he did not give the defendant authorization to engage in those transactions.

On consideration of the property report[22] and the supporting witness' testimony, we determine that the

[21] Section 8-3 (6) of the Connecticut Code of Evidence provides that a past recollection recorded, defined as "[a] memorandum or record concerning an event about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness at or about the time of the event recorded and to reflect that knowledge correctly," is "not excluded by the hearsay rule, even though the declarant is available as a witness . . . ."

[22] Although the defendant also claims that this exhibit was admitted in error, we have already concluded in part II A 1 of this opinion that any objection to those exhibits has been waived.

People's letter and the Chase letter were cumulative of the other evidence presented at trial. These letters were admitted to show that the charges occurred and that Martin reported that he was not involved in those transactions. The other exhibits, Martin's testimony, and Officer Abbassi's testimony, however, were all evidence of the same facts. Although the defendant asserts that this makes the letters corroborative rather than cumulative, the record shows otherwise. Therefore, we conclude that any error in admitting the letters was harmless beyond a reasonable doubt, and this claim fails *Golding*'s fourth prong.

B

Finally, we review the defendant's claim that a statement from Martin's Old Navy credit card (Old Navy statement) and a statement from Martin's Home Depot credit card (Home Depot statement) were improperly admitted as past recollections recorded under § 8-3 (6) of the Connecticut Code of Evidence. Specifically, he argues, as he did at trial, that the information contained in these exhibits was never personally known to Martin, the witness through whom the exhibits were presented, and, therefore, could not be admitted into evidence as past recollections recorded. The state argues, inter alia, that, even if these exhibits were admitted in error, the defendant cannot show harm because the information listed in the exhibits, namely, the various charges made to Martin's cards during the period of time in which the defendant had the cards, was also listed in Martin's property report and statement to the police. In response, the defendant argues that these exhibits were "corroborative, rather than merely cumulative" of the information in the property report and Martin's statement to the police. We agree with the state that admission of the exhibits was harmless, and, therefore, we

need not determine whether the court erred in admitting them.[23]

"[W]hether [an improper evidentiary ruling that is not constitutional in nature] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. (Citation omitted; internal quotation marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 407, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017).

On review, we cannot conclude that the jury's verdict was substantially swayed by the admission of the Old Navy statement and the Home Depot statement. The Old Navy statement listed two transactions from November 19, and Martin testified that he did not make those charges. The charges listed on the Old Navy statement also were listed on the property report. Similarly,

[23] In addition, the defendant argues that the court erred in admitting the People's letter and the Chase letter as past recollections recorded. We already have determined, however, in part II A 2 of this opinion, that the admission of the People's letter and the Chase letter was harmless.

the Home Depot statement listed three charges, one from December 26 and two from December 28, and Martin again testified that he did not make those transactions.

In addition to these exhibits, which are the subject of this claim, the state submitted the property report Martin completed, discussed in detail in part II A 2 of this opinion, and Martin's statement to the police.[24] The statement, which was admitted without objection, detailed the defendant's second round of fraudulent charges in December, 2017. The statement lists three charges on December 28, 2017, to Martin's Home Depot credit card.[25] The charges listed are the same as those listed on the Home Depot statement. Martin testified about the charges made to his Home Depot credit card after he had canceled his stolen cards and about how he learned of the defendant's conduct after receiving a bill for purchases he never made. Martin testified that he then met with Officer Abbassi and provided the statement regarding those additional charges on January 27, 2018. Officer Abbassi testified that he confirmed the Home Depot purchases by obtaining receipts and surveillance footage of the defendant making the purchases from the store.

[24] Although the defendant also claims that the court improperly admitted the property report and statement to the police under the past recollection recorded exception, we have already concluded in part II A 1 of this opinion that any objection to those exhibits has been waived.

[25] We note that the Home Depot statement lists the charges as taking place on two different dates, December 26 and 28, but the value of each of the three charges is identical on both documents, with one minor exception (Martin's statement lists one transaction as $902.92, while the Home Depot statement lists it as $902.91). These differences are, however, inconsequential. First, the transactions that took place on November 19, 2017, totaled more than $2000, the value necessary to convict the defendant of larceny in the third degree. Second, the defendant's purchases from Home Depot totaled well in excess of $2000, and, therefore, the one cent difference between the listed amounts is inconsequential.

Given this record, we cannot conclude that the defendant has sustained his burden of showing harm. Martin's statement to the police established the dates and values of the fraudulent transactions on the Home Depot card, and, therefore, the Home Depot statement, admitted only to prove those values, was merely cumulative. Further, the property report established the dates and values of the fraudulent transactions on the Old Navy card. In addition, Martin's and Officer Abbassi's testimony regarding the charges and the investigation established the amounts listed on the property report and in Martin's statement—the statements were not needed to corroborate the information. In other words, given the other evidence that was before the jury, we have fair assurance that, even if the court improperly admitted these exhibits, any such error did not substantially affect the verdict. Accordingly, the defendant cannot prevail on this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

LENDING HOME FUNDING CORPORATION *v.* REI HOLDINGS, LLC, ET AL. (AC 44564)

Elgo, Cradle and Suarez, Js.

Syllabus

The defendant T Co. appealed to this court from the judgment of the trial court determining that it lacked subject matter jurisdiction to consider T Co.'s motion to reargue or to reconsider the trial court's prior denial of T Co.'s motion to open a judgment of strict foreclosure. The defendant R Co. had defaulted on a promissory note and mortgage it executed in favor of the plaintiff concerning a parcel of real property. The trial court rendered judgment of strict foreclosure in favor of the plaintiff and set the law day to run on May 20, 2019. R Co. did not file a timely appeal from the judgment but, on May 15, 2019, filed a motion to open and vacate the judgment. The court denied R Co.'s motion to open and set a new law day for June 24, 2019. On June 10, 2019, pursuant to the

applicable rule of practice (§ 11-11) and within the twenty day appellate stay period, R Co. filed a motion to reargue or to reconsider the court's denial of its motion to open. The court denied the motion to reargue on July 3, 2019, and notice of the court's ruling was sent to the parties on July 5, 2019. The plaintiff thereafter filed a certificate of foreclosure on the land records and quitclaimed the property to another entity. On December 7, 2020, pursuant to statute (§ 49-15), T Co. filed a motion to open and vacate the foreclosure judgment. T Co. claimed that title to the property had never passed to the plaintiff because the June 24, 2019 law day fell within the twenty day appellate stay period and the parties did not receive notice of the trial court's denial of R Co.'s motion to reargue until July 5, 2019. The trial court concluded that T Co.'s motion to open was moot because the filing of R Co.'s motion to reargue did not stay the June 24, 2019 law day and, thus, absolute title had vested in the plaintiff on the passing of the June 24, 2019 law day. *Held* that the trial court erred in determining that it was without subject matter jurisdiction to hear T Co.'s motion to open and vacate the foreclosure judgment: under the applicable rule of practice (§ 63-1 (b)), R Co.'s timely filing of its motion to reargue the court's denial of R Co.'s motion to open and vacate the foreclosure judgment triggered the automatic stay provision in the applicable rule of practice (§ 61-11 (a)) until the parties received notice of the court's ruling on R Co.'s motion to reargue on July 5, 2019, and, because the June 24, 2019 law day fell within the extended appellate stay period, the June 24, 2019 law day had no legal effect and could not vest absolute title in the plaintiff; accordingly, the trial court retained jurisdiction to decide T Co.'s motion to open and vacate the foreclosure judgment.

Submitted on briefs December 8, 2021—officially released August 30, 2022

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay*, *J.*, rendered judgment of strict foreclosure; thereafter, the court, *Sheridan*, *J.*, denied the named defendant's motion to open and vacate the judgment; subsequently, the court, *Dubay*, *J.*, denied the named defendant's motion to reargue or to reconsider the denial of its motion to open and vacate the judgment; thereafter, the court, *M. Taylor*, *J.*, denied the motion filed by the defendant Traditions Oil Group, LLC, to open and vacate the judgment; subsequently, the court, *M. Taylor*, *J.*, denied the

motion filed by the defendant Traditions Oil Group, LLC, to reargue or to reconsider the denial of its motion to open and vacate the judgment, and the defendant Traditions Oil Group, LLC, appealed to this court. *Reversed*; *further proceedings*.

Elio Morgan filed a brief for the appellant (defendant Traditions Oil Group, LLC).

Opinion

CRADLE, J. The defendant Traditions Oil Group, LLC,[1] appeals from the judgment of the trial court denying its motion to reargue/reconsider the court's denial of its motion to open the judgment of strict foreclosure rendered in favor of the plaintiff, Lending Home Funding Corporation. On appeal, the defendant claims that the court incorrectly determined that it lacked subject matter jurisdiction to open the judgment of strict foreclosure on the ground that title already had vested in the plaintiff, thereby rendering the defendant's motion to open moot. We agree with the defendant and, accordingly, reverse the judgment of the trial court and remand the matter for further proceedings.[2]

The following facts and procedural history are relevant to our resolution of this appeal. On August 11, 2016, the defendant REI Holdings, LLC (REI), executed

[1] Although the plaintiff's complaint initially named REI Holdings, LLC (REI), and Wayne Francis as defendants, neither REI nor Francis appealed from the judgment of the trial court. We will refer to REI and Francis by name, whereas all references to the defendant are to Traditions Oil Group, LLC, only.

[2] The defendant also claims that the court abused its discretion in summarily denying the defendant's motion to reargue. Because we reverse the trial court's judgment on the basis of the defendant's claim that the court erred in concluding that it was without subject matter jurisdiction to hear the defendant's motion to open, we need not reach the merits of this claim. See, e.g., *Hendricks* v. *Haydu*, 160 Conn. App. 103, 105 n.1, 124 A.3d 554 (2015).

a promissory note in favor of the plaintiff for the principal sum of $247,500, secured by a mortgage on a parcel of real property located at 88 Dawn Drive in South Windsor (property). The defendant Wayne Francis also executed a commercial guaranty in which he personally guaranteed the loan. The defendant, REI, and Francis subsequently defaulted on the note, and the plaintiff commenced the underlying foreclosure action on April 27, 2018.

On October 23, 2018, the plaintiff filed a motion for default against the defendant for failure to disclose a defense, which the court, *Dubay*, *J.*, granted. On January 28, 2019, the court rendered judgment of strict foreclosure in favor of the plaintiff and set the law day to run on May 20, 2019. REI subsequently filed a motion to open and vacate the judgment of strict foreclosure (first motion to open) on May 15, 2019, claiming, inter alia, that the appraised value of the property, as found by the court, was too low. On May 20, 2019, the court, *Sheridan*, *J.*, denied the first motion to open and assigned a new law day for June 24, 2019.

On June 10, 2019, pursuant to Practice Book § 11-11,[3] REI filed a motion to reargue/reconsider the court's denial of the first motion to open (first motion to reargue/reconsider), again contending that the appraised value of the property was incorrect. The court, *Dubay*,

[3] Practice Book § 11-11 provides: "Any motions which would, pursuant to Section 63-1, delay the commencement of the appeal period, and any motions which, pursuant to Section 63-1, would toll the appeal period and cause it to begin again, shall be filed simultaneously insofar as such filing is possible, and shall be considered by the judge who rendered the underlying judgment or decision. The party filing any such motion shall set forth the judgment or decision which is the subject of the motion, the name of the judge who rendered it, the specific grounds upon which the party relies, and shall indicate on the bottom of the first page of the motion that such motion is a Section 11-11 motion. The foregoing applies to motions to reargue decisions that are final judgments for purposes of appeal, but shall not apply to motions under Sections 16-35, 17-2A and 11-12."

J., denied the first motion to reargue/reconsider on July 3, 2019, and notice of the court's ruling was sent to the parties on July 5, 2019.[4] On July 17, 2019, the plaintiff filed a certificate of foreclosure on the South Windsor land records. The plaintiff subsequently executed a quit-claim deed transferring the property to CFAI Special Assets LLC, which was recorded on the South Windsor land records.

On December 7, 2020, the defendant filed a motion to open and vacate the judgment of strict foreclosure (second motion to open) pursuant to General Statutes § 49-15.[5] In its memorandum of law in support of the second motion to open, the defendant argued that the court should open the judgment on the ground that title to the property never effectively passed to the plaintiff. Citing Practice Book § 63-1,[6] as well as our Supreme

[4] The court did not assign a new law day following its denial of the first motion to reargue/reconsider.

[5] General Statutes § 49-15 (a) (1) provides that "[a]ny judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection."

[6] Practice Book § 63-1 provides in relevant part: "(a) General Provisions

"Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. The appeal period may be extended if permitted by Section 66-1 (a). If circumstances give rise to a new appeal period as provided in subsection (c) of this rule, such new period may be similarly extended as long as no extension of the original appeal period was obtained. If a motion is filed within the appeal period that might give rise to a new appeal period as provided in subsection (c) of this rule, the appeal may be filed either in the original appeal period, which continues to run, or in the new appeal period. . . .

"(c) New Appeal Period

"(1) How New Appeal Period is Created

"If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal

Court's decision in *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 579 A.2d 1054 (1990), the defendant claimed, inter alia, that REI's filing of the first motion to reargue/reconsider within the twenty day appellate stay period following the court's denial of the first motion to open extended the appellate stay until the parties received notice of the court's ruling on that motion on July 5, 2019. Because the June 24, 2019 law day fell within the alleged appellate stay period, the defendant argued, the law day had no legal effect and, consequently, title could not have passed to the plaintiff. Accordingly, the defendant claimed that the court's failure to "sua sponte reassign a legally effective law day" and the plaintiff's failure to "move the court to set a new law day outside the appeal period prior to its attempt to enforce the judgment" constituted good cause to open the judgment.

On February 16, 2021, the court, *M. Taylor*, *J.*, denied the defendant's motion to open on the ground that the court was without subject matter jurisdiction to hear the motion.[7] Specifically, the court determined that our Supreme Court in *Sullivan* had "relied upon the antiquated language of Practice Book [1978–97] § 4009, which stayed an appeal period until the issuance of notice of the decision upon the motion or the expiration of the time within which a remittitur is ordered filed. . . . This section of the Practice Book regarding the time for an appeal has been amended and is now codified in Practice Book § 63-1, which no longer provides

shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . . Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek . . . *reargument of the judgment or decision* . . . ." (Emphasis added.)

[7] On January 28, 2021, the defendant filed a motion to correct a scrivener's error in the court's order, which incorrectly identified the movant as REI, rather than the defendant. The court vacated the initial order and issued a corrected order on February 16, 2021.

for a continuance of a stay, awaiting a decision on an intervening motion." (Internal quotation marks omitted.) Accordingly, the court concluded that REI's filing of the first motion to reargue/reconsider did not stay the June 24, 2019 law day until that motion was decided and that absolute title vested in the plaintiff upon the passing of the law day, thereby rendering the defendant's motion moot. The defendant subsequently filed a motion to reargue/reconsider (second motion to reargue/reconsider), again contending that the law day fell within the appellate stay period and, therefore, title never effectively passed to the plaintiff.[8] The court denied the second motion to reargue/reconsider on February 16, 2021. This appeal followed.[9]

The dispositive issue on appeal is whether the court improperly concluded that it lacked subject matter jurisdiction to hear the second motion to open and vacate the judgment of strict foreclosure because absolute title had vested in the plaintiff following the June 24, 2019 law day. Specifically, we must determine whether REI's filing of the first motion to reargue/reconsider the court's denial of the first motion to open tolled the automatic stay, pursuant to Practice Book § 61-11 (a),[10]

[8] To clarify the procedural posture in the present appeal, we note that the first motions to open and to reargue/reconsider each challenged the appraisal value set forth in the court's judgment of strict foreclosure. The second motions to open and to reargue/reconsider each contended that REI's filing of the first motion to reargue, which fell within the twenty day appellate stay period following the court's denial of the first motion to open, operated to extend the appellate stay period until the parties received notice of the court's denial of the first motion to reargue on July 5, 2019.

[9] On December 10, 2021, this court ordered, sua sponte, that the parties file supplemental memoranda of law addressing the issue of whether REI's filing of the first motion to reargue/reconsider the trial court's order denying REI's motion to open and vacate the judgment and setting a new law day extended the automatic stay under Practice Book § 61-11 (a).

[10] Practice Book § 61-11 (a) provides: "Automatic Stay of Execution

"Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. If the

until that motion was decided. We agree with the defendant that REI's filing of the first motion to reargue, pursuant to Practice Book §§ 11-11 and 63-1,[11] extended the appellate stay period until July 5, 2019, when the parties received notice of the court's ruling on that motion. See Practice Book 63-1 (b).[12] Because the June 24, 2019 law day fell within the extended appellate stay period, it had no legal effect and could not vest absolute title in the plaintiff. Accordingly, the court improperly determined that it did not have jurisdiction to hear the defendant's motion to open and vacate the judgment of strict foreclosure.

We begin by setting forth the standard of review and relevant legal principles that guide our resolution of the defendant's appeal. "Because the principal issue on appeal concerns questions of law, namely, subject matter jurisdiction and the scope of the appellate stay provisions in the rules of practice, our review is plenary." *Wells Fargo Bank of Minnesota, N.A.* v. *Morgan*, 98 Conn. App. 72, 78, 909 A.2d 526 (2006); see also *Chamerda* v. *Opie*, 185 Conn. App. 627, 637–38, 197 A.3d 982 ("A determination regarding a trial court's subject matter jurisdiction is a question of law. When

case goes to judgment on appeal, any stay thereafter shall be in accordance with Section 71-6 (motions for reconsideration), Section 84-3 (petitions for certification by the Connecticut Supreme Court), and Section 71-7 (petitions for certiorari by the United States Supreme Court)."

[11] Practice Book § 11-11 incorporates by reference "[a]ny motions which would, pursuant to Section 63-1, delay the commencement of the appeal period, and any motions which, pursuant to Section 63-1, would toll the appeal period and cause it to begin again," including, as stated in Practice Book § 63-1 (c) (1), "motions that seek . . . reargument of the judgment or decision . . . ."

[12] Practice Book § 63-1 (b) provides in relevant part that, "[i]f notice of the judgment or decision is given in open court, the appeal period shall begin on that day. If notice is given only by mail or by electronic delivery, the appeal period shall begin on the day that notice was sent to counsel of record by the clerk of the trial court. . . ."

In the present case, the parties were informed of the court's denial of the first motion to open via court notice on July 5, 2019.

. . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.)), cert. denied, 330 Conn. 953, 197 A.3d 893 (2018); *Zirinsky* v. *Zirinsky*, 87 Conn. App. 257, 269, 865 A.2d 488 ("[w]e are required to interpret the scope of [the] rules of practice; accordingly, we are presented with a question of law over which our review is plenary"), cert. denied, 273 Conn. 916, 871 A.2d 372 (2005).

"The opening of judgments of strict foreclosure is governed by § 49-15, which provides in relevant part: Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified . . . *provided no such judgment shall be opened after the title has become absolute in any encumbrancer* . . . ." (Emphasis in original; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Pardo*, 170 Conn. App. 642, 651–52, 155 A.3d 764, cert. denied, 325 Conn. 912, 159 A.3d 231 (2017).

"In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by

the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession." (Internal quotation marks omitted.) *Seminole Realty, LLC* v. *Sekretaev*, 192 Conn. App. 405, 414–15, 218 A.3d 198, cert. denied, 334 Conn. 905, 220 A.3d 35 (2019). "Thus, once the law day passes and title vests in the [plaintiff], no practical relief is available [p]rovided that this vesting has occurred pursuant to an authorized exercise of jurisdiction by the trial court . . . ." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Pardo*, supra, 170 Conn. App. 652. In other words, "§ 49-15 (a) (1) . . . generally prohibits mortgagors from obtaining practical relief after the passage of the law days and, as a result, [renders] . . . postvesting motions to open a judgment . . . moot." *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 375, 260 A.3d 1187 (2021).[13]

On the other hand, it is well established that "law days that are set forth in a judgment of strict foreclosure can have no legal effect if an appellate stay is in effect because to give them legal effect would result in an extinguishment of the right of redemption pending appeal." *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 91 n.11, 172 A.3d 1263 (2017); see also *Continental Capital Corp.* v. *Lazarte*, 57 Conn. App. 271, 273–74,

[13] That general rule notwithstanding, we note "that trial courts possess inherent powers that support certain limited forms of continuing equitable authority . . . and that these powers can, in certain rare and exceptional cases, be exercised in a manner consistent with after the passage of the law days." (Citation omitted.) *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 376–77. Specifically, "§ 49-15 does not deprive the trial court of jurisdiction to open a judgment of foreclosure [after the passage of the law days] to correct an inadvertent omission in the foreclosure complaint." (Internal quotation marks omitted.) Id., 377. Likewise, a trial court possesses an "inherent, continuing, and equitable" authority, even after the passage of the law days, to open a judgment of strict foreclosure for the purpose of enforcing its previous judgment. Id., 378. These limited exceptions, however, are not at issue in the present appeal.

749 A.2d 646 (2000) ("Law days are ineffective while the appeal period is pending. To conclude otherwise would be tantamount to depriving a party of judicial review and, therefore, of due process of law.").

In the context of strict foreclosure, our Supreme Court in *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 216 Conn. 341, addressed the issue of whether a motion to open, filed pursuant to Practice Book (1978–97) § 4009,[14] the predecessor of Practice

[14] Practice Book (1978–97) § 4009 provides in relevant part: "TIME TO APPEAL.

"The party appealing shall, within twenty days, except where a different period is provided by statute, from the issuance of notice of the rendition of the judgment or decision from which the appeal is taken file an appeal in the manner prescribed by Sec. 4012; but if within the appeal period any motion is filed which, if granted, would render the judgment or decision ineffective, as, for example, a motion to open the judgment or to set aside the verdict or for judgment notwithstanding the verdict, the period of time for filing an appeal shall commence from the issuance of notice of the decision upon the motion or the expiration of the time within which a remittitur is ordered filed. . . .

"The time for filing the appeal or for taking any of the steps necessary to prosecute or defend the appeal, as hereinafter provided, may be extended in accordance with the provisions of Sec. 4040."

In its order denying the defendant's second motion to reopen the judgment of strict foreclosure, the court concluded that "[t]he *Sullivan* court . . . relied upon the antiquated language of Practice Book [1978–97] § 4009, which stayed an appeal period until 'the issuance of notice of the decision upon the motion or the expiration of the time within which a remittitur is ordered filed . . . .' This section of the Practice Book regarding the time for an appeal has been amended and is now codified in Practice Book § 63-1, which no longer provides for a continuance of a stay, awaiting a decision on an intervening motion."

Although the court was correct in noting that Practice Book (1978–97) § 4009 has been amended and is now codified as Practice Book § 63-1, we conclude that the court erred in determining that motions filed pursuant to Practice Book § 63-1 no longer trigger the automatic stay pursuant to Practice Book § 61-11 (a). As an initial matter, we note that the rule was rewritten "primarily for clarity" and to "resolve certain ambiguities" rather than to effect substantive changes in its operation. W. Horton & K. Bartschi, Connecticut Practice Series: Rules of Appellate Procedure (2020–2021 Ed.) § 63-1, historical note, p. 145. Moreover, our courts repeatedly have reestablished the principle that the timely filing of a motion to open pursuant to Practice Book § 63-1 stays the execution of the judgment of strict foreclosure until

Book § 63-1, operated to toll the automatic stay period until that motion was decided. In so doing, the court in *Sullivan* distinguished between motions to open that are *timely filed* within the twenty day appellate period following the court's judgment of strict foreclosure and those that are untimely filed. See id., 348–50. When a motion is filed *after* the expiration of the twenty day appellate stay period, the motion must be heard, and not merely filed, prior to the vesting of title, for the court to retain jurisdiction over the motion. Id., 349–50. By contrast, when a motion is filed *within* the appellate stay period, the filing of the motion extends the stay period until that motion is decided, even when a law day is scheduled to run before the court has an opportunity to resolve the motion. Id., 346–47, 349–50; see also *Continental Capital Corp.* v. *Lazarte*, supra, 57 Conn. App. 273 ("[l]aw days in a strict foreclosure cannot run if a motion to open is filed during the appeal period but is yet to be ruled on"). Stated otherwise, the timely filing of a motion to open, pursuant to Practice Book § 63-1, "activate[s] the automatic stay under [Practice Book § 61-11]" until that motion is decided; *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 346; rendering "any redemption . . . violative of the automatic stay, and any title derived through such stated proceedings . . . subject to defeasance." (Internal quotation marks omitted.) Id., 349. Accordingly, it is well settled that, when a motion to open is timely filed within the twenty day appeal period following the court's judgment of strict foreclosure, any law day scheduled before the motion is decided has no effect, and the court retains jurisdiction to decide the motion. See id., 346–47, 349–50; see also *Continental Capital Corp.* v. *Lazarte*, supra, 273–74.

that motion is decided. See, e.g., *Deutsche Bank National Trust Co.* v. *Fraboni*, 182 Conn. App. 811, 830, 191 A.3d 247 (2018); see also *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 686, 899 A.2d 586 (2006).

In the present case, although the matter before the court involves a timely motion to reargue/reconsider the trial court's denial of a motion to open and vacate the judgment of strict foreclosure, rather than a timely filed motion to open following the court's judgment of strict foreclosure, we conclude that the rule set forth in *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 216 Conn. 341, governs our disposition of this appeal. Accordingly, for the reasons we will set forth, REI's timely filing of the motion to reargue/reconsider within the appellate stay period operated to extend that period until the parties received notice of the court's decision of that motion on July 5, 2019.

In determining whether REI's filing of the first motion to reargue/reconsider extended the appellate stay until the parties received notice of the court's denial of that motion, we turn to the rules of practice that govern the creation of new appeal periods under Practice Book § 63-1 and their relation to automatic stays of execution under Practice Book § 63-11.

Practice Book § 63-1 (a) provides in relevant part that, "[u]nless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. . . . If a motion is filed within the appeal period that might give rise to a new appeal period as provided in subsection (c) of this rule, the appeal may be filed either in the original appeal period, which continues to run, or in the new appeal period. . . ." Our Supreme Court previously has held that a trial court's denial of a motion to open is an appealable final judgment that gives rise to a twenty day appeal period following the resolution of that motion. See *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 687 n.8, 150 A.3d 675 (2016) ("[t]he denial of a motion to open a judgment of strict foreclosure is an appealable final judgment itself and

distinctly appealable from the underlying judgment"); see also Practice Book §§ 61-11 and 63-1.

Practice Book § 63-1 (c) (1) governs the creation of new appeal periods and provides in relevant part that, "[i]f a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion. . . . Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: *the opening or setting aside of the judgment* [and] . . . *reargument of the judgment or decision* . . . ." (Emphasis added.) This court previously has determined that the timely filing of a motion to reargue the denial of a motion to open gives rise to a new twenty day appeal period to challenge the denial of the motion to open for the purposes of § 63-1 (c) (1).[15] See *Gibbs*

[15] We note that this court has drawn a distinction between the creation of new appeal periods and the extension of preexisting appeal periods in situations where a party files a motion to reargue a trial court's denial of a motion to open. Practice Book § 63-1 (c) (1) provides in relevant part that "[m]otions that do not give rise to a new appeal period include those that seek . . . reargument of a motion listed in the previous paragraph [including motions that seek the opening or setting aside of the judgment]."

Despite the plain language of Practice Book § 63-1 (c) (1), this court in *Gibbs* v. *Spinner*, 103 Conn. App. 502, 506 n.4, 930 A.2d 53 (2007), held that the timely filing of a motion to reargue the denial of a motion to open the judgment gives rise to a new twenty day appeal period *to challenge the denial of the motion to open*. By contrast, the timely filing of such a motion does not *extend the appeal period to challenge the merits of the underlying judgment*. Id.; see also *Opoku* v. *Grant*, 63 Conn. App. 686, 693–94, 778 A.2d 981 (2001). Accordingly, REI's filing of the first motion to reargue/reconsider following the court's denial of the first motion to open would not operate to extend the twenty day appeal period following the court's judgment of strict foreclosure by which to challenge the merits of the judgment of strict foreclosure.

We conclude, however, that the timely filing of the first motion to reargue/reconsider extended the automatic stay period following the court's denial of the first motion to open, by which to challenge the court's denial of the

v. *Spinner*, 103 Conn. App. 502, 506 n.4, 930 A.2d 53 (2007); see also *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 845, 158 A.3d 405 (2017).

We find this court's decision in *Brooklyn Savings Bank* v. *Frimberger*, 29 Conn. App. 628, 617 A.2d 462 (1992), to be instructive in resolving the present appeal. In *Frimberger*, following the entry of a judgment of strict foreclosure, the defendant filed a motion to reopen the judgment and extend the law day. Id., 630. The trial court denied that motion, and the defendant appealed "well within the twenty day period from the issuance of the notice of the trial court's denial of the motion." Id. On appeal, this court concluded that the defendant's appeal was not moot. See id., 632. First, this court determined that the trial court's denial of the defendant's motion to open the judgment "resulted in the entry of an appealable final judgment invoking the automatic stay under [Practice Book (1978–97)] § 4046."[16] Id., 631. This court then concluded that "[*t*]*he stay remain*[*ed*] *in effect until the disposition of* [*the*] *appeal because the defendant's appeal was timely filed during the appeal period* . . . ." (Emphasis added.) Id.

In the present case, REI did not file an appeal within the twenty day appeal period following the court's denial of the first motion to open but, rather, filed the first motion to reargue/reconsider. It is well established,

motion to open, until the motion to reargue was decided. See *Young* v. *Young*, 249 Conn. 482, 496, 733 A.2d 835 (1999); see also *Brooklyn Savings Bank* v. *Frimberger*, 29 Conn. App. 628, 630–31, 617 A.2d 462 (1992). While we are bound by this court's holding in *Gibbs*, we also acknowledge that either clarification of Practice Book § 63-1 (c) (1) or review by our Supreme Court may be warranted.

[16] Practice Book (1978–97) § 4046 provides in relevant part that, "[i]n all actions, except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment shall be automatically stayed until the time to take an appeal has expired . . . ." Practice Book (1978–97) § 4046 has since been recodified as Practice Book § 61-11.

however, that "[a] motion filed within the appeal period automatically stays the judgment if an appeal from the judgment would do so." W. Horton & K. Bartschi, Connecticut Practice Series: Rules of Appellate Procedure (2020–2021 Ed.) § 61-11, p. 117, authors' comments (citing *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 216 Conn. 349); see also *Weinstein* v. *Weinstein*, 275 Conn. 671, 699, 882 A.2d 53 (2005) ("the filing of a motion [pursuant to Practice Book § 63-1] that seeks an alteration, rather than a clarification, of the judgment suspends the appeal period"); *Young* v. *Young*, 249 Conn. 482, 496, 733 A.2d 835 (1999) (interpreting Practice Book § 63-1 such that "the defendants' motion to reargue [pursuant to Practice Book § 11-11] suspended the . . . appeal period . . . until the . . . denial of that motion"). We conclude, therefore, that there is no meaningful distinction between REI's timely filing of the first motion to reargue the court's denial of the first motion to open in the present case, and the timely filing of a motion to open the judgment of strict foreclosure in *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 346–50. Accordingly, we conclude that the rule set forth in *Sullivan* controls our disposition of the present appeal.

Applying the foregoing rationale to the unique facts of the present case, we conclude that the court erred in determining that it was without subject matter jurisdiction to hear the defendant's second motion to open. The court's denial of REI's first motion to open was "an appealable final judgment . . . from which an automatic twenty day [appellate] stay [arises]." *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, supra, 171 Conn. App. 845; see also Practice Book §§ 61-11 (a) and 63-1 (a). In addition, REI's filing of the first motion to reargue was a motion that, if granted, could render the court's ruling on the first motion to open ineffective under Practice Book § 63-1. See *Young* v. *Young*, supra,

249 Conn. 494–96; *Atlantic St. Heritage Associates, LLC* v. *Bologna*, 204 Conn. App. 163, 170, 252 A.3d 881 (2021) (holding that both motions to reargue and motions to open were among motions that would "render . . . judgment ineffective pursuant to Practice Book § 63-1 (c) (1)"). It is undisputed that REI's filing of the first motion to reargue/reconsider on June 10, 2019, was timely filed within the twenty day period following the court's denial of the first motion to open.[17] As such, REI's timely filing of the motion to reargue triggered the automatic stay provision, pursuant to Practice Book § 61-11 (a), until the parties received notice of the court's denial of the first motion to reargue on July 5, 2019.[18] See *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 216 Conn. 346–50; see also *Young* v. *Young*, supra, 494–96; Practice Book § 63-1 (b). Therefore, the June 24, 2019 law day passed during the appellate stay period and could not have had the legal effect

[17] The twentieth day following the court's denial of REI's motion to open was June 9, 2019, which fell on a Sunday. Because REI filed the motion to reargue/reconsider on June 10, 2019, the next business day, it is considered timely filed within the appeal period. See General Statutes § 51-347c.

[18] For clarity, we note that Practice Book § 61-11 (g) is not applicable to the present action. Section 61-11 (g) was enacted "to a put a stop to the 'perpetual motion machine' and accompanying appellate litigation generated when a defendant files serial motions to open a judgment of strict foreclosure and, each time a motion to open is denied, files a new appeal from the judgment denying the motion to open." (Footnote omitted.) *Connecticut National Mortgage Co.* v. *Knudsen*, supra, 323 Conn. 687.

Practice Book § 61-11 (g) provides in relevant part that, "[i]n any action for foreclosure in which the owner of the equity has filed, and the court has denied, *at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party*, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion . . . ." (Emphasis added.)

Because the first motion to reargue/reconsider the court's denial of the first motion to open was only the second "motion to open or other similar motion" filed subsequent to the judgment of strict foreclosure, and because the court did not deny the motion to reargue/reconsider until July 5, 2019, Practice Book § 61-11 (g) does not apply. Accordingly, an appellate stay

of vesting absolute title in the plaintiff. See *Sovereign Bank* v. *Licata*, supra, 178 Conn. 91 n.11; *Continental Capital Corp.* v. *Lazarte*, supra, 57 Conn. App. 273–74. Accordingly, the court's determination that it did not have jurisdiction to hear the merits of the defendant's second motion to open the judgment of strict foreclosure was improper. "To hold otherwise would circumvent the automatic stay provisions established by our rules of practice." *Wells Fargo Bank of Minnesota, N.A.* v. *Morgan*, supra, 98 Conn. App. 84.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.[19]

In this opinion the other judges concurred.

REGINA MENTION *v.* KENSINGTON SQUARE APARTMENTS (AC 42832)

Elgo, Cradle and Alexander, Js.

Syllabus

The plaintiff tenant sought, inter alia, an order to compel the defendant to exterminate an infestation of insects and rodents in her leased premises, one of six rental units in a building for which the defendant is the landlord. The plaintiff, who was the recipient of a rent subsidy, first reported the infestation to the defendant and then contacted the municipal agency responsible for housing code enforcement in the city in which the premises was located. An inspector from the agency ordered the defendant to rid the premises of the infestation and issued a notice of compliance after the defendant treated the infestation. The plaintiff

was in place until the court's denial of that motion on July 5, 2019. See *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 216 Conn. 346–50.

[19] We reiterate that our decision is limited to the question of whether the trial court had subject matter jurisdiction to consider the second motion to open. We express no view on the merits of that motion, which is left to the sound discretion of the trial court. In exercising its discretion, the court may consider a number of factors, including the fact that the defendant never appealed from the original judgment of strict foreclosure, the court's order denying the first motion to open, and/or the court's order denying the first motion to reargue/reconsider.

thereafter filed a complaint for housing code enforcement pursuant to the applicable statute (§ 47a-14h), alleging that the defendant violated the statute (§ 47a-7 (a) (1)) when it failed to exterminate the infestation in the premises, and she began paying her portion of the monthly rent to the clerk of the court pursuant to § 47a-14h. The defendant filed a counterclaim alleging that the plaintiff had prevented and/or failed to prepare for its access to the premises in an attempt to debilitate and/or thwart its ability to comply with the housing code enforcement orders. The trial court determined that the premises had been infested with insects and rodents for more than one year, the defendant's efforts to remediate the infestation had not been reasonable as, inter alia, other units within the building also remained infested, and the defendant had violated its duties as a landlord pursuant to § 47a-7 and the housing code. The court rendered judgment in favor of the plaintiff on her complaint and on the defendant's counterclaim and awarded the plaintiff, inter alia, an abatement of any rent in arrearage and six months of prospective abatement of rent based on her share of the subsidized rent. Thereafter, the defendant appealed to this court, claiming, inter alia, that the court improperly concluded as a matter of law that the defendant had violated the housing code and the housing code was unconstitutionally vague, and the plaintiff filed a cross appeal, arguing that the court erred in calculating rent abatement based on her share of the subsidized rent. *Held*:

1. This court declined to review the defendant's claim that the trial court lacked subject matter jurisdiction to consider evidence of housing code violations that predated the filing of the plaintiff's complaint with the municipal agency; the defendant did not dispute that the trial court had subject matter jurisdiction over the plaintiff's complaint, as the plaintiff complied with the requirement pursuant to § 47a-14h that a complaint be made to the municipal agency responsible for enforcement of the housing code at least twenty-one days prior to the filing of a complaint with the court, and the defendant's claim that the trial court did not have jurisdiction over any evidence of housing code violations prior to the filing of the complaint was an evidentiary claim raised for the first time on appeal.
2. The defendant could not prevail on its claim that the trial court improperly concluded as a matter of law that the defendant violated the housing code; the city's housing code plainly and unambiguously required that, when an infestation exists in two or more dwelling units, the owner of the property was responsible for extermination, defined as the control and elimination of insects or other pests, and the court's factual findings that the defendant did not act reasonably to resolve the infestation problem because its actions were too slow and not effective were not clearly erroneous, as, on the basis of the evidence presented at trial, the court found that the premises and several other units in the building had been infested, that more than one year had elapsed between the

initial report of infestation and the notice of compliance from the municipal agency, and that multiple other units remained infested in violation of the housing code.

3. The defendant could not prevail on its claim that the housing code, as applied to it in this case, was unconstitutionally vague: although the plaintiff claimed that the defendant failed to exhaust its administrative remedies, the doctrine of exhaustion of administrative remedies was not applicable, as the municipal agency responsible for enforcing the housing code was not a state agency as defined by statute (§ 4-166 (1)); moreover, the defendant's unpreserved claim that the housing code was void for vagueness failed to meet the requirement of *State* v. *Golding* (213 Conn. 233) that a constitutional violation occurred that deprived the defendant of a fair trial, as the defendant had proper notice of what constituted an infestation under the housing code and the required steps to remedy such an infestation, and the housing code did not lack minimal guidelines or sufficient standards to guide the municipal agency or the court with respect to its proper application in this case.

4. The plaintiff could not prevail on her claim in her cross appeal that the trial court erred in calculating rent abatement based on her share of the subsidized rent rather than the full market rent: § 47a-14h clearly and unambiguously authorized the court to order abatement of rent and return such rent paid to the court in proportion to the amount paid by each party; moreover, although the court was not required to make the subsidizing entity a party to the action, and the subsidizing entity was not made a party, the statute explicitly provided that, when a subsidizing entity is joined as a party and pays its share of rent to the court, any rent to be returned shall be returned to the tenant and such entity in proportion to the amount of rent each deposited with the court.

Argued March 1—officially released August 30, 2022

Procedural History

Action for housing code enforcement, and for other relief, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Cordani*, *J.*; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

James P. Sexton, with whom were *John Weikart*, and, on the brief, *Megan Wade*, for the appellant-cross appellee (defendant).

Areeb Siddiqui and *Patrick Monaghan*, certified legal interns, with whom were *J. L. Pottenger, Jr.*, and, on the brief, *Shannon Price* and *Nathan Leys*, certified legal interns, for the appellee-cross appellant (plaintiff).

Melissa Marichal and *Shelley White* filed a brief for New Haven Legal Assistance Association et al. as amici curiae.

Opinion

ALEXANDER, J. In this housing code enforcement action, the defendant, Kensington Square Apartments, appeals from the judgment of the trial court rendered in favor of the plaintiff, Regina Mention. On appeal, the defendant claims that (1) the court lacked subject matter jurisdiction to consider evidence in support of the plaintiff's claim that predated the filing of her complaint with the New Haven Livable City Initiative (Initiative), (2) the court improperly concluded as a matter of law that the defendant violated title V of the New Haven Code of Ordinances (housing code), and (3) the housing code is unconstitutionally vague. The plaintiff also challenges the judgment of the trial court, by way of a cross appeal, claiming that the court erred in calculating rent abatement based on her share of the subsidized rent, rather than the full market rent. We affirm the judgment of the trial court.

The following facts, as found by the court or otherwise undisputed by the parties, and procedural history are relevant to this appeal. In February, 2017, the plaintiff moved into an apartment located at 166 Edgewood Avenue, Apartment 2, in New Haven (premises). The premises is one of six rental units in the building. The defendant is the landlord of the premises. The plaintiff's rent is subsidized and her share is $226 per month.[1]

[1] The plaintiff is a recipient of a rent subsidy under the housing assistance program administered by the Department of Housing and Urban Development pursuant to section 8 of the National Housing Act, as amended in 1974 and codified at 42 U.S.C. § 1437f. The subsidizing agency was not made a party to this action in the trial court, nor is it a party to this appeal.

The premises became infested with insects and rodents around September, 2017, at which time the plaintiff reported the infestation to the defendant. Several other rental units in the building had been infested with insects and rodents during the period in which the premises was infested and remained infested through the date of trial. The defendant hired an exterminator who visited the premises several times between September, 2017, and December, 2018.

On September 17, 2018, the plaintiff contacted the Initiative to report the infestation of the premises. The Initiative is the municipal agency responsible for housing code enforcement in New Haven. On September 20, 2018, an inspector from the Initiative examined the premises and found evidence of insect and rodent infestation. The inspector determined that, pursuant to article III, paragraph 309 of the housing code, the defendant was responsible for extermination and ordered the defendant to rid the apartment of the insect and rodent infestation within three days and to provide documentation of a treatment plan from a licensed exterminator. See New Haven Code of Ordinances, tit. V, art. III, ¶ 309. The defendant treated the infestation and the inspector issued a notice of compliance on December 19, 2018.

On November 15, 2018, the plaintiff initiated this action by filing a complaint for housing code enforcement pursuant to General Statutes § 47a-14h, in which she alleged that the defendant had violated General Statutes § 47a-7 (a) (1)[2] by failing to exterminate the infestation in the premises. The plaintiff sought (1) an order directing the defendant to comply with its duties pursuant to § 47a-7 (a) (1), (2) an order appointing a

[2] General Statutes § 47a-7 (a) (1) provides: "A landlord shall: (1) Comply with the requirements of chapter 368o and all applicable building and housing codes materially affecting health and safety of both the state or any political subdivision thereof . . . ."

receiver to collect rent pursuant to § 47a-14h (h),[3] (3) a retroactive abatement of rent paid, and (4) such other relief in law or equity that the court may deem proper. As a result of the plaintiff's complaint and pursuant to § 47a-14h (h), the plaintiff began paying her portion of the monthly rent to the clerk of the court. The defendant filed an answer, special defenses, and counterclaim. In its counterclaim, the defendant alleged that the plaintiff "prevented access and/or failed to prepare for . . . repairs and/or services in an effort to debilitate and/or thwart the counterclaim defendant's attempts to comply with such housing code enforcement orders or repair/service requests of the counterclaim plaintiff." The defendant also raised the defense of unclean hands, alleging that the plaintiff made numerous requests for repairs of the premises but never complained of pests or rodents as alleged in the complaint.

A trial on the plaintiff's complaint and the defendant's counterclaim was held on February 28 and March 28, 2019. In its memorandum of decision, the court found that the premises was infested with insects and rodents from September, 2017, until at least December 19, 2018, and that such infestation materially affected the health and safety of the occupants. It also found that the plaintiff did not contribute to the infestation, that she expended her own resources and time in addressing the infestation, and that she reasonably cooperated with the defendant in its attempts to remedy the infestation. The court further found that, "to a small extent, insects and rodents still exist in the premises, likely because

[3] General Statutes § 47a-14h (h) provides in relevant part: "On each rent due date on or after the date when the complaint is filed with the clerk of the court, or within nine days thereafter . . . the tenant shall deposit with the clerk of the court an amount equal to the last agreed-upon rent. If all or a portion of the tenant's rent is being paid to the landlord by a housing authority, municipality, state agency or similar entity, this requirement shall be satisfied if the tenant deposits an amount equal to such tenant's portion of the last agreed-upon rent with the clerk. . . ."

the insect and rodent infestation in other rental units within the building [had] not yet been brought under control." The court determined that, although the defendant had "exerted substantial efforts to remediate the infestation problem . . . the defendant's efforts were not reasonable because of (i) the long time period that elapsed between initial report (September, 2017) and compliance (December, 2018), (ii) the fact that other units within the building remain infested, and (iii) insects still enter the premises, albeit to a much lesser extent, from the other units in the building." The court concluded that the defendant had violated its duties as a landlord pursuant to § 47a-7 and the housing code.

The court rendered judgment in favor of the plaintiff on her complaint and on the defendant's counterclaim. It awarded the plaintiff $1130, the amount of rent she had paid into court. It also awarded an abatement of any rental arrearage that may exist and six months of prospective abatement of rent. Finally, the court ordered the defendant to eradicate the insect and rodent infestation in the entire building within two months. This appeal and cross appeal followed.

I

We first address the defendant's claim that the court lacked subject matter jurisdiction to consider evidence in support of the plaintiff's claim that predated the filing of her complaint with the Initiative. Specifically, the defendant contends that, because a cause of action pursuant to § 47a-14h is purely statutory, the court did not have jurisdiction over the case until the plaintiff filed the complaint with the Initiative and waited twenty-one days to file a complaint in the Superior Court. The defendant claims that the court could not consider evidence regarding any violations that took place prior to the date when the complaint was filed with the Initiative. We disagree.

We begin our analysis by setting forth the standard of review and legal principles relevant to our review of this claim. "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover . . . [s]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . [J]urisdiction of the [subject matter] is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Citation omitted; internal quotation marks omitted.) *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 338 Conn. 651, 658, 258 A.3d 1244 (2021). Furthermore, "[a] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . ." (Internal quotation marks omitted.) *Premier Capital, LLC* v. *Shaw*, 189 Conn. App. 1, 5, 206 A.3d 237 (2019).

We next set forth the relevant language of the statute. Section 47a-14h provides in relevant part: "(a) Any tenant who claims that the landlord has failed to perform his or her legal duties, as required by section 47a-7 . . . may institute an action in the superior court having jurisdiction over housing matters in the judicial district in which such tenant resides to obtain the relief authorized by this section . . . . (b) The action shall be instituted by filing a complaint, under oath, with the clerk of the court. . . . The complaint shall also allege that at least twenty-one days prior to the date on which the complaint is filed, the tenant made a complaint concerning the premises to the municipal agency, in the municipality where the premises are located,

responsible for the enforcement of the housing code . . . ."

In *Dugan* v. *Milledge*, 196 Conn. 591, 595, 494 A.2d 1203 (1985), our Supreme Court held that the requirement of notification to the housing code enforcement agency set forth in § 47a-14h is mandatory and "[c]ompliance with this essential condition [is] a requisite for the court's jurisdiction." In that case, the plaintiff filed a complaint pursuant to § 47a-14h prior to notifying the housing code enforcement agency. Id., 596. The trial court dismissed the plaintiff's complaint for lack of subject matter jurisdiction. Id., 592. Our Supreme Court affirmed the trial court's dismissal after determining that notification to the housing code enforcement agency was a condition precedent to maintaining the action, and, therefore, that the court lacked subject matter jurisdiction over the plaintiff's complaint. Id., 595–96.

In the present case, the defendant does not dispute that the plaintiff complied with the requirement that a complaint be made to the municipal agency responsible for enforcement of the housing code, namely, the Initiative, at least twenty-one days prior to the filing of a complaint with the court; see General Statutes § 47a-14h (b); or that the court had jurisdiction over the plaintiff's complaint. The defendant contends, however, that any evidence of housing code violations prior to the September 17, 2018 filing of the plaintiff's complaint with the Initiative is outside the court's jurisdiction. We do not agree with the defendant's contention. We conclude that the defendant's claim is not a challenge to the court's subject matter jurisdiction. Rather, it is an evidentiary claim that is being raised for the first time on appeal. The defendant essentially is claiming that the evidence of any violation prior to September 17, 2018, is not relevant to the plaintiff's complaint with the Initiative.

"The standard for the preservation of a claim of improperly admitted evidence at trial is well settled. Practice Book § 60-5 provides in relevant part that [this] court shall not be bound to consider a claim unless it was distinctly raised at the trial . . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . Our rules of practice make it clear that counsel must object to a ruling of evidence [and] state the grounds upon which objection is made . . . to preserve the grounds for appeal. . . . These requirements are not simply formalities. . . . We consistently have stated that we will not consider evidentiary rulings where counsel did not properly preserve a claim of error by objection . . . ." (Internal quotation marks omitted.) *Villa* v. *Rios*, 88 Conn. App. 339, 344, 869 A.2d 661 (2005). The defendant never objected in the trial court to the evidence it now challenges on appeal. Consequently, we decline to review such a claim. The plaintiff plainly complied with the notification requirement set forth in § 47a-14h, and therefore met the jurisdictional requirement set forth in § 47a-14h and recognized by the court in *Dugan* v. *Milledge*, supra, 196 Conn. 595. Accordingly, the court had subject matter jurisdiction over the plaintiff's complaint.

II

We next address the defendant's claim that the court improperly concluded as a matter of law that the defendant violated the housing code. Specifically, the defendant contends that the trial court's incorrect interpretation of the housing code resulted in its improper conclusion that the defendant failed to act reasonably in the context of what the housing code requires. We disagree.

We first set forth our standard of review and the legal principles that guide our analysis. "Our interpretation of ordinances presents a question of law and, therefore,

our review is plenary. . . . We interpret and construe local ordinances according to the principles of statutory construction." (Citation omitted; internal quotation marks omitted.) *Azzarito* v. *Planning & Zoning Commission*, 79 Conn. App. 614, 622, 830 A.2d 827, cert. denied, 266 Conn. 924, 835 A.2d 471 (2003); see also *O'Shea* v. *Scherban*, 339 Conn. 775, 784, 262 A.3d 776 (2021). "Under General Statutes § 1-2z, [t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When 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 . . . ." (Internal quotation marks omitted.) *Diaz* v. *Bridgeport*, 208 Conn. App. 615, 622?23, 266 A.3d 909 (2021).

We next set forth the relevant provisions of the housing code. The housing code authorizes an enforcing officer to "make inspections to determine the condition of . . . [the] premises" in order to safeguard "the health and safety and welfare of the occupants of dwellings and of the general public." New Haven Code of Ordinances, tit. V, art. II, ¶ 200. It further provides in relevant part: "Whenever the enforcing officer determines that there are reasonable grounds to believe that there has been a violation of any provision of this title, he shall give notice of such alleged violation to the person or persons responsible therefor, as hereinafter provided. Such notice shall: (a) Be in writing; (b) Include a statement of the reason why it is being issued; (c) Allow a reasonable time for the performance of any

act it requires . . . (e) Contain an outline of remedial action, which if taken, will effect compliance with the provisions of this title and with rules and regulations adopted pursuant thereto." Id., ¶ 201. Additionally, the housing code provides that, "[w]henever infestation exists, in two (2) or more of the dwelling units in any dwelling . . . extermination shall be the responsibility of the owner." Id., art. III, ¶ 309.

The housing code also provides relevant definitions. It defines extermination as "the control and elimination of insects, or other pests, by eliminating their harborage places; by removing or making inaccessible materials that may serve as their food; by poisoning, spraying, fumigating, trapping; or by any other recognized and legal pest elimination methods approved by the enforcing officer." Id., art. I, ¶ 100 (h). Infestation is defined as "the presence, within or around a dwelling, [of] any insects, rodents or other pests." Id., ¶ 100 (*l*).

The housing code plainly and unambiguously requires that, when an infestation exists in two or more dwelling units, the owner of the property, in this case the defendant, is responsible for extermination. It also clearly provides that extermination is the "control *and* elimination of insects, or other pests." (Emphasis added). Id., ¶ 100 (h). The court, therefore, properly determined that, because an infestation existed in multiple dwelling units, the defendant was required to remove the infestation by controlling and eliminating insects and rodents from all affected units.

The defendant also challenges the court's determination that, although the defendant took steps to remediate the infestation, it did not act reasonably to resolve the infestation problem because it acted "too slowly and not as effectively as required." To the extent the defendant challenges the court's factual findings, our review of those findings is limited to determining

whether they were clearly erroneous. "In a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to specific testimony. . . . [When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 69, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.3d 205 (2017).

On our thorough review of the record, we cannot conclude that the court's findings were clearly erroneous. On the basis of the evidence presented at trial, the court found that the premises and several other rental units in the building were infested with insects and rodents. The defendant, therefore, was required, pursuant to article III, paragraph 309 of the housing code, to exterminate the plaintiff's premises and any other infested apartments in the building. The court further found that a significant period of time had elapsed between the initial report of infestation and the issuance of the notice of compliance from the Initiative.

Although the housing code authorizes the inspector to uncover violations and provide an outline of remedial

action to be taken, the notice of compliance issued by the Initiative in regard to the premises is not conclusive as to whether the defendant complied with its duties under the housing code. The court noted that insects were still present in the premises, just to a lesser extent, likely due to the fact that the insect and rodent infestation in other rental units had not yet been brought under control. At trial, there was also evidence that cockroaches can travel from one infested rental unit to another and that an individual's housekeeping habits may create conditions that allow for the increase of insect activity. On the basis of the totality of this evidence, it was reasonable for the court to conclude that, until the infestation in each affected rental unit was eliminated, the infestation in the premises would not be adequately addressed. Because the premises remained infested until at least December 19, 2018, and multiple other rental units in the building remained infested, the defendant did not comply with its duties under the housing code because it failed to adequately exterminate the infestation in each infested rental unit, including the premises. See New Haven Code of Ordinances, tit. V, art. III, ¶ 309; id., art. I, ¶ 100 (h).

III

We next address the defendant's contention that the housing code, as applied to it in this case, is unconstitutionally vague. Specifically, the defendant claims that the court's interpretation of the housing code "failed to provide the defendant with notice as to what actually constitutes an 'infestation,' as well as whether the defendant had to take any steps beyond what the Initiative had ordered to ensure its mitigation efforts were reasonable and, if so, what those additional steps were." The defendant further claims that the housing code was arbitrarily and discriminatorily enforced because the court "concluded that, notwithstanding the defendant having done everything the Initiative ordered, indeed

having even made 'substantial efforts' at extermination, its actions were still unreasonable." The defendant concedes that it did not raise its void for vagueness claim before the trial court, but argues that this claim is reviewable pursuant to *State* v. *Golding*, 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). The plaintiff responds that the defendant's void for vagueness challenge is unreviewable because the defendant failed to exhaust its administrative remedies and, therefore, the court lacks subject matter jurisdiction. In the alternative, the plaintiff argues that the defendant cannot prevail under *Golding* because it has failed to demonstrate that the housing code is unconstitutionally vague as applied.

A

We first address the plaintiff's contention that this court lacks subject matter jurisdiction to decide the defendant's void for vagueness claim because the defendant failed to exhaust its administrative remedies by appealing the decision of the Initiative's inspector to New Haven's code enforcement board of appeals. In its reply brief, the defendant responds that its void for "vagueness claim is not one that could have been the subject of an administrative appeal from the agency's order because the claim is that the housing code is vague as applied to the defendant by way of and under the circumstances of the present § 47a-14h proceeding, not a challenge to the original administrative order." We conclude that, because the Initiative is a local agency, rather than a state agency, the doctrine of exhaustion of administrative remedies is inapplicable to the present case. See *Edwards* v. *Code Enforcement Committee*, 13 Conn. App. 1, 10, 534 A.2d 617 (1987).

We begin with our standard of review. "Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must

decide as a threshold matter whether that doctrine requires dismissal of the [defendant's] claim. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Godbout* v. *Attanasio*, 199 Conn. App. 88, 97, 234 A.3d 1031 (2020).

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. . . . The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . . If the available administrative procedure . . . provide[s] the [party] with a mechanism for attaining the remedy that [it] seek[s] . . . [it] must exhaust that remedy. . . . The [party's] preference for a particular remedy does not determine the adequacy of that remedy. [A]n administrative remedy, in order to be adequate, need not comport with the [party's] opinion of what a perfect remedy would be. . . .

"A primary purpose of the doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer." (Citation omitted; internal quotation marks omitted.) *Coyle* v. *Commissioner of Revenue Services*, 142 Conn.

App. 198, 206, 69 A.3d 310 (2013), appeal dismissed, 312 Conn. 282, 91 A.3d 902 (2014).

Article II, paragraph 203 (a) of the housing code provides in relevant part: "Any person adversely affected by any order which has been issued in connection with the enforcement of any provisions of this title may request and . . . shall be granted a hearing on the matter before the board of appeals established under section 21B-7 of the Code of Ordinances . . . ." Paragraph 204[4] provides that, after a hearing, the board may, inter alia, grant an extension or variance. New Haven Code of Ordinances, tit. V, art. II, ¶ 204. The housing code further provides that "[a] person aggrieved by the decision of the enforcing officer or the board of code appeals may seek relief therefrom in any court of competent jurisdiction, as provided by the laws of this state." Id., ¶ 206.

[4] Title V, article II, paragraph 204 of the New Haven Code of Ordinances provides in relevant part: "Such hearing shall be had before the members of said board. Said board, by a majority vote of those present, may sustain, modify or withdraw the notice; it may also grant an extension or variance in accordance with the following conditions:

"(a) Extension. The time for performance of any act required by the order may be extended for not more than eighteen (18) months subject to appropriate conditions and provided that the board makes specific findings of fact based on evidence relating to the following factors:

"(1) That there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any provisions of this title; and

"(2) That such extension is in harmony with the general purpose and intent of this title in securing the public health, safety and general welfare.

"(b) Variances. A variance may be granted in a specific case and from a specific provision of this title subject to appropriate conditions and provided that the board makes specific findings of fact based on evidence relating to the following factors:

"(1) That there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provision;

"(2) That the effect of the application of the provisions would be arbitrary in the specific case;

"(3) That an extension would not constitute an appropriate remedy for these practical difficulties or unnecessary hardships and this arbitrary effect; and

"(4) That such variance is in harmony with the general purpose and intent of this title in securing the public health, safety and general welfare. . . ."

In *Edwards* v. *Code Enforcement Committee*, supra, 13 Conn. App. 10, this court held that the defendant, the code enforcement committee of Vernon, was not a state agency and, therefore, was not subject to provisions of the Uniform Administrative Procedure Act (UAPA), General Statutes §§ 4-166 through 4-189. In *Edwards*, the plaintiffs, owners of real estate in the town of Vernon, were cited by Vernon's housing code inspector for alleged code violations. Id., 2. The plaintiffs appealed to the housing code enforcement committee, which confirmed the inspector's findings, and, thereafter, the plaintiffs appealed to the Superior Court pursuant to General Statutes § 4-183.[5] Id., 3. Service of the petition was made upon the chairman of the code enforcement committee, and the defendant filed a motion to dismiss the appeal due to insufficiency of service of process, claiming that service was not made pursuant to General Statutes § 52-57, which requires that process in a civil action against a town be served upon one of its specified officials. Id. The court granted the defendant's motion to dismiss, and the sole issue in the plaintiff's appeal to this court was whether the court erred in finding that the defendant was not an " 'agency' " within the meaning of the UAPA.[6] Id.

The defendant in *Edwards* maintained that it was a town agency enforcing the local housing code in the exercise of the town's police power, and, therefore, it

[5] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

[6] General Statutes § 4-166 (1) provides: " 'Agency' means each state board, commission, department or officer authorized by law to make regulations or to determine contested cases, but does not include either house or any committee of the General Assembly, the courts, the Council on Probate Judicial Conduct, the Governor, Lieutenant Governor or Attorney General, or town or regional boards of education, or automobile dispute settlement panels established pursuant to section 42-181."

was not a state agency within the provisions of the UAPA. Id., 5. The court reasoned that, "[b]y virtue of . . . legislative delegation of general police powers to local officials and agencies [pursuant to General Statutes § 7-148 (c)], their enforcement has been made a local function and duty." Id., 7. Accordingly, the court concluded that the defendant was not a state agency pursuant to § 4-166 (1) of the UAPA. Id., 11.

In the present case, we conclude that the New Haven housing code enforcement division is not a state agency as defined in § 4-166 (1). See id. Accordingly, the UAPA and the doctrine of exhaustion of administrative remedies are not applicable to the present case.

B

We next address the defendant's claim that the housing code is void for vagueness as applied to the present case. Although it did not raise its void for vagueness claim before the trial court, the defendant contends that this claim is reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. We conclude that the defendant cannot prevail pursuant to *Golding* because the housing code is not void for vagueness as applied to the defendant.

"Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if 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 [party] 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 reasonable doubt. In the absence of any one of these conditions, the [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party's] claim by

focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Madison C.*, 201 Conn. App. 184, 190, 241 A.3d 756, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020). "The first two [*Golding*] requirements involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *Wethersfield ex rel. Monde* v. *Eser*, 211 Conn. App. 537, 554, 274 A.3d 203 (2022).

In the present case, the record is adequate to review the defendant's claim, and the defendant has asserted a claim of constitutional magnitude. We conclude, however, that the defendant has failed to demonstrate that the housing code is unconstitutionally vague as applied to it for purposes of the third prong of *Golding* and, therefore, the defendant cannot prevail on this claim.

"A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . The party challenging a statute's constitutionality has a heavy burden of proof; the unconstitutionality must be proven beyond all reasonable doubt. . . . Additionally, in a vagueness challenge, such as this, civil statutes can be less specific than criminal statutes and still pass constitutional muster. . . . To prove that a statute is unconstitutionally vague, the challenging party must establish that an ordinary person is not able to know what conduct is permitted and prohibited under the statute. . . .

"To demonstrate that [a statute] is unconstitutionally vague as applied to [it], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [it] had inadequate notice of what was prohibited or that [it was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine

embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review. . . . The foregoing principles apply equally to municipal ordinances." (Citation omitted; internal quotation marks omitted.) *Petrucelli* v. *Meriden*, 197 Conn. App. 1, 18–19, 231 A.3d 231, cert. denied, 335 Conn. 923, 233 A.3d 1091 (2020).

The defendant contends that the court's interpretation and application of the housing code rendered the housing code unconstitutionally vague because it (1) failed to provide the defendant with notice as to what constitutes an "infestation" and whether the defendant was required to take any steps beyond what the Initiative had ordered to ensure its mitigation efforts were reasonable and (2) was arbitrarily and discriminatorily enforced because, despite the defendant's efforts at remediation and the Initiative's issuance of a notice of compliance, the court determined that the defendant's efforts were not reasonable.

We begin with the defendant's contention that the housing code does not provide proper notice as to what constitutes an infestation and what steps must be taken when the Initiative identifies an infestation. We disagree.

As we noted in part II of this opinion, the housing code defines an infestation as "the presence, within or around a dwelling, [of] any insects, rodents or other pests." New Haven Code of Ordinances, tit. V, art. I, ¶

100 (*l*). It further defines "extermination" as "the control *and* elimination of insects, or other pests, by eliminating their harborage places; by removing or making inaccessible materials that may serve as their food; by poisoning, spraying, fumigating, trapping; or by any other recognized and legal pest elimination methods approved by the enforcing officer." (Emphasis added.) Id., ¶ 100 (h). The housing code authorizes an enforcing officer to perform inspections and determine the condition of dwellings, as well as to issue notice of alleged violations that includes an outline of remedial action and a reasonable time to perform such actions. See id., art. II, ¶¶ 200, 201. The housing code further provides that, "[w]henever an infestation exists, in two (2) or more of the dwelling units in any dwelling, or in the shared or common parts of any dwelling containing two (2) or more dwelling units, extermination shall be the responsibility of the owner." Id., art. III, ¶ 309.

We conclude that the defendant had proper notice of what constitutes an infestation under the housing code and the required steps to remedy such infestation. The relevant provisions of the housing code expressly state what an infestation is and when a landlord has the duty to exterminate such infestation. It also expressly provides that extermination is both the control *and* the elimination of insects or other pests and provides the manner in which extermination can be performed.

The court, applying the applicable provisions of the housing code, determined that an infestation existed in both the plaintiff's premises and other rental units in the building and that, although such infestation had been treated by an exterminator, it had not been controlled and eliminated as required by the housing code. The fact that the Initiative, after determining that there existed an infestation that violated article III, paragraph

309 of the housing code, issued a notice of compliance[7] to the defendant is not the determining factor as to whether an infestation existed or whether the defendant had complied with its duties under the housing code. In addition to the notice of compliance issued by the Initiative, the court was presented with evidence that insects and rodents still existed in the plaintiff's premises, albeit to a lesser extent, and that there existed an insect and rodent infestation in multiple other rental units in the building that contained the plaintiff's premises. The presence of insects and rodents in the premises and other units was sufficient to satisfy the definition of an infestation provided in the housing code. See id., art. I, ¶ 100 (*l*). Furthermore, although the defendant also claims that three days is not a reasonable time in which to remediate an infestation in a multifamily dwelling, the court ordered the defendant to eradicate the infestation within two months from the date of its decision. We conclude that, on the basis of the facts and circumstances of the present case, a person of ordinary intelligence would know that the presence of insects and rodents in multiple rental units constitutes an infestation as that term is defined in the housing code and that the defendant had a duty to exterminate the infestation in each affected unit by controlling and eliminating the insects and rodents.

We next address the defendant's claim that the housing code was arbitrarily and discriminatorily enforced because the defendant did everything the Initiative ordered and received a notice of compliance, but the court still determined that the defendant's efforts were not reasonable. We disagree.

The defendant claims that the vagueness of the housing code impermissibly delegates basic policy matters

[7] We note that the letter of compliance issued by the Initiative to the defendant related only to the plaintiff's premises and not to other infested units in the building.

to the Initiative and to the court and that the housing code's lack of meaningful guidance resulted in its arbitrary and discriminatory enforcement. In light of the evidence that insects and rodents still existed in the plaintiff's premises at the time of trial, and that several rental units in the building remained infested, the court, applying the relevant, express provisions of the housing code, properly concluded that an infestation existed and that the defendant had not complied with the provisions of the housing code requiring it to exterminate an infestation that exists in two or more dwelling units. See id., art. III, ¶ 309. We cannot conclude that the housing code lacked minimal guidelines or sufficient standards to guide the Initiative and the court with respect to its proper application in the present case.

We conclude that the defendant has failed to meet its burden of demonstrating beyond a reasonable doubt that it lacked adequate notice or that it was the victim of arbitrary and discriminatory enforcement. Accordingly, the defendant's claim fails under *Golding*'s third prong because it failed to establish that a constitutional violation occurred that deprived it of a fair trial.

IV

We now turn to the plaintiff's cross appeal, in which she claims that the court erred in calculating rent abatement, pursuant to § 47a-14h (e), based on her share of the subsidized rent, rather than the full market rent. Specifically, the plaintiff contends that, "when rent abatement is awarded in a § 47a-14h action to a subsidized tenant, it should be calculated based upon the full market rent of the apartment, except in the narrow circumstances (inapplicable here) where a subsidizing agent is made a party and pays the subsidy into court during the action's pendency." Essentially, the plaintiff contends that, had the subsidizing entity been joined

as a party, the plaintiff would not be entitled to abatement of rent equal to the full market rent, but because the subsidizing entity was not joined as a party and did not pay its portion of rent to the court, the plaintiff is entitled to abatement of rent equal to the full market rent. We disagree.

The following facts and procedural history are relevant to our resolution of this claim. The plaintiff's portion of the monthly rent was $226. In her complaint, the plaintiff sought, inter alia, "[a] retroactive abatement of rent paid." In its decision, the court awarded the plaintiff "the amount currently paid into court—[$1130]." It also ordered an abatement of any rental arrearage and prospective abatement of the plaintiff's share of the rent for the next six months.

We begin by setting forth the standard of review and legal principles relevant to our resolution of the plaintiff's claim. The plaintiff's claim raises a question of statutory interpretation, over which our review is plenary. See *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2020). "[W]hen interpreting a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . However, [w]hen a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter.

. . . A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation." (Citation omitted; internal quotation marks omitted.) *Dominguez* v. *New York Sports Club*, 198 Conn. App. 854, 860–61, 234 A.3d 1017 (2020).

We next set forth the relevant language of the statutes. Section 47a-14h (e) provides in relevant part: "The complainant may seek and the court may order interim or final relief including, but not limited to, the following . . . (4) an award of money damages, which may include a retroactive abatement of *rent paid pursuant to subsection (h) of this section* . . . . If the court orders retroactive abatement of rent pursuant to subdivision (4) of this subsection and all or a portion of the tenant's rent was deposited with the court pursuant to subsection (h) of this section by a housing authority, municipality, state agency or similar entity, any rent ordered to be returned *shall be returned to the tenant and such entity in proportion to the amount of rent each deposited with the court pursuant to subsection (h) of this section*." (Emphasis added.)

Section 47a-14h (h) provides in relevant part: "On each rent due date on or after the date when the complaint is filed with the clerk of the court . . . the tenant shall deposit with the clerk of the court an amount equal to the last agreed-upon rent. If all or a portion of the tenant's rent is being paid to the landlord by a housing authority, municipality, state agency or similar entity, this requirement shall be satisfied if the tenant deposits an amount equal to such tenant's portion of the last agreed-upon rent with the clerk. The court may make such entity a party to the action. . . ." General Statutes § 47a-1 (h) provides: " 'Rent' means all periodic payments to be made to the landlord under the rental agreement."

We conclude that § 47a-14h clearly and unambiguously authorizes the court to order abatement of rent

and, in circumstances when all or a portion of rent was paid to the court, order the return of such rent paid to the court in proportion to the amount paid by each party. Section 47a-14h (e) plainly provides that the court may order a retroactive abatement of rent "paid pursuant to subsection (h) of this section." Section 47a-14h (h) provides that a subsidized tenant "*shall* deposit with the clerk of the court an amount equal to" her portion of the monthly rent. (Emphasis added.) It further provides that the "court *may* make" the subsidizing entity a party to the action. (Emphasis added.) General Statutes § 47a-14h (h). The statute does not require that the court make the subsidizing entity a party to the action, nor does it require that the subsidizing entity pay its portion of the monthly rent into court. See *Angelsea Productions, Inc.* v. *Commission on Human Rights & Opportunities*, 236 Conn. 681, 694, 674 A.2d 1300 (1996) ("[t]he use of the word 'shall' in conjunction with the word 'may' confirms that the legislature 'acted with complete awareness of their different meanings' . . . and that it intended the terms to have different meanings" (citation omitted)). Because § 47a-14h (e) authorizes the court to order abatement of rent paid pursuant to subsection (h), and that subsection requires only that the tenant pay her share of the monthly rent to the court, the statute authorizes the court to award abatement of the tenant's share of the monthly rent that was paid into court. Furthermore, even if the subsidizing entity had been made a party to the action, the statute plainly authorizes the court to order the return of each party's share of the subsidized rent that was paid to the court. General Statutes § 47a-14h (e). We find no language in the statute to support the plaintiff's contention that § 47a-14h (e) compels the court to award, to the plaintiff, abatement of rent equal to the full market value of rent.

In her brief, the plaintiff contends that "[t]his court has already addressed the issue of rent abatement and

subsidized tenancies in title 47a of the General Statutes." The plaintiff further asserts that, "[u]nder a subsidy based interpretation of rent abatement in § 47a-14h, a landlord who cannot lawfully receive rent under [General Statutes] § 47a-4a[8] would still receive and retain payments from a subsidizing entity," resulting in an "undeserved windfall." The plaintiff points to *Rodriguez* v. *Ancona*, 88 Conn. App. 193, 868 A.2d 807 (2005), to support her proposition that rent abatement must be equal to the full market value of rent.[9]

In *Rodriguez*, this court interpreted the meaning of the phrase " 'one month's rent' " as used in General Statutes § 47a-18a.[10] Id., 198. In that case, the plaintiff,

[8] General Statutes § 47a-4a provides: "A rental agreement shall not permit the receipt of rent for any period during which the landlord has failed to comply with subsection (a) of section 47a-7."

[9] The plaintiff further contends that a "market rent construction is the only interpretation consistent with two other sources of legislative policy: Connecticut's ban on source of income discrimination and the federal statutory goals of subsidized housing." As we explain further in this opinion, we do not interpret the plain language of § 47a-14h as discriminating against subsidized tenants. The statute provides for damages in the form of rent abatement of the full amount of the tenant's rent that is paid to the court, in addition to the return of the subsidizing entity's portion of the rent when such is paid to the court.

We similarly find the plaintiff's reliance on out of state authority to be unavailing. None of the cases cited by the plaintiff involved the application of a statute with language similar to that of § 47a-14h. See *Multi-Family Management, Inc.* v. *Hancock*, 664 A.2d 1210, 1213, 1224 (D.C. App. 1995) (Ferren, J., concurring) (concluding that, in absence of claim asserted by subsidizing entity, subsidized tenant was entitled to full abatement of rent on counterclaim alleging breaches of implied warranty of habitability); *Cruz Management Co.* v. *Wideman*, 417 Mass. 771, 773, 633 N.E.2d 384 (1994) (affirming trial court's award of damages based on contract rent for subsidized tenant's counterclaim alleging common-law breach of implied warranty of habitability).

[10] General Statutes § 47a-18a provides: "If the landlord makes an entry prohibited by section 47a-16 or 47a-16a, or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the tenant, the tenant may recover actual damages not less than an amount equal to one month's rent and reasonable attorney's fees. The tenant may also obtain injunctive relief to prevent the recurrence of the conduct or terminate the rental agreement."

a tenant in a subsidized apartment, sued her landlord, the defendant, for illegal entry into her apartment in violation of General Statutes § 47a-16.[11] Id., 195–96. Section 47a-18a provides that, as damages for illegal entry, a tenant may recover from a landlord "actual damages less than an amount equal to one month's rent and reasonable attorney's fees." The trial court awarded the plaintiff $438, an amount equal to her portion of one month's rent. *Rodriguez* v. *Ancona*, supra, 196. On appeal, the plaintiff argued that the statute required that damages for the defendant's illegal entry be based on the full rent due to the landlord and not just her portion due under the lease. Id., 197. This court determined that the term " 'rent' " as used in § 47a-18a was ambiguous, and examined the definition of " 'rent' " provided in § 47a-1 (h), which provides that rent is " 'all periodic payments to be made to the landlord under the rental agreement.' " Id., 198–99. This court concluded that, "[b]ecause the term 'rent' is defined in § 47a-1 (h) as including all periodic payments made to a landlord, we understand the same term in § 47a-18a as including all rent payments made to the landlord, regardless of their source." Id., 199. The court explained that " '[o]ne month's rent' " as used in § 47a-18a "is merely the statutory standard for damages assessed against a landlord to deter him or her from illegally entering a tenant's apartment. Making damages dependent on the source of rent payments would cause unfair discrepancies in the amounts recovered by tenants. . . . The result urged by the defendant and adopted by

[11] General Statutes § 47a-16 provides in relevant part: "(c) A landlord shall not abuse the right of entry or use such right of entry to harass the tenant. The landlord shall give the tenant reasonable written or oral notice of his intent to enter and may enter only at reasonable time, except in case of emergency.

"(d) A landlord may not enter the dwelling unit without the consent of the tenant except (1) in case of emergency, (2) as permitted by section 47a-16a, (3) pursuant to a court order, or (4) if the tenant has abandoned or surrendered the premises."

the [trial] court would have the effect of decreasing a landlord's incentive to comply with the statute's proscriptions when renting to substantially subsidized tenants. . . . This result gives a landlord an equal incentive not to violate a tenant's privacy rights, regardless of the tenant's economic status." Id., 199–200. It further stated that it could find "no language in the applicable statutory scheme that warrants the disparate treatments of tenants based on the amount of rent they actually pay." Id., 200.

Rodriguez, however, is distinguishable from the present case. The statute at issue in *Rodriguez*, § 47a-18a, does not provide for abatement of rent but, rather, provides for damages for unlawful entry equal to " 'one month's rent.' " Id., 198. Section 47a-18a does not define the phrase "one month's rent" or further qualify its meaning. In interpreting the meaning of that phrase, the court in *Rodriguez*, therefore, looked to the statutory definition of " 'rent' " in addition to the deterrent purpose of the statute. *Rodriguez* v. *Ancona*, supra, 199. In the present case, § 47a-14h provides for damages in the form of, inter alia, rent abatement, and is therefore consistent with § 47a-4a. When the plaintiff is a subsidized tenant, the statute does provide an avenue for abatement of the full market value of rent by authorizing, but not mandating, the court to make the subsidizing entity a party to the action and requiring it to pay its portion of the rent to the court. General Statutes § 47a-14h (h). Further, the statute explicitly provides that, when a subsidizing entity is joined as a party and pays its share of rent to the court, "any rent ordered to be returned *shall be returned to the tenant and such entity in proportion to the amount of rent each deposited with the court*." (Emphasis added.) General Statutes § 47a-14h (e). This provision negates the plaintiff's argument that when a subsidized tenant brings an action pursuant to § 47a-14h, the landlord will receive an

"undeserved windfall" if rent abatement is ordered. In the present case, however, the court did not make the subsidizing entity a party to the action and, therefore, the statute authorized the court to return to the plaintiff only her portion of the monthly rent that was paid to the court.[12]

The judgment is affirmed.

In this opinion the other judges concurred.

FAIRLAKE CAPITAL, LLC *v.* PETER LATHOURIS ET AL.
(AC 44622)

Bright, C. J., and Prescott, Elgo, Moll, Cradle, Alexander, Suarez, Clark and DiPentima, Js.

Syllabus

The defendant N Co. appealed to this court challenging the trial court's denial of its motions to terminate a stay of the proceedings and to discharge a notice of lis pendens that the plaintiff lender had recorded against certain of N Co.'s real property. The plaintiff brought this action seeking the avoidance of what it alleged were a fraudulent transfer of the property to N Co. by the defendants P and L, and a fraudulent mortgage loan to N Co. by the defendant C Co. The trial court, upon the agreement of the parties, stayed the action pending the resolution of a prior, separate action the plaintiff had brought against P and L, alleging breach of guaranty and unjust enrichment in connection with their transfer of the property to N Co. N Co. thereafter filed motions to terminate the stay and to discharge the notice of lis pendens, alleging that the plaintiff lacked probable cause to sustain its claims. The court denied both motions, reasoning that the stay precluded it from adjudicating the motion to discharge the notice of lis pendens. While N Co.'s appeal from the trial court's orders was pending, this court denied a motion the plaintiff filed to dismiss the appeal for lack of a final judgment. On appeal, N Co. claimed that the denial of its motion to discharge was a final judgment and that the trial court improperly relied on the stay to decline to conduct a statutorily (§§ 52-325a and 52-325b) required hearing on the motion to discharge. *Held*:

[12] We note that there is no evidence in the record before us indicating that the plaintiff at any time requested that the subsidizing entity be made a party to the action.

1. The trial court's denial of N Co.'s motion to discharge the notice of lis pendens was an appealable final judgment, and the court abused its discretion in relying on the discretionary stay to decline to conduct the hearing to adjudicate the merits of the motion to discharge under §§ 52-325a and 52-325b:

   a. Although the denial of N Co.'s motion to discharge the notice of lis pendens was an interlocutory order, the governing statutory (§ 52-325c (a)) provision plainly states that any order entered as provided in § 52-325b (b) constitutes a final judgment for purposes of appeal; moreover, contrary to the plaintiff's claim that the court's order denying the motion was not a final judgment because the court never heard the motion on the merits, this court did not believe that the legislature drafted §§ 52-325a, 52-325b and 52-325c to deprive a party of a right to appeal when a probable cause hearing was not held and the required findings were not made, as the right to a probable cause hearing exists to protect the constitutional rights of property owners such as N Co., which explicitly raised its constitutional right to a prompt hearing; furthermore, the court's denial of N Co.'s motion to discharge because it exercised its discretion not to lift the stay did not alter the fact that N Co. had a statutory right to appeal, and this court determined that it could reach the trial court's denial of N Co.'s motion to lift the stay, which, although not a final judgment itself, was inextricably intertwined with the final judgment that resulted from the court's denial of the motion to discharge.

   b. The trial court abused its discretion when it denied the request by N Co. to lift the temporary stay for the purpose of going forward with a hearing on its motion to discharge the notice of lis pendens; the motion to discharge was not subject to a discretionary stay of indeterminate length, and to conclude that the stay could preclude the adjudication of the merits of the motion to discharge would undermine N Co.'s constitutional right to procedural due process to be heard on the motion at a meaningful time in a meaningful manner and its statutory right to a prompt hearing.

2. This court's determination that the trial court erred in denying N Co.'s motion to discharge the notice of lis pendens by improperly relying on the discretionary stay necessarily resolved the question of whether the court should have lifted the stay to permit a hearing to proceed on the motion to discharge; accordingly, the discretionary stay was ordered lifted for the limited purpose of considering the merits of and conducting a hearing on N Co.'s motion to discharge.

(*Two judges concurring in part and dissenting in part in one opinion*)

Argued April 14—officially released August 30, 2022

Procedural History

Action to recover damages for the defendants' alleged fraudulent transfer of certain real property owned by

the defendant Number Six, LLC, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket; thereafter, the court, *Lee*, *J.*, issued an order staying the action; subsequently, the court, *Ozalis*, *J.*, denied the motions filed by the defendant Number Six, LLC, to terminate the stay and to discharge a notice of lis pendens filed against certain of its real property, and the defendant Number Six, LLC, appealed to this court; thereafter, this court denied the plaintiff's motion to dismiss the appeal for lack of a final judgment. *Reversed*; *remanded with direction*.

Danielle J. B. Edwards, with whom, on the brief, was *Peter V. Lathouris*, for the appellant (defendant Number Six, LLC).

Patrick McCabe, with whom, on the brief, was *Yan Margolin*, pro hac vice, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant Number Six, LLC (Number Six), appeals from the order of the trial court denying its motion to discharge a notice of lis pendens (motion to discharge) recorded by the plaintiff, Fairlake Capital, LLC.[1] Number Six also appeals from the order of the court denying its motion to lift a discretionary stay in the underlying proceedings to allow it to pursue the motion to discharge. Our disposition of this appeal hinges on two issues that concern the denial of the motion to discharge. First, as a threshold matter implicating our subject matter jurisdiction, we must determine whether the denial of the motion to discharge is

[1] The plaintiff's complaint named Peter Lathouris, Patricia Spanos Lathouris, and Continental Mortgage Banking, Ltd., as additional defendants, but those parties are not participating in this appeal. For clarity, we refer to Peter Lathouris, Patricia Spanos Lathouris, Continental Mortgage Banking, Ltd., and Number Six collectively as the defendants and individually by their names as designated in this opinion.

a final judgment for appeal purposes. If we answer that question in the affirmative, the second issue is whether the court abused its discretion by denying the motion to discharge, without holding a hearing and adjudicating the merits of the motion in accordance with General Statutes §§ 52-325a and 52-325b, solely on the procedural ground that the discretionary stay was in place. Number Six claims that the denial of the motion to discharge is a final judgment and that the court improperly denied the motion to discharge on the basis of the discretionary stay. The plaintiff, on the other hand, maintains that (1) no final judgment exists, or, alternatively, (2) the court properly denied the motion to discharge on the basis of the discretionary stay. We conclude that (1) the denial of the motion to discharge is a final judgment for appeal purposes and (2) the court abused its discretion when it relied on the discretionary stay to deny Number Six's motion to discharge.[2] We further conclude that our resolution of Number Six's claim concerning its motion to discharge necessarily resolves the question of whether the court should have lifted the discretionary stay to permit a hearing on that motion.[3]

The following facts and procedural history are relevant to our resolution of this appeal. On August 1, 2017,

[2] As we further explain in part I of this opinion, in the motion to discharge, Number Six raised two grounds on which it sought to discharge the notice of lis pendens, only one of which (lack of probable cause) is relevant to this appeal.

[3] On November 22, 2021, Number Six filed a motion to strike portions of the plaintiff's appellate brief that cited the COVID-19 pandemic as a basis supporting the court's denials of the motion to discharge and the motion to terminate stay, arguing that such references were improper. On November 23, 2021, the plaintiff filed an objection. On January 5, 2022, this court denied the motion to strike without prejudice to Number Six raising its arguments supporting the motion to strike in its reply brief. Number Six has reasserted these arguments in its reply brief. In light of our resolution of this appeal, we need not decide whether the plaintiff's references to the COVID-19 pandemic in its appellate brief were improper.

the plaintiff commenced the present action against Peter Lathouris (Peter), Patricia Spanos Lathouris (Patricia), Continental Mortgage Banking, Ltd. (Continental), and Number Six. The plaintiff's four count complaint asserts claims of fraudulent transfer against the defendants in violation of the Connecticut Uniform Fraudulent Transfer Act (CUFTA), General Statutes § 52-552a et seq., against the defendants.[4]

In support of those claims, the plaintiff alleged the following facts in its complaint. In April, 2017, the plaintiff commenced an action against Peter and Patricia claiming breach of guaranty and unjust enrichment. See *Fairlake Capital, LLC* v. *Lathouris*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-17-6031982-S (August 13, 2019) (69 Conn. L. Rptr. 168) (guaranty action), aff'd, 210 Conn. App. 801, 271 A.3d 689, cert. denied, 343 Conn. 928, A.3d (2022). On May 12, 2017, Peter and Patricia purchased real property located in New Canaan (property) for $1.9 million. That same day, for consideration in the sum of one dollar, Peter and Patricia quitclaimed the property to Number Six, which was formed two days before the sale and which at all relevant times was owned, controlled, or dominated by Peter and/or Patricia. Additionally, on May 12, 2017, Continental, which was formed in 1990 and which is owned, operated, managed, or dominated by Peter and/or Patricia, extended a mortgage loan to Number Six in the sum of $2.5 million. A portion of the mortgage loan was used to pay the sellers of the property, with Number Six retaining the balance of the funds. As relief, the plaintiff seeks, inter alia, avoidance of the alleged

[4] Counts one and two of the complaint assert claims of fraudulent transfer in violation of General Statutes §§ 52-552e and 52-552f of CUFTA, respectively, against Peter, Patricia, and Number Six. Counts three and four of the complaint assert claims of fraudulent transfer in violation of §§ 52-552e and 52-552f of CUFTA, respectively, against all four defendants.

fraudulent transfer of the property and of the alleged fraudulent mortgage loan.

The parties do not dispute that the plaintiff, on the basis of its fraudulent conveyance claims, recorded a notice of lis pendens against the property. The plaintiff appended a copy of the notice of lis pendens, dated July 28, 2017, to its complaint.

On October 15, 2018, the plaintiff filed a motion to stay the present action pending the resolution of the guaranty action, which, according to the plaintiff, was scheduled at the time to be tried in April, 2019. On December 14, 2018, after initially having objected to the motion to stay, the defendants consented to the trial court staying the present action for three months. On January 14, 2019, the court, *Lee*, *J.*, upon the parties' consent, stayed the present action until March 15, 2019.

On October 31, 2019, the defendants filed a motion to terminate the discretionary stay, contending that, since March 15, 2019, the present action had been "informally stayed by agreement with the consent of the court" but that they no longer assented to the stay.[5] On December 3, 2019, the plaintiff filed an objection. On January 9, 2020, the court denied the defendants' motion, determining that "[t]he rationale for the original stay of this action remains valid. The resolution of this case is heavily dependent upon the result of the trial on the merits in [the guaranty action]. As a result, the possibility of an inconsistent result is substantial. The continuation of the stay until the [guaranty action] is resolved will promote judicial economy."

On August 21, 2020, Number Six filed a motion to terminate the discretionary stay, asserting that it

[5] On August 28, 2019, with the defendants' consent, the plaintiff filed a second motion to stay the present action pending the outcome of the guaranty action, in which proceedings were ongoing at the time following the denial of a motion for summary judgment filed by Peter and Patricia. The court did not adjudicate the second motion to stay.

intended to file, inter alia, a motion to discharge the notice of lis pendens that the plaintiff had recorded against the property. Number Six stated that an appeal had been filed in the guaranty action, thereby delaying resolution of that separate matter.[6] On September 14, 2020, the plaintiff filed an objection, arguing, inter alia, that any delays in the guaranty action were caused by Peter and Patricia and that there had been no change in circumstances warranting a termination of the stay. On September 18, 2020, Number Six filed a reply brief. On September 21, 2020, the court, *Ozalis*, *J.*, denied Number Six's motion and sustained the plaintiff's objection "[f]or the reasons stated in the plaintiff's objection . . . and as the rationale for the original stay of this action remains . . . ." On October 29, 2020, Number Six filed a motion to reargue, which the court summarily denied on December 2, 2020.

On February 16, 2021, Number Six filed the motion to terminate stay at issue in this appeal, requesting that the discretionary stay be lifted for the limited purpose of enabling it to file a motion to discharge the notice of lis pendens. That same day, Number Six filed the motion to discharge, claiming that (1) the plaintiff lacks probable cause to sustain the validity of its claims asserted against Number Six and (2) the notice of lis pendens is defective and, thus, "void and of no force or effect." On March 12, 2021, the plaintiff filed a combined objection to both motions. On March 24, 2021, Number Six filed a reply brief. On March 29, 2021, the court summarily denied both motions and, in addition, summarily sustained the plaintiff's objection. On April 1,

[6] On January 29, 2020, Peter and Patricia appealed from the denial of a motion for summary judgment, predicated in part on the doctrine of res judicata, that they had filed in the guaranty action. See *Fairlake Capital, LLC* v. *Lathouris*, 210 Conn. App. 801, 802–803, 271 A.3d 689, cert. denied, 343 Conn. 928, A.3d (2022). On March 1, 2022, this court affirmed that judgment. See id., 803.

2021, Number Six filed this appeal challenging the denials of both motions.

On June 22, 2021, the plaintiff filed with this court a corrected motion to dismiss this appeal for lack of a final judgment.[7] On July 2, 2021, Number Six filed an objection. On July 28, 2021, while the corrected motion to dismiss was pending, this court, sua sponte, ordered the trial court to articulate whether its denial of the motion to discharge and its order sustaining the plaintiff's objection "were based on the merits or were procedural because of the stay of this case." On July 29, 2021, the trial court articulated that the "orders denying the motion to discharge and sustaining the objection thereto were procedural because of the stay of this case." That same day, this court granted the plaintiff's corrected motion to dismiss this appeal for lack of a final judgment.

On August 9, 2021, Number Six filed a motion to reconsider this court's judgment of dismissal. On August 17, 2021, the plaintiff filed an objection. On September 3, 2021, while the motion to reconsider was pending, this court ordered, sua sponte, the parties to file supplemental memoranda to address the following two issues: (1) whether, in light of the trial court's articulation stating that its denial of the motion to discharge was " 'procedural,' " our Supreme Court's decision in *Ahneman* v. *Ahneman*, 243 Conn. 471, 706 A.2d 960 (1998), "appl[ies] such that [Number Six], as to the denial of the motion to discharge . . . has filed its appeal from a final judgment"; and (2) "[i]f this court concludes that [Number Six] has appealed from a final judgment as to the denial of the motion to discharge . . . because *Ahneman* applies, [whether] this court

[7] The plaintiff filed its original motion to dismiss this appeal on June 3, 2021, but subsequently withdrew that motion and filed the corrected motion to dismiss to correct an erroneous reference.

[should] remand the case for a prompt hearing on the motion to discharge, or [whether] there [are] other issues in this appeal that would remain to be addressed as to the denial of that motion . . . .'' The parties filed supplemental memoranda in accordance with our briefing order.

On October 6, 2021, we granted the motion to reconsider and denied the corrected motion to dismiss without prejudice to the parties addressing the final judgment issue in their respective appellate briefs,[8] as augmented by their supplemental memoranda. In addition, we ordered that this appeal would be heard en banc.

I

We first address the portion of this appeal taken from the trial court's denial of the motion to discharge based solely on the existence of a discretionary stay of the underlying proceedings.[9] Number Six claims that (1) the denial of the motion to discharge is a final judgment for appeal purposes and (2) the court, in denying the motion to discharge, improperly relied on the stay to decline to hold a hearing and to address the merits of the motion pursuant to §§ 52-325a and 52-325b. The plaintiff maintains that (1) there is no final judgment or, in the alternative, (2) the court correctly denied the motion to discharge based on the stay. For the reasons that follow, we conclude that (1) the denial of the motion to discharge is an appealable final judgment and (2) the court abused its discretion when it relied on the discretionary stay to decline to conduct a hearing and to adjudicate the merits of the motion to discharge in accordance with §§ 52-325a and 52-325b.

[8] Number Six filed its principal appellate brief prior to the October 6, 2021 order. Following the October 6, 2021 order, the plaintiff filed an appellate brief, and, thereafter, Number Six filed a reply brief.

[9] For clarity and ease of discussion, we have reordered the claims as they are set forth in Number Six's brief.

Before analyzing Number Six's claims, we briefly clarify the scope of its appeal as to the denial of the motion to discharge. In the motion to discharge, Number Six raised the following two independent grounds to support its motion: (1) the plaintiff lacks probable cause to sustain the validity of its claims against Number Six; and (2) the notice of lis pendens is defective and, thus, "void and of no force or effect." These distinct grounds are governed by different statutory provisions. See *Dunham* v. *Dunham*, 217 Conn. 24, 35–38, 584 A.2d 445 (1991) ("When a property owner challenges the existence of probable cause for the validity of the lis pendens claim, resolution of this application for discharge is governed by General Statutes §§ 52-325a, 52-325b and 52-325c. . . . When, however, a property owner files a motion for discharge alleging an invalid notice of lis pendens, resolution of this motion is governed in its entirety by General Statutes § 52-325d." (Footnote omitted.)), overruled on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 682 A.2d 106 (1996).

In its appellate briefs, Number Six argues that the court precluded it from "holding the plaintiff to its proof" on the issue of probable cause. Number Six also cites §§ 52-325a and 52-325b, which are relevant to its probable cause claim, but it does not refer to § 52-325d, which applies to the second ground in its motion, i.e., that the notice of lis pendens is defective. Moreover, in its principal appellate brief, Number Six raises an argument addressing the merits of whether probable cause exists; however, the brief is silent as to the merits of Number Six's claim that the notice of lis pendens is "void and of no force or effect" because it is defective. Finally, unlike an order based on § 52-325b, an order based on § 52-325d is not an immediately appealable final judgment. See *Dunham* v. *Dunham*, supra, 217 Conn. 40. For these reasons, we construe Number Six's

claim on appeal as to the denial of the motion to discharge to be limited to its probable cause claim, and we limit our review accordingly.[10] See footnote 19 of this opinion.

In addition, we note that our review of Number Six's claims as to the denial of the motion to discharge requires us to construe statutes governing notices of lis pendens. "The construction of a statute is a question of law subject to de novo review. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to

[10] During oral argument, Number Six's counsel made several brief comments regarding purported defects in the notice of lis pendens. We do not infer from these comments that Number Six is challenging the denial of the motion to discharge with respect to its claim that the notice of lis pendens is defective. Assuming arguendo that Number Six's counsel attempted to raise such a claim during oral argument, it is well settled that a party cannot raise a claim on appeal for the first time during oral argument. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005) ("claims on appeal . . . cannot be raised for the first time at oral argument before the reviewing court"), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); see also *Traylor* v. *State*, 332 Conn. 789, 809 n.17, 213 A.3d 467 (2019) ("[r]aising a claim at oral argument is not . . . a substitute for adequately briefing that claim").

implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Citation omitted; internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 767, 269 A.3d 790 (2022).

A

At the outset, because the issue raises a question regarding our subject matter jurisdiction, we consider whether the denial of the motion to discharge constitutes a final judgment. Number Six argues that, pursuant to the controlling statutes, a denial of a motion to discharge a notice of lis pendens is a final judgment. The plaintiff argues that the court's order denying the motion is not a final judgment because the court never heard the motion on the merits but, instead, denied it solely because of the stay it had entered in the case. Relying on our Supreme Court's decision in *Prevedini* v. *Mobil Oil Corp.*, 164 Conn. 287, 320 A.2d 797 (1973), the plaintiff argues that the court's order denying the motion to discharge was essentially the court's simply affirming its decision to leave the discretionary stay in place and is thus not an appealable final judgment. We agree with Number Six that the court's denial of the motion to discharge is, by statute, an appealable final judgment. We further conclude that *Prevedini* is inapplicable to the circumstances of this case.

We begin with the applicable legal principles regarding our jurisdiction. ''The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . We therefore must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim.'' (Citation omitted; internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272

(2020). "A determination regarding . . . subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary." (Internal quotation marks omitted.) *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 651, 161 A.3d 657 (2017).

"The jurisdiction of the appellate courts is restricted to appeals from judgments that are final." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, supra, 335 Conn. 459. "[T]he legislature may [however] deem otherwise interlocutory actions of the trial courts to be final judgments, as it has done by statute in limited circumstances. . . . Alternatively, the courts may deem interlocutory orders or rulings to have the attributes of a final judgment if they fit within either of the two prongs of the test set forth in *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 566 (1983)]. . . . Under *Curcio*, the landmark case in the refinement of final judgment jurisprudence . . . interlocutory orders are immediately appealable if the order or ruling (1) terminates a separate and distinct proceeding or (2) so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Niro* v. *Niro*, 314 Conn. 62, 67–68, 100 A.3d 801 (2014).

Here, it is undisputed that the denial of the motion to discharge is an interlocutory ruling. Accordingly, to be considered a final judgment for appeal purposes, the order must be subject to immediate appellate review either (1) by statute or (2) pursuant to the test articulated in *Curcio*. We conclude that, pursuant to the applicable statutes, *any* denial of a motion to discharge a notice of lis pendens under § 52-325b, including denials that occur in the absence of the required probable cause hearing and finding as to the merits of the motion, constitutes an appealable final judgment.

In discerning whether there is a statutory right to appeal from the denial of the motion to discharge, we

focus our attention on the statutory scheme governing applications and motions to discharge notices of lis pendens. Section 52-325a provides in relevant part: "(a) Whenever a notice of lis pendens is recorded against any real property pursuant to subsection (a) of section 52-325, the property owner, if the action has not then been returned to court, may make application, together with a proposed order and summons, to the superior court for the judicial district to which the action is made returnable, or to any judge thereof, that a hearing or hearings be held to determine whether such notice of lis pendens should be discharged. The court or judge shall thereupon order reasonable notice of such application to be given to the plaintiff and shall set a date or dates for the hearing or hearings to be held thereon. . . .

"(c) If the action for which notice of lis pendens was recorded, is pending before any court, the property owner may at any time, unless the application under subsection (a) of this section has previously been ruled upon, move that such notice of lis pendens be discharged of record."

Section 52-325b provides in relevant part: "(a) Upon the hearing held on the application or motion set forth in section 52-325a, the plaintiff shall first be required to establish that there is probable cause to sustain the validity of his claim and, if the action alleges an illegal, invalid or defective transfer of an interest in real property, that the initial illegal, invalid or defective transfer of an interest in real property occurred less than sixty years prior to the commencement of the action. . . .

"(b) Upon consideration of the facts before it, the court or judge may: (1) Deny the application or motion if (A) probable cause to sustain the validity of the claim is established or (B) in an action that alleges an illegal,

invalid or defective transfer of an interest in real property, probable cause to sustain the validity of the claim is established and the initial illegal, invalid or defective transfer of an interest in real property occurred less than sixty years prior to the commencement of the action, or (2) order such notice of lis pendens discharged of record if (A) probable cause to sustain the validity of the plaintiff's claim is not established or (B) in an action that alleges an illegal, invalid or defective transfer of an interest in real property, the initial illegal, invalid or defective transfer of an interest in real property occurred sixty years or more prior to the commencement of the action."

Section 52-325c (a) provides: "Any order entered as provided in subsection (b) of section 52-325b shall be deemed a final judgment for the purpose of appeal." An appeal from an order entered pursuant to § 52-325b (b) is subject to a seven day appeal period.[11] See General Statutes § 52-325c (b).

Section 52-325c (a) plainly states that "[a]ny order *entered as provided in subsection (b) of section 52-325b*" constitutes a final judgment for the purpose of appeal. (Emphasis added.) Section 52-325b (b) expressly delineates two orders that a trial court may enter on an application or a motion to discharge a notice of lis pendens after conducting a prompt hearing and upon considering the facts before the court. Specifically, the court may either (1) deny the application or motion if probable cause is established and, in an action alleging an illegal, invalid, or defective transfer of an interest in real property, the alleged transfer occurred less than sixty years prior to the commencement of the action; see General Statutes § 52-325b (b) (1); or (2) issue an order discharging the notice of lis pendens if

[11] Number Six filed this appeal within seven days of the denial of the motion to discharge.

probable cause is not established or, in an action alleging an illegal, invalid, or defective transfer of an interest in real property, the alleged transfer occurred sixty years or more prior to the commencement of the action. General Statutes § 52-325b (b) (2).

Although, read together, §§ 52-325a, 52-325b and 52-325c contemplate that the court will hold a hearing and make probable cause findings before ruling on a motion to discharge a notice of lis pendens, we do not construe those statutes as requiring a hearing and findings in order for the denial of such a motion to be an appealable final judgment. "We often have stated that it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results." (Internal quotation marks omitted.) *Raftopol* v. *Ramey*, 299 Conn. 681, 703, 12 A.3d 783 (2011). Accordingly, we will not construe statutes in a way that will lead to such results. See id.; see also *Derrane* v. *Hartford*, 295 Conn. 35, 46 n.9, 988 A.2d 297 (2010) (declining to interpret statute in way that would lead to unworkable result because such result was "surely not what the legislature intended"); *In re Corey E.*, 40 Conn. App. 366, 374, 671 A.2d 396 (1996) (interpreting statute so as to avoid "bizarre and unworkable results and [advance] the policies that underpin the statute").

The legislature clearly intended for interlocutory orders denying a motion to discharge a notice of lis pendens to be immediately appealable. Although the legislature also intended that the Superior Court conduct a hearing and make findings before issuing such an order, it would make little sense to read §§ 52-325a, 52-325b and 52-325c as limiting appeals to those orders issued only after a hearing. Such an interpretation effectively would permit a trial court to thwart a party's right to appeal simply by not holding the required hearing. This outcome cannot be what the legislature intended

when it drafted this statutory scheme. See *Derrane* v. *Hartford*, supra, 295 Conn. 46 n.9. In fact, it makes no sense that a party deprived of the process contemplated by the statutes would have fewer appellate rights than a party who was provided with the statutorily required process. Consequently, we do not believe that the legislature drafted §§ 52-325a, 52-325b and 52-325c to deprive a party of a right to appeal from the denial of a motion to discharge a notice of lis pendens in cases in which a probable cause hearing was not held and the required findings not made, given that (1) such a hearing and probable cause findings are statutorily required; see General Statutes §§ 52-325a and 52-325b; and (2) the right to a probable cause hearing exists specifically to protect the constitutional rights of property owners. See part I B of this opinion. Thus, we conclude that *any* denial of a motion to discharge a notice of lis pendens that challenged the existence of probable cause constitutes a final judgment under § 52-325b (b) (1).

We also are not persuaded by the plaintiff's argument that our Supreme Court's decision in *Prevedini* v. *Mobil Oil Corp.*, supra, 164 Conn. 287, requires a different result. In *Prevedini*, the Mobil Oil Corporation (Mobil) leased property for a gas station from the plaintiff, Val Prevedini, for several years. *Prevedini* v. *Mobil Oil Corp.*, supra, 288. During the lease period, Prevedini sold the property to another person. Id., 289. Thereafter, Mobil commenced a civil action to enforce its right to buy the property under its lease agreement with Prevedini. Id., 290. Prevedini then commenced a summary process action against Mobil seeking possession of the property because the lease had expired. Id. The trial court stayed the summary process proceedings, which concerned possession of the property, until the final adjudication of the civil action, which concerned the title to the property and would necessarily resolve

the question of the right to possession. Id., 291. Prevedini sought appellate review of the stay order from the Appellate Division of the Superior Court. Id. Mobil claimed that the Appellate Division lacked jurisdiction over the appeal because there was no final judgment. Id. The Appellate Division vacated the stay order, and Mobil appealed to our Supreme Court. Id.

On appeal, our Supreme Court determined that the trial court's order staying the summary process action did not constitute a final judgment because the order did not determine finally the rights of the parties. The court held: "[T]he rights of the parties are not concluded so that further proceedings after the rendition of the stay order cannot affect them. There remains to be determined the very issue for which the summary process action was brought, namely, the question of possession of the premises. When that is resolved, following a trial before the Circuit Court, then a final judgment will result. The order of the Circuit Court is not a final judgment from which an appeal lies and the Appellate Division in denying Mobil's motion to dismiss for lack of jurisdiction and in vacating the stay of proceedings ordered by the Circuit Court was in error." Id., 293–94.

The plaintiff argues that the holding of *Prevedini* applies in this case because the court did not resolve Number Six's motion to discharge on the merits but merely delayed resolution of the motion while the case is stayed. It argues that, when the court eventually hears the merits, and if it denies the motion to discharge, there will then be a final judgment from which Number Six may appeal. We are not persuaded for a number of reasons.

First, as previously discussed in this opinion, Number Six has a statutory right to appeal from the court's denial of the motion to discharge. That the court denied

the motion because it exercised its discretion not to lift the stay in the case does not alter this fact.

Second, as explained in part I B of this opinion, the statutory right to a prompt hearing on the motion to discharge has constitutional underpinnings, and Number Six has explicitly raised its constitutional right to a prompt hearing in this appeal. There is no indication in *Prevedini* that such a constitutional claim was made. In fact, the constitutional right to a prompt hearing on a motion to discharge a notice of lis pendens was not recognized by our Supreme Court until its decision in *Kukanskis* v. *Griffith*, 180 Conn. 501, 430 A.2d 21 (1980), which was decided seven years after *Prevedini*.[12]

Finally, in *Prevedini*, the only issue on appeal was the court's stay order. In the present case, however, the court's order denying Number Six's motion to lift the stay so that it could pursue the motion to discharge is inextricably intertwined with the court's order denying the motion to discharge. Consequently, although the court's decision denying the motion to lift the stay is not by itself a final judgment, we may reach it because it is part of the final judgment. See *Aqleh* v. *Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 89, 10 A.3d 498 (2010) ("We recognize that the court's denial of [Cadlerock Joint Venture II, L.P.'s] motion to cite in [Wageeh S.] Aqleh as an additional defendant in the original action is not, by itself, a final judgment. Nevertheless, because that decision is inextricably intertwined with the trial

[12] In reaching its conclusion in *Kukanskis* that due process requires that a property owner be permitted to challenge the notice of lis pendens at a meaningful time and in a meaningful manner, the court relied on its decision in *Roundhouse Construction Corp.* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 362 A.2d 778, vacated, 423 U.S. 809, 96 S. Ct. 20, 46 L. Ed. 2d 29 (1975), on remand, 170 Conn. 155, 365 A.2d 393, cert. denied, 429 U.S. 889, 97 S. Ct. 246, 50 L. Ed. 2d 172 (1976), in which it reached the same conclusion as to mechanic's liens. See *Kukanskis* v. *Griffith*, supra, 180 Conn. 508–509. *Roundhouse Construction Corp.* also was decided after *Prevedini*.

court's ruling granting the application to discharge the attachment, we conclude that the joint appeal is taken from appealable final judgments."). Accordingly, in the present case, the court's order denying Number Six's motion to discharge is a final judgment.[13]

B

We now turn to Number Six's claim on the merits as to the denial of the motion to discharge. Number Six contends that the court improperly relied on the discretionary stay to decline to hold a hearing and to resolve the merits of the motion in accordance with §§ 52-325a and 52-325b. We agree.

We begin by setting forth the applicable standard of review. Whether the court properly refused to lift the discretionary stay to permit a hearing on the motion to discharge is subject to review for an abuse of discretion. See, e.g., *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 459, 493 A.2d 229 (1985) ("[w]e have vested a large measure of discretion in trial judges in terminating or granting stays and, upon review, the issue usually is whether that discretion has been abused"). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court . . . . Under that standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to the questions of whether the trial court *correctly applied the law* and reasonably could have reached the conclusion that it did." (Citation omitted; emphasis added; internal

[13] Because we conclude that § 52-325c provides a statutory right to appeal from any denial of a motion to discharge a notice of lis pendens under § 52-325b, we need not determine whether the court's denial of the motion to discharge constitutes a final judgment under either *State* v. *Curcio*, supra, 191 Conn. 31, or *Ahneman* v. *Ahneman*, supra, 243 Conn. 471.

quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 135 Conn. App. 167, 190–91, 43 A.3d 679, cert. denied, 307 Conn. 905, 53 A.3d 220 (2012); see also *Ghio* v. *Liberty Ins. Underwriters, Inc.*, 212 Conn. App. 754, 778, 276 A.3d 984 (2022) ("[t]he trial court's exercise of its discretion will be reversed only [when] the abuse of discretion is manifest or [when] injustice appears to have been done" (internal quotation marks omitted)).

We next summarize some important historical background underlying the statutory scheme governing notices of lis pendens. General Statutes § 52-325[14] establishes the procedure for recording a notice of lis pendens. In *Kukanskis* v. *Griffith*, supra, 180 Conn. 501,

[14] General Statutes § 52-325 provides in relevant part: "(a) In any action in a court of this state or in a court of the United States (1) the plaintiff or his attorney, at the time the action is commenced or afterwards, or (2) a defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief at the time the answer is filed, if the action is intended to affect real property, may cause to be recorded in the office of the town clerk of each town in which the property is situated a notice of lis pendens, containing the names of the parties, the nature and object of the action, the court to which it is returnable and the term, session or return day thereof, the date of the process and the description of the property, except that no such notice may be recorded in an action that alleges an illegal, invalid or defective transfer of an interest in real property unless the complaint or affirmative cause of action contains the date of the initial illegal, invalid or defective transfer of an interest in real property and such transfer has occurred less than sixty years prior to the commencement of such action. Such notice shall, from the time of the recording only, be notice to any person thereafter acquiring any interest in such property of the pendency of the action; and each person whose conveyance or encumbrance is subsequently executed or subsequently recorded or whose interest is thereafter obtained, by descent or otherwise, shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action. . . .

"(c) Notwithstanding the provisions of subsection (a) of this section, in any action except a suit to foreclose a mortgage or other lien, no recorded notice of lis pendens shall be valid or constitute constructive notice thereof unless the party recording such notice, not later than thirty days after such recording, serves a true and attested copy of the recorded notice of lis pendens upon the owner of record of the property affected thereby. . . ."

in considering a claim that the trial court had dissolved without statutory authority a notice of lis pendens, our Supreme Court addressed whether General Statutes (Rev. to 1979) § 52-325[15] was "unconstitutional because it [did] not comply with the due process of law requirements of [the United States and Connecticut constitutions] in that it fail[ed] to provide for notice to property owners and an opportunity for them to be heard at a meaningful time and in a meaningful manner." Id., 506–507. The court observed that "the effect of a notice of lis pendens sufficiently interferes with the alienability of real estate," such that the court was required to determine whether property owners were being afforded the "minimum of due process which is constitutionally required." Id., 509. The court determined that, at the time, "the Connecticut lis pendens statutes fail[ed] to provide even the barest minimum of due process protection.[16] Most conspicuously absent [was]

[15] General Statutes (Rev. to 1979) § 52-325 provides in relevant part: "In any action in a court of this state or in a district court of the United States the plaintiff or his attorney, at the time the action is commenced or afterwards, or a defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief at the time the answer is filed, if the same is intended to affect real estate, may cause to be recorded in the office of the town clerk of each town in which the property is situated a notice of the pendency of the action, containing the names of the parties, the nature and object of the action, the court to which it is returnable and the term, session or return day thereof, the date of the process and the description of the property. Such notice shall, from the time of the recording only, be notice to any person thereafter acquiring any interest in such property of the pendency of the action; and each person whose conveyance or encumbrance is subsequently executed or subsequently recorded or whose interest is thereafter obtained, by descent or otherwise, shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action. . . ."

[16] At the time of *Kukanskis*, as our Supreme Court noted, "[t]he filing of a [notice of] lis pendens require[d] no judicial action, no showing of probable cause and no notice to the defendant property owner. The party filing the [notice of] lis pendens [was] not required to post a bond or provide any surety to protect the owner against damages from an unsupportable claim. No opportunity [was] provided to the owner either before or after the

any provision whatsoever for any sort of a timely hearing, either before or after the recording of the notice of lis pendens, which would give the property owner an opportunity to be heard or require the party recording the notice to demonstrate in any way the probability of prevailing on the underlying action. The statutes allow[ed] the notice of lis pendens to continue indefinitely without any further action on the part of the party recording it, during which time the property owner [was] without recourse to the courts to contest the merits of the underlying claim." (Footnote added.) Id., 510. In sum, the court concluded that the "absence of a statutory provision for a hearing for the defendant property owner at a meaningful time and in a meaningful manner . . . deprived him of his constitutional right to due process of law." (Citation omitted; internal quotation marks omitted.) Id., 510–11.

In 1981, following *Kukanskis*, our legislature enacted No. 81-8 of the 1981 Public Acts (P.A. 81-8), which amended General Statutes (Rev. to 1979) § 52-325 to include language later codified, in part, in §§ 52-325a and 52-325b. See Public Acts 1981, No. 81-8, §§ 2 and 3; see also part I A of this opinion. Two years later, our Supreme Court in *Williams* v. *Bartlett*, 189 Conn. 471, 457 A.2d 290, appeal dismissed, 464 U.S. 801, 104 S. Ct. 46, 78 L. Ed. 2d 67 (1983), addressed whether § 52-325, as amended by P.A. 81-8, was constitutionally infirm on procedural due process grounds because, although it provided for a postfiling hearing, it failed to "contain a bonding provision or any other mechanism whereby the property owner may substitute security to obtain release of the [notice of] lis pendens . . . ." Id., 476. The court concluded that the amended statute met the

recording of the [notice of] lis pendens to challenge its propriety. Moreover, no provision [was] made whereby the owner [could] apply for the dissolution of the [notice of] lis pendens upon the substitution of a bond with surety." *Kukanskis* v. *Griffith*, supra, 180 Conn. 507.

minimum requirements of procedural due process. Id., 480–81 and 481 n.6. Notably, in examining the amended statute, the court commented that "[t]he *prompt post-filing hearing* afforded under the [amended] statute eliminates the risk of an erroneous deprivation of property interests." (Emphasis added.) Id., 480.

We glean two salient principles from *Kukanskis* and/or *Williams* that guide us in resolving Number Six's claim. First, Number Six's constitutional right to procedural due process requires that it be afforded a hearing to address its probable cause claim raised in the motion to discharge, with such hearing being held "at a meaningful time and in a meaningful manner . . . ." (Internal quotation marks omitted.) Id., 478; *Kukanskis* v. *Griffith*, supra, 180 Conn. 510. Second, the hearing to which Number Six is entitled pursuant to §§ 52-325a and 52-325b must be "prompt . . . ." *Williams* v. *Bartlett*, supra, 189 Conn. 480.[17]

Pursuant to *Kukanskis* and *Williams*, we are compelled to conclude that the court abused its discretion when it denied Number Six's request to lift the stay for the purpose of going forward with a hearing on its motion to discharge. The record demonstrates that the stay, to which Number Six no longer consented at the time it filed the motion to discharge, is tied to the

[17] The plaintiff argues in its supplemental brief that the constitutional right discussed in *Williams* "is merely to have an 'opportunity to be heard at a meaningful time and in a meaningful manner.' Implicit in the trial court's determination here, in refusing to lift the stay, was a finding that the three and one-half years that elapsed prior to [Number Six's] present motion to discharge was a sufficient *opportunity*, especially given [Number Six's] justifications for discharge—all of which, if true, would have existed since the day the lis pendens was filed." (Emphasis in original.) The plaintiff further argues that Number Six chose to forgo its opportunity by agreeing to the stay in this case. The record does not support the plaintiff's claim that the court made some implicit finding that Number Six waived its right to a prompt hearing. Furthermore, the fact that Number Six may have agreed to a stay of limited duration does not mean that it was forever waiving its statutory and constitutional right to a prompt hearing.

ongoing proceedings in the guaranty action and, thus, is of indefinite duration. To conclude that the stay could permissibly preclude the adjudication of the merits of the motion to discharge would undermine Number Six's constitutional right to be heard on the motion to discharge "at a meaningful time and in a meaningful manner" (internal quotation marks omitted); id., 478; *Kukanskis* v. *Griffith*, supra, 180 Conn. 510; and its statutory right to a "prompt" hearing on the motion to discharge. *Williams* v. *Bartlett*, supra, 480.

We are mindful of the well established principle that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." (Internal quotation marks omitted.) *Lee* v. *Harlow, Adams & Friedman, P.C.*, 116 Conn. App. 289, 311–12, 975 A.2d 715 (2009). Our holding does not weaken a court's broad authority to impose a discretionary stay. We merely elucidate that a discretionary stay of indefinite duration cannot function to infringe on a litigant's rights attendant to an application or a motion to discharge a notice of lis pendens as bestowed by §§ 52-325a and 52-325b, as well as constitutional guarantees of procedural due process. We underscore the limited breadth of our holding. In *Kukanskis* and *Williams*, our Supreme Court made clear that a litigant is entitled to swift judicial action with respect to an application or a motion to discharge a notice of lis pendens. Our holding accords with that mandate, and we expressly limit it to the circumstances present in this case.[18]

[18] As the COVID-19 pandemic has demonstrated, circumstances outside of the control of courts and litigants may arise that preclude prompt action on an application or a motion to discharge a notice of lis pendens. In the present action, however, there is nothing in the record indicating that there are external forces preventing the court and the parties from moving forward on the motion to discharge.

In sum, we conclude that the motion to discharge is not subject to a discretionary stay of indeterminate length, and, therefore, the court abused its discretion when it relied on the stay to deny the motion to discharge on procedural grounds. On remand, in accordance with §§ 52-325a and 52-325b, the court must conduct a prompt hearing on the motion to discharge and adjudicate the merits of the motion insofar as Number Six claims that there is no probable cause sustaining the validity of the plaintiff's claims.[19]

II

We next address Number Six's remaining claim that the court improperly denied its motion to terminate the discretionary stay.[20] Our determination in part I of this opinion that the court committed error in denying the motion to discharge by improperly relying on the discretionary stay necessarily resolves the question of

[19] As we explained in footnote 10 of this opinion and the accompanying text, Number Six has not briefed a claim challenging the denial of the motion to discharge on the basis of the discretionary stay with respect to the second ground raised in the motion asserting that the notice of lis pendens is defective. Accordingly, such a claim is not before us for review, and our remand order does not contain any direction to the court with regard to the second ground. Nevertheless, in the interests of judicial economy, we opine that it would be prudent for the court on remand to address Number Six's claim that the notice of lis pendens is defective in conjunction with the court's consideration of Number Six's probable cause claim.

[20] As discussed previously in this opinion, we properly may consider Number Six's claim concerning its motion to terminate the stay because this claim is inextricably intertwined with its claim that the court erred in denying its motion to discharge, which, as explained previously, is a final judgment. See part I A of this opinion; see also *Clukey* v. *Sweeney*, 112 Conn. App. 534, 542, 963 A.2d 711 (2009) ("in some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so inextricably intertwined with another argument, the appealability of which is established that we should assume jurisdiction over both" (internal quotation marks omitted)); see also *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 29–30, 836 A.2d 1124 (2003) (permitting interlocutory appeal for certain claims when inextricably intertwined with other claims that were subject to interlocutory appeal pursuant to statute).

whether the court should have lifted the stay to permit the hearing on the motion to discharge to proceed. Accordingly, the discretionary stay must be lifted for the limited purpose of considering the merits of, and holding a hearing on, Number Six's motion to discharge.

The judgment is reversed as to the denial of Number Six's motion to discharge the notice of lis pendens and the case is remanded with direction to lift the discretionary stay for the purpose of holding a prompt hearing and adjudicating the merits of the motion to discharge in accordance with General Statutes §§ 52-325a and 52-325b and consistent with this opinion.

In this opinion PRESCOTT, ELGO, CRADLE, SUAREZ, CLARK and DiPENTIMA, Js., concurred.

MOLL, J., with whom ALEXANDER, J., joins, concurring in part and dissenting in part. Although I agree with the majority's conclusions in part I of its opinion that (1) the trial court's denial of the motion to discharge the notice of lis pendens filed by the defendant Number Six, LLC (Number Six), is a final judgment for appeal purposes and (2) the trial court improperly denied the motion to discharge solely on the basis of the discretionary stay, I write separately because I respectfully disagree with the reasoning underpinning the majority's conclusions. I conclude that (1) the trial court's pro forma denial of the motion to discharge, predicated solely on the procedural ground that the discretionary stay was in effect, is a final judgment for appeal purposes pursuant to General Statutes § 52-325c (a) *only* when, in accordance with the rationale of *Ahneman* v. *Ahneman*, 243 Conn. 471, 706 A.2d 960 (1998), the decision is construed properly as the functional equivalent of a denial of the motion on the merits under General Statutes § 52-325b (b) (1); and (2) the court improperly relied on the stay to deny the motion to discharge

because, as a matter of law, the motion is not subject to the stay. Accordingly, I would reverse the court's denial of the motion to discharge and order the court on remand, irrespective of the discretionary stay, to hold a prompt hearing and to adjudicate the merits of Number Six's probable cause claim raised in the motion in accordance with General Statutes §§ 52-325a and 52-325b. In addition, because I conclude that, as a matter of law, the motion to discharge is not subject to the discretionary stay, I further conclude that there is no practical relief that can be afforded to Number Six as to the denial of its motion to terminate stay. Rather than reversing the denial of the motion to terminate stay, as the majority, in effect, does in part II of its opinion, I would dismiss the portion of this appeal taken from that decision as moot. Accordingly, I concur in part and respectfully dissent in part.[1]

I

With respect to Number Six's claims concerning the trial court's denial of the motion to discharge, I agree with the majority that (1) the denial of the motion is a final judgment for appeal purposes and (2) the court improperly invoked the stay to deny the motion without a hearing and without reaching the merits of Number Six's probable cause claim pursuant to §§ 52-325a and 52-325b. As I will more fully explain, however, the majority and I take divergent paths to reach these conclusions.

A

I first turn to the threshold legal question of whether the denial of the motion to discharge constitutes a final judgment for appeal purposes. As the majority recognizes, there is no dispute that the denial of the motion

[1] The majority opinion aptly sets forth the facts and procedural history of this matter, and, therefore, I do not restate them here.

to discharge is an interlocutory ruling. I agree with the majority that, pursuant to § 52-325c (a), the denial of the motion to discharge is subject to immediate appellate review. Unlike the majority, however, I conclude that this determination hinges on an application of the reasoning of *Ahneman* v. *Ahneman*, supra, 243 Conn. 471, to construe the pro forma denial of the motion to discharge as the functional equivalent of a denial of the motion on the merits under § 52-325b (b) (1).

In light of the plain and unambiguous language of §§ 52-325a, 52-325b, and 52-325c, as recited in part I A of the majority opinion, I conclude that, facially, the denial of the motion to discharge in the present case is outside of the purview of § 52-325c (a) because it is not an "order entered as provided in subsection (b) of section 52-325b . . . ." General Statutes § 52-325c (a). Read together, § 52-325b (a) and (b) contemplate the court's conducting a hearing and making certain probable cause determinations in connection with issuing an order pursuant to § 52-325b (b). In the present matter, the court did not hold the statutorily required hearing or make any probable cause findings in connection with denying the motion to discharge. In addition, the court's denial of the motion to discharge rested solely on the discretionary stay, which is a procedural ground wholly absent from § 52-325b (b).

I do not agree with the majority's determination that construing the relevant statutes to mandate a hearing and probable cause findings in order for the denial of the motion to discharge to constitute a final judgment for appeal purposes leads to bizarre and unworkable results. Indeed, as our Supreme Court has recognized, the statutory scheme of which §§ 52-325a, 52-325b, and 52-325c are a part is limited in the breadth of appeals that it authorizes. See *Dunham* v. *Dunham*, 217 Conn. 24, 39, 584 A.2d 445 (1991) (concluding that orders

entered pursuant to General Statutes § 52-325d,[2] in contrast to orders entered pursuant to § 52-325b, are not final judgments), overruled on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 682 A.2d 106 (1996). In my view, reading the plain and unambiguous language of the statutes at issue to authorize appeals only from orders that strictly comport with § 52-325b (b) advances, rather than contravenes, the intent of the legislature. See General Statutes § 1-2z.

My inquiry, however, does not end here. Although I conclude that the denial of the motion to discharge, on its face, is not a final judgment for appeal purposes pursuant to § 52-325c (a), our Supreme Court's reasoning in *Ahneman* v. *Ahneman*, supra, 243 Conn. 471, persuades me to determine that the court's decision, only when properly construed as the functional equivalent of a denial of the motion on the merits pursuant to § 52-325b (b) (1), is subject to immediate appellate review under § 52-325c (a).

In *Ahneman*, a marital dissolution action, the defendant appealed from the granting of a postjudgment motion filed by the plaintiff seeking modification of the defendant's unallocated alimony and child support obligation. Id., 474. Around the time that she had filed the appeal, the defendant filed several postjudgment

[2] General Statutes § 52-325d provides: "In any action in which (1) a notice of lis pendens was recorded which is not intended to affect real property, or (2) the recorded notice does not contain the information required by subsection (a) of section 52-325 or section 46b-80, as the case may be, or (3) service of process or service of the certified copy of the notice of lis pendens was not made in accordance with statutory requirements, or (4) when, for any other reason, the recorded notice of lis pendens never became effective or has become of no effect, any interested party may file a motion requesting the court to discharge the recorded notice of lis pendens. If the court finds that such notice never became effective or has become of no effect, it shall issue its order declaring that such notice of lis pendens is invalid and discharged, and that the same does not constitute constructive notice. A certified copy of such order may be recorded in the land records of the town in which the notice of lis pendens was recorded."

motions concerning both financial and nonfinancial issues. Id., 474–75. The trial court agreed to adjudicate the defendant's motions relating to nonfinancial issues, but it refused to consider her motions concerning financial issues. Id., 476. Specifically, during a hearing, the court stated in relevant part: "I will not hear anything on monetary aspects because I think the law of the case was established as a result of [an] earlier hearing. It's now on appeal." (Internal quotation marks omitted.) Id., 477 n.7. The defendant amended her appeal to contest the court's refusal to consider her motions concerning financial issues. Id., 477. This court subsequently dismissed the amended appeal for lack of a final judgment. See id., 477 and n.10.

After granting certification to appeal, our Supreme Court concluded that the trial court's refusal to consider the defendant's motions on financial issues constituted a final judgment for appeal purposes. See id., 478–79. The court observed that, "if the trial court formally had denied the defendant's motions concerning financial issues, that decision would have constituted a final judgment." Id., 480. The court continued: "The trial court's decision not to consider the defendant's motions was the functional equivalent of a denial of those motions. Like a formal denial, the effect of the court's decision refusing to consider the defendant's motions during the pendency of the appeal was to foreclose the possibility of relief from the court on those issues, unless and until the resolution of the appeal required further proceedings. Indeed, the refusal to consider a motion is more deserving of appellate review than a formal denial, because the defendant not only has been denied relief; she has been denied the opportunity even to persuade the trial court that she is entitled to that relief. Moreover, at least with respect to a legitimate motion to modify financial aspects of a dissolution judgment,

there is an unacceptable possibility that any harm suffered as a result of the court's refusal to consider the motion will never be remediable. The original motion in this case was engendered by a change in the factual circumstances, and further changes may again have occurred by the time the court finally considers the defendant's motions after the appeal is decided." Id.

I consider our Supreme Court's reasoning in *Ahneman* to be applicable to the narrow circumstances of the present action. Initially, I acknowledge that, unlike in *Ahneman*, the trial court in the present action issued an order denying the motion to discharge. As the court subsequently articulated, however, the denial was pro forma; in substance, the court refused to act on the motion to discharge in accordance with §§ 52-325a and 52-325b—that is, by holding a prompt hearing and adjudicating the merits of the motion—because of the discretionary stay. Thus, I treat the court's pro forma denial of the motion to discharge as a refusal to decide the motion under §§ 52-325a and 52-325b and, in turn, pursuant to the rationale of *Ahneman*, as the functional equivalent of a denial of the motion on the merits under § 52-325b (b) (1). See *Mundell* v. *Mundell*, 110 Conn. App. 466, 476–77, 955 A.2d 99 (2008) (citing *Ahneman* in construing denial of motion for modification of child support and alimony obligations as refusal to consider merits of motion when sole basis of denial was pendency of appeal taken from decision on prior motion for modification). As in *Ahneman*, had the court in the present action held the statutorily required hearing and denied the motion to discharge pursuant to § 52-325b (b) (1), that decision would have been a final judgment for appeal purposes. See General Statutes § 52-325c (a). In addition, as in *Ahneman*, the refusal by the court in the present action to proceed on the motion to discharge pending the discretionary stay "foreclose[d] the possibility of relief from the court" on the motion,

unless and until the stay was lifted, and denied Number Six the "opportunity even to persuade the trial court that [it] was entitled" to the relief that it sought. *Ahneman* v. *Ahneman*, supra, 243 Conn. 480. I recognize, as the plaintiff, Fairlake Capital, LLC, notes in its supplemental memorandum, that the sui generis concerns associated with a motion to modify a dissolution judgment highlighted in *Ahneman* are not present in this case. See id. Nevertheless, as the majority correctly explains in part I B of its opinion, Number Six is entitled to a prompt hearing on the motion to discharge and, from my perspective, is subject to interference with the alienability of its property so long as no additional action is taken on the motion.

In sum, guided by our Supreme Court's reasoning in *Ahneman*,[3] I conclude that the pro forma denial of the motion to discharge is the functional equivalent of a denial of the motion on the merits pursuant to § 52-325b (b) (1) and, thus, constitutes a final judgment for appeal purposes under § 52-325c (a).

B

Having concluded that the denial of the motion to discharge constitutes a final judgment for appeal purposes, I next consider Number Six's claim that the court improperly denied the motion to discharge on the basis of the discretionary stay. Like the majority, I conclude that the court committed error in relying on the discretionary stay to deny the motion to discharge without a hearing and without considering the merits of Number

[3] I emphasize that my application of *Ahneman* in the present appeal is limited. The court's refusal to proceed on the motion to discharge denied Number Six a prompt hearing afforded to it by statute and a decision on the merits of the motion to discharge, from which an immediate appeal could have been taken pursuant to § 52-325c (a). In other words, I do not construe *Ahneman* as enabling this court to provide immediate appellate review of every interlocutory order declining to consider the merits of a motion.

Six's probable cause claim in accordance with §§ 52-325a and 52-325b. I respectfully disagree with the majority's analysis, however, insofar as the majority frames the issue as one implicating the court's discretion to terminate or to maintain the stay. In my view, the preliminary, and dispositive, issue is whether, in light of our Supreme Court's decisions in *Kukanskis* v. *Griffith*, 180 Conn. 501, 430 A.2d 21 (1980), and *Williams* v. *Bartlett*, 189 Conn. 471, 475, 457 A.2d 290, appeal dismissed, 464 U.S. 801, 104 S. Ct. 46, 78 L. Ed. 2d 67 (1983), the motion to discharge is subject to the discretionary stay as a matter of law. I conclude that it is not, and, therefore, the discretionary stay had no bearing on the court's ability to hear and to adjudicate the motion to discharge.

I begin by setting forth the applicable standard of review. The inquiry here is not whether the court abused its discretion by failing to terminate the discretionary stay vis-à-vis the motion to discharge but, instead, whether the court committed error in failing to act on the motion to discharge in accordance with §§ 52-325a and 52-325b on the basis of its determination that the stay encompassed the motion to discharge, which presents a question of law subject to plenary review. See *Coleman* v. *Bembridge*, 207 Conn. App. 28, 34, 263 A.3d 403 (2021) ("[i]t is axiomatic that a matter of law is entitled to plenary review on appeal" (internal quotation marks omitted)).

Part I B of the majority opinion thoroughly summarizes the historical background underlying the statutory scheme governing notices of lis pendens, as well as our Supreme Court's decisions in *Kukanskis* and *Williams*. As the majority recognizes, pursuant to *Kukanskis* and *Williams*, (1) Number Six's constitutional right to procedural due process entitles it to a hearing on the motion to discharge, with such hearing being held "at a meaningful time and in a meaningful manner" (internal

quotation marks omitted); *Williams* v. *Bartlett*, supra, 189 Conn. 478; *Kukanskis* v. *Griffith*, supra, 180 Conn. 510; and (2) the hearing contemplated by §§ 52-325a and 52-325b must be "prompt . . . ." *Williams* v. *Bartlett*, supra, 480. In contrast to the majority, however, I apply the principles drawn from *Kukanskis* and *Williams* to conclude that, as a matter of law, the motion to discharge is not subject to the discretionary stay. In other words, the discretionary stay does not function to preclude the court from hearing the motion to discharge and adjudicating the merits of Number Six's probable cause claim in accordance with §§ 52-325a and 52-325b, such that no order terminating the stay for that purpose is necessary. This conclusion, I posit, protects Number Six's aforementioned constitutional and statutory hearing rights. Moreover, like the majority, I expressly limit my analysis to the facts of this case, and I do not believe that my analysis would undermine a trial court's broad authority to impose a discretionary stay.

In sum, I conclude that the motion to discharge is not subject to the discretionary stay, and, therefore, the court improperly relied on the stay to deny the motion on procedural grounds. Accordingly, I would reverse the denial of the motion to discharge and direct the court on remand, without regard to the discretionary stay, to act in accordance with §§ 52-325a and 52-325b by conducting a prompt hearing on the motion and adjudicating the merits of the motion insofar as Number Six claims that there is no probable cause sustaining the validity of the plaintiff's claims.[4]

II

Number Six also claims that the trial court improperly denied the motion to terminate stay. In part II of the

[4] I agree with the majority that (1) the court's denial of the motion to discharge as to Number Six's claim that the notice of lis pendens is defective is not properly before this court on appeal, but (2) in the interests of judicial economy, it would be prudent for the trial court on remand to consider Number Six's defective notice claim in addition to its probable cause claim.

majority opinion, the majority concludes that the court improperly denied the motion to terminate stay. In light of my conclusion in part I B of this concurring and dissenting opinion that the court committed error in denying the motion to discharge because, as a matter of law, the motion to discharge is not subject to the discretionary stay, I conclude that there is no practical relief that may be afforded to Number Six as to the denial of the motion to terminate stay. Therefore, rather than reversing the denial of the motion to terminate stay, I would dismiss the remaining portion of this appeal challenging that decision as moot.[5]

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 753, 269 A.3d 790 (2022).

In the motion to terminate stay, Number Six did not seek to terminate the discretionary stay in toto; rather,

[5] Because I would dismiss the portion of this appeal taken from the denial of the motion to terminate stay as moot, it is unnecessary to address whether the denial of the motion constitutes a final judgment for appeal purposes. See *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 85 n.3, 172 A.3d 1263 (2017) (declining to address finality of judgment question when appeal dismissed on mootness grounds).

it moved to terminate the stay solely to permit it to file and to prosecute a motion to discharge the notice of lis pendens. As I previously explained in part I B of this concurring and dissenting opinion, the discretionary stay should not have affected the adjudication of the motion to discharge as a matter of law, and, consequently, it was unnecessary for Number Six to file the motion to terminate stay. Under my analysis in part I B of this concurring and dissenting opinion, Number Six would receive the relief that it seeks vis-à-vis the motion to terminate stay, namely, the ability to pursue the motion to discharge. Accordingly, I conclude that reviewing the merits of the denial of the motion to terminate stay would afford no practical relief to Number Six, and, therefore, the remaining portion of this appeal taken from that decision is moot.[6]

In sum, I would (1) reverse the judgment only as to the denial of the motion to discharge and remand the case with direction that the trial court, without taking action as to the discretionary stay, hold a prompt hearing and adjudicate the merits of the motion as to Number Six's probable cause claim in accordance with §§ 52-325a and 52-325b, and (2) dismiss the remainder of the appeal taken from the portion of the judgment denying the motion to terminate stay as moot.

Accordingly, I concur in part I of the majority opinion, and I respectfully dissent from part II of the majority opinion.

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[6] In its supplemental memorandum, Number Six concedes that its claim as to the denial of the motion to terminate stay is rendered moot "if this court exercises its jurisdiction to address the merits of the trial court's denial of the motion to discharge and remands this matter for a prompt hearing on the motion . . . ."

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Foreclosure; discovery; protective order; whether trial court abused its discretion by granting protective order that precluded defendant heir from engaging in discovery to develop and pursue special defenses; claim that state and federal law prohibited plaintiff from complying with discovery requests; claim that heir could have amended stricken special defenses or obtained discovery from sources other than plaintiff; claim that heir was required to file affidavit pursuant to applicable rule of practice (§ 17-47) in response to plaintiff's motion for summary judgment as to special defenses.

Davis *v.* Property Owners Assn. of Moodus Lake Shores, Inc. 165
Declaratory judgment; motion for summary judgment; res judicata; restrictive covenants; deed rights; whether trial court erred in granting motion for summary judgment when it determined that plaintiffs' claims were barred by doctrine of res judicata; claim that trial court improperly determined that present claims could have been raised in first action; whether plaintiffs' claims in present action were same as those in first action.

Deutsche Bank AG *v.* Vik. 487
Tortious interference with business expectancy; Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); whether plaintiff's claims against defendants were barred by litigation privilege.

Diaz *v.* Commissioner of Correction 199
Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal as to claim that petitioner's right to due process was violated when trial court denied his request for specific unanimity instruction; whether habeas court abused its discretion by denying certification to appeal as to petitioner's claims that trial counsel and first habeas counsel rendered ineffective assistance; whether habeas court erred in dismissing claim that petitioner's counsel in his second habeas action rendered ineffective assistance; claim that habeas court abused its discretion in denying motion to open judgment.

Doe *v.* New Haven. 553
Negligence; governmental immunity; summary judgment; action against defendant city, defendant board of education and defendant high school principal alleging negligence for failure to properly monitor and supervise teacher who sexually abused plaintiff; whether trial court properly concluded that no genuine issue of material fact existed as to whether principal breached ministerial duty under mandatory reporting statutes (§ 17a-101a) to report reasonable suspicion of child abuse; claim that defendants violated ministerial duties to prohibit free class periods and to take attendance in every class; claim that plaintiff fell within imminent harm to identifiable persons exception to governmental immunity for discretionary acts.

Fairlake Capital, LLC *v.* Lathouris. 750
Motion to discharge notice of lis pendens; motion to terminate stay; subject matter jurisdiction; final judgment; whether trial court's denial of motion to discharge notice of lis pendens was appealable final judgment pursuant to statute (§ 52-325c (a)); whether trial court abused its discretion in relying on discretionary stay of proceedings to decline to conduct statutorily (§§ 52-325a and 52-325b) required hearing to adjudicate merits of motion to discharge notice of lis pendens; whether trial court improperly denied motion to discharge notice of lis pendens

without conducting hearing and making findings pursuant to §§ 52-325a and 52-325b.

Francis *v.* Briatico 244
Alleged violation of plaintiff prisoner's constitutional rights under federal law (42 U.S.C. § 1983); motion for summary judgment; whether trial court erred in rendering summary judgment for defendant correctional institution employees; claim that trial court erred by applying heightened standard pursuant to Whitley *v.* Albers *(475 U.S. 312) to determine violation of eighth amendment rather than deliberate indifference standard pursuant to* Estelle *v.* Gamble *(429 U.S. 97).*

Gianetti *v.* Neigher 394
Legal malpractice; whether defendant, who represented plaintiff in prior action, committed professional negligence by failing to initiate claims under Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) and for tortious interference with business expectancies; whether trial court abused its discretion by granting defendant's motion to preclude testimony of plaintiff's proposed expert witness based on plaintiff's noncompliance with rule of practice (§ 13-4) applicable to disclosure during discovery; whether sanction of preclusion of testimony by expert witness was proportional to plaintiff's noncompliance with Practice Book § 13-4; whether trial court improperly granted defendant's motion for summary judgment.

In re Delilah G.. 604
Termination of parental rights; whether trial court properly granted petition by petitioner father to terminate respondent mother's parental rights as to minor child; whether trial court properly determined that, pursuant to statute (§ 45a-717 (g) (2) (C)), no ongoing parent-child relationship existed between mother and child; whether cumulative effect of evidence was sufficient to justify trial court's determinations that child had no present, positive feelings toward or memories of mother; whether trial court properly determined that mother failed to establish that father's actions rendered inevitable her lack of ongoing parent-child relationship with child; claim that certain court order effectively barred mother from visiting with child; whether evidence was sufficient to support trial court's conclusion that allowing further time for reestablishment of parent-child relationship between child and mother would be detrimental to child's best interests.

In re Katia V.. 468
Termination of parental rights; mootness; claim that trial court violated respondent mother's rights under Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) in determining that Department of Children and Families had made reasonable efforts to reunify her with minor child; claim that trial court erred in denying motion to bifurcatead judicatory phase of termination proceeding from dispositional phase; claim that trial court erred in denying motion to sequester child's foster parents during trial.

In re Omar I. 1
Termination of parental rights; motion to open and set aside adoptions; whether respondent father lacked standing to challenge adoptions of his minor children.

In re Probate Appeal of Harris. 596
Probate appeal; appeal to trial court from decree of Probate Court admitting decedent's will to probate; claim that trial court erred in concluding that decedent's will was validly attested by two witnesses as required by statute (§ 45a-251); whether Supreme Court's decision in Gardner *v.* Balboni *(218 Conn. 220) applied in circumstances of present case.*

Kazemi *v.* Allen 86
Vexatious litigation; adverse possession; trespass; whether defendants properly appealed from final judgment; claim that trial court erred when it determined that defendants lacked probable cause to bring adverse possession and trespass counts of counterclaim; claim that trial court improperly concluded that defendants did not establish their advice of counsel defense; claim that it was improper for trial court to infer that defendants acted with malice.

Konover Development Corp. *v.* Waterbury Omega, LLC 648
Breach of contract; prejudgment remedy; claim that trial court improperly granted application for prejudgment remedy; claim that trial court improperly concluded that plaintiff had established probable cause that defendant had breached oral agreement relating to plaintiff's management of rooftop wireless telecommunications agreements on behalf of defendant; whether enforcement of oral management

agreement was barred by statute (§ 20-325a), rule against perpetuities, or statute of frauds.

Lending Home Funding Corp. *v.* REI Holdings, LLC 703
Foreclosure; whether trial court erred in determining it was without subject matter jurisdiction to hear motion to open and vacate judgment of strict foreclosure; whether timely filed motion to reargue or to reconsider trial court's denial of motion to open and vacate foreclosure judgment triggered automatic stay provision in applicable rule of practice (§ 61-11 (a)) until parties received notice of court's ruling on motion to reargue, thereby rendering law day that fell within extended appeal period without legal effect.

Levco Tech, Inc. *v.* Kelly 257
Declaratory judgment; action seeking determination of number of shares of plaintiff corporation owned by certain shareholder; whether trial court improperly determined that any trust created by plaintiff's shareholder was revocable; whether trial court properly determined that plaintiff's sale of stock to certain shareholder was invalid due to inadequate notice of board meeting at which sale was approved.

Maye *v.* Canady 455
Landlord-tenant; action to recover possession of certain premises and personal property following allegedly unlawful entry and detainer by defendants in violation of statute (§ 47a-43); reviewability of claim that trial court improperly found that plaintiff and defendant had landlord-tenant relationship; claim that trial court erred in its calculation of damages award; whether trial court's award for certain of plaintiff's moving expenses was clearly erroneous.

Mention *v.* Kensington Square Apartments. 720
Housing code enforcement; whether trial court had subject matter jurisdiction over evidence of housing code violations that predated filing of complaint; whether trial court properly concluded that defendant violated housing code; whether housing code, as applied to defendant, was unconstitutionally vague; claim that defendant failed to exhaust administrative remedies; claim that defendant failed to meet its burden for review of unpreserved claim pursuant to State *v.* Golding *(213 Conn. 233); whether trial court erred in calculating amount of rent abatement due to plaintiff based on her share of subsidized rent.*

Michael G. *v.* Commissioner of Correction. 358
Habeas corpus; dismissal of third habeas petition as untimely pursuant to applicable statute (§ 52-470 (d) and (e)); claim that habeas court abused its discretion in denying petition for certification to appeal; whether habeas court abused its discretion in determining that petitioner failed to demonstrate good cause for delay in filing third habeas petition; whether habeas court abused its discretion in denying motion for disqualification of habeas judge.

Miller *v.* Doe 35
Alleged violation of plaintiff prisoner's constitutional rights under federal law (42 U.S.C. § 1983); claim that defendant correctional officer acted with deliberate indifference in violation of eighth amendment when defendant transported plaintiff in vehicle that he drove erratically and unsafely while plaintiff was not secured by seat belt; whether trial court improperly denied defendant's motion for summary judgment on basis of qualified immunity; whether defendant's conduct while transporting plaintiff violated clearly established constitutional right; whether defendant's conduct was severe enough to constitute obvious constitutional violation.

Olson *v.* Olson 4
Dissolution of marriage; motion to dismiss; whether trial court improperly dismissed motion for modification of alimony for lack of subject matter jurisdiction.

Reiner *v.* Reiner 63
Declaratory judgment; contract interpretation; claim that term "interest," as used in buyout provision of settlement agreement for certain parcels of real estate, meant "equitable interest"; claim that trial court erred in concluding that amount required to buy out defendant's interests in certain real property pursuant to parties' settlement agreement was to be calculated by multiplying his percentage interest in each property by difference of its fair market value minus any outstanding mortgage debt.

Sargent, Sargent & Jacobs, LLC *v.* Thoele 179
Interpleader; action for interpleader brought by escrow agent to determine rights to funds deposited by purchaser to ensure performance of obligations under real estate purchase and sale agreement; cross claim by purchaser that seller breached purchase and sale agreement; whether parol evidence rule precluded consideration

of letter of intent related to sewer easement on property signed two years prior to purchase and sale agreement at issue; whether purchaser had actual knowledge of potential sewer easement on property; whether potential sewer easement was encumbrance on property; claim that trial court erred in determining that seller's failure to disclose potential sewer easement was material breach of purchase and sale agreement.

Simms *v.* Zucco 525

Dissolution of marriage; motion to modify alimony; whether trial court incorrectly determined that plaintiff's service of notice of motion to modify alimony sent to defendant's out of state residence by certified mail by state marshal was legally sufficient pursuant to statutes (§§ 52-50 and 52-52); whether trial court erred in opening judgment of dissolution and modifying defendant's alimony obligation in violation of automatic bankruptcy stay imposed by federal law (11 U.S.C. § 362); whether trial court abused its discretion in increasing defendant's alimony obligation and ordering retroactive alimony.

State *v.* Glass. 132

Burglary in first degree; robbery in first degree; claim that evidence was insufficient to establish that defendant was perpetrator of crimes; whether evidence that defendant was major contributor to mixture of touch DNA found on fragment of latex glove used during commission of crimes was sufficient to determine that he was most recent or sole wearer of glove.

State *v.* Gonzalez 511

Assault in first degree; carrying pistol without permit; motion to correct illegal sentence; claim that No. 18-63, § 2, of the 2018 Public Acts (P.A. 18-63) was intended to apply retroactively to defendant's sentence imposing period of special parole because statute governing special parole (§ 54-125e) was procedural rather than substantive; claim that P.A. 18-63 was intended to apply retroactively because legislative history and amendatory language demonstrated that it was meant to clarify § 54-125e rather than effect change in law.

State *v.* Guild. 121

Petition filed pursuant to statute (§ 17a-593) for order to extend commitment of acquittee to jurisdiction of Psychiatric Security Review Board; whether trial court's denial of acquittee's motion to dismiss state's petition to extend his commitment constituted appealable final judgment pursuant to State *v.* Curcio *(191 Conn. 27).*

State *v.* Sweet 679

Larceny in third degree; identify theft in third degree; persistent serious felony offender; claim that evidence was insufficient to prove that defendant appropriated in excess of $2000 to himself; unpreserved claim that property report created by investigating police officer and victim's statement to police were improperly admitted into evidence in violation of sixth amendment right to confrontation; unpreserved claim that letters from two credit card issuers regarding fraudulent charges, which were admitted as past recollections recorded under provision (§ 8-3 (6)) of Connecticut Code of Evidence, constituted testimonial hearsay that was admitted in violation of sixth amendment right to confrontation; claim that statements of card issuers were improperly admitted into evidence as past recollections recorded because information contained therein was not personally known to victim, through whom statements were presented.

State *v.* Turner 584

Murder; assault in first degree; motion to correct illegal sentence; claim that trial court made materially false assumptions about defendant's potential for rehabilitation at his sentencing proceeding when contrasted with youth related brain science set forth in Miller v. *Alabama* (567 U.S. 460), and its progeny; whether trial court erred in holding that defendant failed to state colorable claim for relief; claim that defendant was entitled to evidentiary hearing to present expert testimony on juvenile brain science in support of his motion to correct illegal sentence.

State *v.* Waters. 294

Operating motor vehicle while under influence of intoxicating liquor in violation of statute (§ 14-227a (a) (1)); sufficiency of evidence; reviewability of unpreserved claim that testimony by state's expert witness about likely blood alcohol content of person who was slurring his speech violated § 14-227a (c) when defendant was charged under behavioral subdivision of § 14-227a (a); whether trial court committed plain error in permitting opinion testimony by state's expert witness that was implicitly related to defendant's blood alcohol content in behavioral case under § 14-227a (a) (1); whether trial court abused its discretion in determining

that defendant failed to establish proper foundation to cross-examine state's expert witness about whether other substances could have affected rate at which individual can become visibly intoxicated from alcohol; reviewability of claim that trial court improperly denied motion to suppress statements defendant made at accident scene and at police station.

Wilmington Trust, National Assn. *v.* N'Guessan 229

Foreclosure; motion for summary judgment; claim that trial court erred in granting plaintiff's motion for summary judgment without considering applicability of doctrines of res judicata and collateral estoppel; claim that trial court abused its discretion by sustaining plaintiff's objections to defendant's interrogatories and requests for production.

SUPREME COURT PENDING CASE

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

BARRY LEE COHEN *v.* NANCY ROSSI et al., SC 20737
Judicial District of New Haven

Elections; Absentee Ballots; Whether Trial Court Properly Found for Defendant Democratic Mayoral Candidate and Municipal Election Officials in Plaintiff Republican Mayoral Candidate's General Statutes § 9-328 Action After Concluding That Substantial Violations of Election Statutes Occurred but Results of Election Were Not Seriously in Doubt. The plaintiff Barry Lee Cohen was the Republican candidate and the defendant Nancy Rossi was the Democratic candidate for the West Haven mayoral election on November 2, 2021. Due to the closeness of the race, an automatic recanvass occurred on November 7, 2021. The certified election results following the recanvass provided that Rossi received 4275 votes and won the election by 32 votes over the plaintiff, who received 4243 votes. The plaintiff thereafter brought this action under General Statutes § 9-328, which provides in relevant part for such an action by a candidate in a municipal election who aggrieved by a ruling of an election official or claims statutory violations with respect to absentee ballots. The defendants included Rossi and the city clerk of West Haven, the Republican and Democratic registrars of voters, the head moderator, and the head absentee ballot moderator. The plaintiff alleged that the defendant municipal election officials had failed to process, count, maintain the chain of custody over, and endorse absentee ballots in compliance with mandatory statutory requirements and asked that the trial court issue a writ of mandamus and either set aside the results of the election or hold a special election. The action was tried to the court over a series of dates between November 2021 and April 2022, after which the trial court issued a memorandum of decision on June 24, 2022, that found in favor of the defendants. The trial court determined that "the evidence presented shows a concerning lack of overall compliance with statutory guidelines by election officials in the city of West Haven." It nonetheless concluded that the plaintiff had failed to prove that the election results were seriously in doubt where it posited that a reallocation of improperly counted absentee ballots in favor of the plaintiff would still be insufficient to overcome the 32 vote margin. The plaintiff thereafter raised questions of law to be reviewed by the Supreme Court pursuant to General Statutes § 9-325, and the trial court transmitted the questions of law and its finding of

facts to the Chief Justice in accordance therewith. The Supreme Court will decide whether the trial court erred in concluding that fourteen "same day" absentee ballots that were endorsed by the assistant city clerk rather than the city clerk should be included in the vote count as substantially compliant with the relevant statutes where absentee ballots had been rejected from the initial count for the same reason. The Supreme Court will also decide whether the trial court erred in concluding that the city clerk was permitted to have a designee retrieve absentee ballots from drop boxes. The Supreme Court will further decide whether certain absentee ballots were properly counted despite their absence from the absentee ballot log or their noncompliance with statutory affidavit requirements. In addition, the Supreme Court will decide whether certain absentee ballots were deemed to be substantially compliant with the relevant statutes where the plaintiff argues that they were returned by improperly designated persons. The Supreme Court will finally decide whether the trial court erred in concluding that the election results were not in serious doubt and that there was no mistake in the vote count.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES
DEPARTMENT OF DEVELOPMENTAL SERVICES

NOTICE OF INTENT TO RENEW THE INDIVIDUAL AND FAMILY SUPPORT MEDICAID WAIVER and TO AMEND THE EMPLOYMENT AND DAY SUPPORTS and COMPREHENSIVE SUPPORTS MEDICAID WAIVERS

In accordance with the provisions of section 17b-8(c) of the Connecticut General Statutes, notice is hereby given that the Commissioner of Social Services intends to submit the following three applications to the Centers for Medicare and Medicaid Services (''CMS''), each to be effective February 1, 2023:

(1) Renewal of the Medicaid Waiver for Individual and Family Support;
(2) Amend the Medicaid Waiver for Employment and Day Supports; and
(3) Amend the Medicaid Waiver for Comprehensive Supports

All of the above-referenced waivers are operated by the Department of Developmental Services. TheDepartment of Social Services and the Department of Developmental Services are proposing the following changes to all three waivers:

1) Adding a virtual component to the Individualized Day Support service;
2) Increasing the Assistive Technology limit from $15,000 to $25,000 over a five-year period, per waiver participant;
3) Increasing the Vehicle Modification limit from $15,000 to $25,000 over the term of each waiver, per waiver participant;
4) Increasing the Environmental Modification limit on all waivers from $25,000 to $35,000 over the term of each waiver, per waiver participant;
5) Adding language to the Individualized Home Supports service, Individualized Day Support service and the Adult Companion service to allow for such supports to be provided in a short-term acute care hospital stay for the purposes of supporting the participant's personal, behavioral and communication supports not otherwise provided in that setting;
6) Removing the Prevocational Support service as this service has no utilization and focuses on an outdated model of day support that no longer aligns with the agency's mission;
7) Adding a home delivery meal service for participants who are unable to prepare or obtain nourishing meals independently, or when the individual responsible for this activity is temporarily absent or unable to prepare meals;
8) Combining and incorporating the Independent Support Broker service into the Individualized Goods and Services service;
9) Transcribing the approved Appendix K (temporary emergency preparedness and response amendments) language specific to the approved Home and Community-Based Services (''HCBS") American Rescue Plan to the permanent waiver authorities, effective upon the expiration of the Appendix K, and repealing and replacing an initiative under the HCBS American Rescue Plan effective 2/1/2023; and
10) Technical and administrative clarifications, including those revisions requested by CMS.

Specific to the Individual and Family Support Medicaid waiver and the Comprehensive Supports Medicaid waiver, the Departments are proposing the following additional change to these waivers:

(1) Combining and incorporating the Personal Supports service into the Individualized Home Supports service;

Finally, the Departments are proposing the following waiver cap increases:

(1) Increasing the Employment and Day Supports waiver annual cap from $58,000 to $75,000;
(2) Increasing the Individual and Family Support waiver annual cap from $130,000 to $165,000;

No current enrollees will be negatively impacted by the changes proposed in the applications.

Copies of the complete text of the waiver applications are available upon request from: Krista Ostaszewski, Health Management Administrator, DDS Central Office, 460 Capitol Avenue, Hartford, CT, 06106, or via email Krista.Ostaszewski@ct.gov. They are also available on the Department of Social Services' website, www.ct.gov/dss, under News and Press,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications, and the Department of Developmental Services' website, https://portal.ct.gov/dds, under ''Latest News.''

All written comments regarding these applications must be submitted by Thursday, September 29, 2022 to: Krista Ostaszewski, 460 Capitol Avenue Hartford, Connecticut, 06106, or via email at Krista.Ostaszewski@ct.gov.

Notice of Intent to Amend Connecticut Green Bank C-PACE Program Guidelines

In accordance with Section 1-121 of the General Statutes of Connecticut, NOTICE IS HEREBY GIVEN that the Connecticut Green Bank (the ''Green Bank'') proposes to update the program guidelines (the ''Program Guidelines'') for the commercial sustainable energy program authorized pursuant to Section 16a-40g of the General Statutes of Connecticut (the ''C-PACE Program'').

Summary of written procedures: The updated Program Guidelines for the C-PACE Program establish the rules for all program participants (e.g. capital providers, technical reviewers, borrowers etc.). The proposed changes add zero emission vehicle refueling infrastructure to eligible energy Improvements and exempts this measure from the saving to investment ratio requirement. There are also updates to the third-party capital provider application and approval process and other clarification edits.

Statement of purpose: To adopt the updated Program Guidelines for the C-PACE Program.The proposed Program Guidelines may be viewed on Green Banks website, at the following address: https://www.ctgreenbank.com/publiccomment/. Due to COVID-19 restrictions, the offices of the Green Bank are not open to the public, however a copy may be requested via e-mail at: barbara.johnson@ctgreenbank.com. All interested parties may submit comments in connection with the proposed Program Guidelines, within thirty (30) days following publication of this notice, to

Barbara Johnson, the Administrative Coordinator at the Connecticut Green Bank, 75 Charter Oak Avenue, Suite 1-103, Hartford, CT 06106 or via e-mail at: publiccomment@ctgreenbank.com.