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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* PATRICK M.*
(SC 20476)

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

Syllabus

Convicted of the crimes of murder and criminal possession of a firearm in connection with the death of his wife, Y, the defendant appealed to this court. The police had reported to the defendant's apartment, where he lived with Y and their two year old daughter, P, in response to a 911 call concerning a domestic disturbance. Upon entering the apartment, the police found the body of Y, who had died from multiple gunshot wounds to her head, as well as narcotics, packaging materials, and cash. The police thereafter located P in Brooklyn, New York, at the home of the defendant's sister, who indicated that the defendant had dropped off P the morning after Y's murder. The defendant was found in Massachusetts and arrested several days later. Following his arrest, the defendant was advised of and exercised his right to remain silent pursuant to *Miranda* v. *Arizona* (384 U.S. 436). Before trial, the state filed notice of its intent to introduce evidence of the defendant's uncharged misconduct, including the testimony of J, an ex-girlfriend of Y with whom Y had recently reunited, for the purpose of demonstrating the defendant's intent and identity. The defendant moved to exclude J's testimony, but

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

the trial court ultimately concluded that it was relevant and not unduly prejudicial. At trial, J testified about two incidents that occurred a few months before Y's murder, when the defendant threatened J with a firearm at a funeral and when the defendant broke down the door to J's apartment while J and Y were in bed together. The state also elicited testimony from T, who was a drug runner for the defendant. T testified that he had been with the defendant in a car owned by T's mother on the day of Y's murder and that the defendant had texted the following morning asking him to look up "[h]ow much time do you get." The defendant testified in his own defense at trial. He admitted that he was a drug dealer and stated that, when he returned to his apartment on the night of the murder, he found Y dead and a large amount of cash and a certain quantity of heroin missing. The defendant claimed that he fled with P to his sister's home in Brooklyn because he feared the perpetrators of the purported robbery. He also testified that T picked him up in Brooklyn and drove him to New London, where he stayed for two days before going to Massachusetts. During closing arguments, which commenced later in the day on which the defendant testified, the prosecutor sought to cast doubt on the credibility of the defendant's testimony by emphasizing the defendant's delay in telling his version of events. The prosecutor repeated that "today" or "this morning" at trial was the "first time" the defendant had shared his story and argued that, if Y's murder was the result of a botched robbery, as the defendant claimed, common sense would have compelled the defendant to share that information with the police "closer to the time of the crime" in order to assist with the investigation. The prosecutor also stated during rebuttal argument that, in comparison to the months long delay it took J to report the incident at the funeral, "[t]here was a much bigger delay in hearing [from the defendant] about the missing large quantity of money." Defense counsel objected to the prosecutor's statements regarding the defendant's silence, but the court overruled the objection. After the defendant was found guilty, defense counsel moved for a new trial, claiming that the prosecutor had violated the defendant's right to due process by commenting on his post-*Miranda* silence. The court denied that motion, concluding that the prosecutor's statements referred to the defendant's prearrest silence, which is permissible. *Held*:

1. The evidence was sufficient to satisfy the state's burden of proving beyond a reasonable doubt that the defendant had committed the crimes of murder and criminal possession of a firearm: although there was no direct evidence linking the defendant to Y's murder, the cumulative impact of the circumstantial evidence was sufficient to support a reasonable inference that it was the defendant who murdered Y with a firearm insofar as that evidence revealed that his marriage with Y was disintegrating due to his own extramarital affairs and Y's romantic relationship with J, that the defendant previously had threatened to kill Y and had threatened J with a gun, and, therefore, that the defendant had a motive

to murder Y and had expressed a willingness to take action consistent with that motive; moreover, the defendant's own testimony placed him at the scene of the murder less than one hour before the 911 call, the trier of fact was not required to credit the defendant's testimony that Y was dead when he arrived at the apartment, particularly because it was inconsistent with the timeline of events established by the 911 call and certain video surveillance footage that was admitted at trial, and it was undisputed that the defendant was a drug dealer who routinely possessed large quantities of cash and narcotics, which permitted a reasonable inference that the defendant possessed a firearm and had the means and opportunity to kill Y with such a weapon; furthermore, the defendant's flight from the scene of Y's murder without calling the police or seeking medical assistance for Y, certain incriminatory statements that he made indicating that he was "sorry" and "on the run," as well as his inquiry to T regarding "[h]ow much time do you get," constituted indirect evidence of the defendant's guilt.

2. The prosecutor improperly commented on the defendant's post-*Miranda* silence, in violation of the defendant's due process right to a fair trial, and, accordingly, the judgment of conviction was reversed, and the case was remanded for a new trial: the state conceded that the prosecutor's comment during rebuttal argument regarding the significant "delay in hearing [from the defendant] about the missing large quantity of money" was improper because its context revealed that it referred both to the defendant's pre-*Miranda* and post-*Miranda* silence, and the prosecutor's other references to the defendant's silence during closing argument were ambiguous because they referred generally to the defendant's delay in disclosing his version of events and could reasonably have been understood to include both the four days of pre-*Miranda* silence between the murder and the defendant's arrest and the lengthier post-*Miranda* period between his arrest and trial; moreover, this court adopted a contextualized approach for the purpose of construing such ambiguous prosecutorial remarks, pursuant to which the court must analyze whether the language used by the prosecutor was manifestly intended to be, or was of such a character that the jury would naturally and necessarily take it to be, a comment on the defendant's post-*Miranda* silence, and pursuant to which the defendant bears the initial burden of proving an impermissible comment on his post-*Miranda* silence, after which the state bears the burden of demonstrating that the error was harmless beyond a reasonable doubt; in the present case, viewing the prosecutor's remarks in the context in which they were made, the jury naturally and necessarily would have construed them to refer to both the defendant's pre-*Miranda* silence, insofar as the comments focused on the defendant's flight to Brooklyn, New London, and Massachusetts before his arrest, and his post-*Miranda* silence, insofar as the prosecutor repeatedly emphasized that "today" or "this morning" was the "first time" the defendant told his story; furthermore, the

prosecutor emphasized the recent nature of the defendant's disclosure by arguing that the police had not investigated Y's death as a botched robbery because, between the date of the murder and the date the defendant testified, he never informed the police that a robbery occurred, and, thus, the prosecutor's remarks encompassed the full continuum of the defendant's pre-*Miranda* and post-*Miranda* silence, and the natural and necessary impact of the prosecutor's statements during initial closing argument was reinforced by the admittedly improper comment during rebuttal argument when the prosecutor expressly noted that the defendant's silence far exceeded four months; in addition, the state failed to satisfy its burden of demonstrating that the prosecutor's improper remarks were harmless, as it failed to explain how the prosecutor's repeated emphasis on the defendant's post-*Miranda* silence during initial closing argument, which struck at the jugular of the defendant's testimony that Y was killed during a botched robbery, was harmless beyond a reasonable doubt.

3. The trial court did not abuse its discretion in admitting J's testimony regarding the funeral incident as evidence of the defendant's uncharged misconduct on the ground that the probative value of that evidence outweighed its prejudicial effect: J's testimony regarding her relationship with Y and the defendant's threatening conduct clearly was relevant to the issue of the defendant's motive to commit the crimes of conviction, as the jury reasonably could have found that the defendant blamed the breakdown of his marriage on Y's relationship with J, that he was willing to resort to violence to end their relationship, and that his willingness to use violence extended to Y herself, especially in light of evidence that the defendant had threatened to kill Y and that Y had called the police after the defendant burst in on her and J in bed together; moreover, the uncharged misconduct evidence was not unduly prejudicial, as the defendant's threatening conduct toward J at the funeral was less severe than the conduct that formed the basis for his conviction of Y's murder and, therefore, was unlikely to unduly arouse the emotions of the jurors; furthermore, the trial court instructed the jury that its use of J's testimony regarding the funeral incident was limited to showing or establishing the motive for the commission of the charged crimes, which minimized any prejudicial effect that the evidence otherwise may have had.

Argued May 5—officially released September 2, 2022**

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial dis-

** September 2, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

trict of New Britain, where the charge of murder was tried to the jury before *Oliver*, *J.*; verdict of guilty; thereafter, the charge of criminal possession of a firearm was tried to the court, *Oliver*, *J.*; finding of guilty; judgment of guilty in accordance with the jury's verdict and the court's finding, from which the defendant appealed to this court. *Reversed*; *new trial.*

Emily H. Wagner, assistant public defender, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Brett J. Salafia*, executive assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The defendant, Patrick M., was convicted of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1) in connection with the death of his wife, Y. On appeal, the defendant raises four claims: (1) the evidence was insufficient to establish his identity as the perpetrator of the crimes of conviction; (2) the prosecutor violated the proscriptions set forth in *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), by improperly commenting on the defendant's invocation of his right to remain silent following his arrest and advisement of rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); (3) the prosecutor's comments during closing argument on the defendant's post-*Miranda* silence and pretrial incarceration constituted prosecutorial improprieties that deprived the defendant of his due process right to a fair trial; and (4) the trial court improperly admitted evidence of the defendant's prior uncharged misconduct in violation of our rules of evidence. We conclude that the evidence was sufficient to support the defendant's conviction but that the

prosecutor improperly commented on the defendant's post-*Miranda* silence. We therefore reverse the conviction and remand the case for a new trial.

The jury reasonably could have found the following facts. The defendant and Y were married in 2015 and had one child together, P. Their relationship was tumultuous and plagued by infidelity. The defendant had a series of extramarital affairs with various women, and, by 2017, Y was in a sexual relationship with her former girlfriend, Kye Jones. The defendant, who did not approve of Y and Jones' relationship, at one point threatened to kill Y[1] and, on a different occasion, also threatened Jones with a gun, yelling at her, "I told you I ain't no punk."

On April 7, 2017, the defendant, Y, and P, who was two years old at the time, lived in a second floor apartment in New Britain. Their neighbor, M, lived in the apartment directly below them. On the night of April 7, M arrived home at approximately 9 p.m. Less than an hour later, M heard "a lot of ruckus coming from upstairs," which she characterized as fighting, yelling, and bodies being tossed around. M called 911, and the police arrived shortly thereafter, at 10:05 p.m.

The police knocked on the locked door of Y's apartment, but there was no answer. After speaking to M, the police decided to force entry into the apartment. Inside, they found Y in the master bedroom face down in a pool of blood. Attempts to revive Y were unsuccessful, and she was pronounced dead at the scene. A subsequent autopsy revealed the cause of Y's death to be multiple gunshot wounds to the head and that the manner of her death was a homicide.[2]

[1] Y's mother testified that the defendant was abusive toward Y and that, in March, 2017, less than one month before the murder, the defendant said that "he was going to kill [Y]."

[2] Y sustained three gunshot wounds: one to the face, one to the temple, and one to the shoulder.

The police searched the apartment, but neither the child nor anyone else was there. Inside the master bedroom, the police discovered multiple nine millimeter shell casings and bullet fragments. There also was evidence of a struggle: a blood like substance was found on the bed, and Y was wearing only one shoe. The search also resulted in the seizure of multiple cell phones, narcotics, packaging materials, and approximately $2900 in cash.

Given the nature of the initial 911 call as a domestic disturbance, the police focused their efforts on locating the defendant and P. When those efforts yielded no results, an Amber Alert was issued, insofar as P was "a missing child [who was] in danger because there was a homicide." The Amber Alert also warned that the defendant was "considered dangerous" and should be approached with "extreme caution." The police later located P at the home of the defendant's sister in Brooklyn, New York. The defendant's sister informed the police that the defendant had stopped by unannounced on the morning of April 8, 2017, and told her to "take care of [his] daughter." On that same date, the defendant also called Y's aunt and said to her, "I love you. . . . I'm sorry. I'm on the run."

The defendant was found on April 11, 2017, in Massachusetts. He was arrested and charged with murder and criminal possession of a firearm. The defendant elected a jury trial on the murder charge and a bench trial on the criminal possession of a firearm charge.

At trial, the jury heard testimony from Dwayne Watson, who was familiar with the defendant through Y's sister, with whom he had a child. Watson testified that he saw the defendant on the afternoon of April 7, 2017, picking up P after school in a gray Chevrolet Malibu. Watson also saw the defendant later that evening in Hartford in the same gray vehicle. The jury also heard

testimony from Daniel Thomas, an associate of the defendant's. Thomas testified that he went with the defendant to pick up P after school on the afternoon of the day of the murder in a silver Chevrolet Malibu, which was registered and insured in the name of Thomas' mother. Thomas spent a couple of hours with the defendant and P and then went home.

Later that night, Thomas learned that Y had been shot and killed. Thomas subsequently received a phone call from the defendant, in which the defendant asked him "what was going on out there." Thomas responded that "people [were] saying that you killed your girl," and the defendant replied, "for real? That's what they saying?" The defendant also said that "he probably wasn't going to see his daughter."

The defendant texted Thomas again during the early morning hours the following day and asked him to look up "[h]ow much time do you get." Thomas told the defendant to park the Chevrolet Malibu and to "take the plates off so [his] mother won't be a part of [a criminal investigation]." The defendant asked Thomas to pick up the car in Brooklyn. Thomas drove to Brooklyn, where he and a friend picked up the Chevrolet Malibu and the defendant's cell phone. They delivered the Chevrolet Malibu to the home of Thomas' mother, but Thomas kept the cell phone in his possession. On cross-examination, Thomas admitted that he currently was incarcerated as a result of a conviction for the sale of narcotics and that, prior to his incarceration, he was "a drug runner" for the defendant. He explained that he kept the defendant's cell "phone because [he] wanted to wrap up any loose ends [regarding] drug deals."

The state adduced video surveillance footage showing a vehicle matching the description of the gray Chevrolet Malibu driving through an intersection near Y's apartment at approximately 10 p.m. on the day of the

murder. Additionally, cameras operated by the city of New York captured images of the Chevrolet Malibu's license plate in various areas of New York a few hours later, between 1 and 2:30 a.m. on April 8, 2017.

The defendant testified in his own defense. The defendant admitted that he was a drug dealer and a convicted felon. He explained that, as a drug dealer, he drove many cars, one of which was the Chevrolet Malibu owned by Thomas' mother. The defendant testified that, on the afternoon of April 7, 2017, he drove the Chevrolet Malibu to pick up his daughter from school at approximately 3 p.m. Thomas accompanied the defendant and returned with him and P to the apartment in New Britain for two or three hours. Sometime thereafter, the defendant left the apartment with P to go to Hartford to purchase "some weed." According to the defendant, he did not drive the Chevrolet Malibu to Hartford. Instead, he drove a blue Acura because he "needed to bring money to New York" and the Acura "had a stash box," or "a hidden compartment under the seat."

The defendant testified that he returned to his New Britain apartment with P at approximately 9 p.m. He noticed that Y's truck was parked in the parking lot and that the door to his apartment was open. When the defendant entered the apartment, he realized that a large amount of cash and illicit drugs were missing. The defendant placed P on the couch and searched the apartment. In the master bedroom, he found Y dead on the floor. In panic and fear, the defendant "grabbed [P] and ran out the door" of the apartment. In order to "[get P] to safety," the defendant fled in the blue Acura to his sister's home in New York.

According to the defendant, he received a phone call from Thomas on the way to New York, in which Thomas informed him that "[his] wife got killed and they saying [that he] did it." The defendant also received notice of

the Amber Alert, which described him as "[a]rmed and dangerous . . . ." Because he was a suspect in Y's murder, the defendant was afraid to contact the police. Instead, he dropped P off at his sister's house and arranged to have Thomas pick him up in Brooklyn. Thomas arrived to pick him up in the Chevrolet Malibu and then drove the defendant to a girlfriend's house in New London. The defendant stayed in New London for two days, after which Thomas drove him to Massachusetts in the Chevrolet Malibu. The police arrested the defendant in Massachusetts one and one-half days later.

On the basis of the foregoing evidence, the jury found the defendant guilty of murder, and the trial court found the defendant guilty of criminal possession of a firearm. The trial court rendered judgment in accordance with the jury's verdict and the court's finding, and sentenced the defendant to fifty-five years of incarceration.[3] This direct appeal followed.

I

The defendant first claims that the evidence was insufficient to support his conviction because the state failed to prove the essential element of identity. We disagree.

"[T]he question of identity of a perpetrator of a crime is a question of fact that is within the sole province of the jury to resolve. . . . To determine whether the evidence was sufficient to establish the essential element of identity, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom, the [jury] reasonably could have concluded

[3] The trial court sentenced the defendant to fifty-five years of incarceration for the crime of murder and imposed a concurrent sentence of ten years of incarceration for the crime of criminal possession of a firearm, for a total effective sentence of fifty-five years.

that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . In doing so, we are mindful that the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Abraham*, 343 Conn. 470, 476, 274 A.3d 849 (2022).

In view of these principles, it is readily apparent that the evidence was sufficient to support a reasonable inference that the defendant committed the crimes of murder and criminal possession of a firearm. The evidence at trial revealed that the defendant's marriage with Y was disintegrating due to the defendant's extramarital affairs and Y's romantic relationship with Jones. As their marriage unraveled, the defendant threatened to kill Y and threatened Jones with a gun. The defendant had a motive to murder Y and had expressed a willingness to take action consistent with that motive. See id., 479 (although motive is not essential element of murder, "the existence or absence of motive often is used at trial to construct a narrative of guilt or innocence"); see also part III of this opinion.

The defendant also had the opportunity and means to commit the crimes with which he was charged. The defendant's own testimony placed him at the scene of the murder at approximately 9 p.m., less than one hour before the 911 call complaining of fighting, yelling, and bodies being tossed around inside the apartment. Although the defendant testified that Y was dead when he arrived at the apartment, the triers of fact were not required to credit the defendant's testimony, particularly because it was inconsistent with the timeline of events established by the 911 call and the video surveillance footage, which depicted the Chevrolet Malibu driven by the

defendant earlier in the day leaving the area at 10 p.m. See, e.g., *State* v. *Roy D. L.*, 339 Conn. 820, 849, 262 A.3d 712 (2021) ("[I]t is well established that [w]e may not substitute our judgment for that of the [finder of fact] when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the [finder] of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.)).

The defendant also had the means to commit the crimes because there was evidence from which the jury reasonably could have found that he had access to a firearm. It was undisputed that the defendant was a drug dealer who routinely possessed large quantities of cash and narcotics. "Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms . . . ." (Internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 240, 249 A.3d 683 (2020). "The jury is permitted to rely on its common sense, experience and knowledge of human nature in drawing inferences . . . and may draw factual inferences on the basis of already inferred facts." (Citation omitted; internal quotation marks omitted.) Id.; see *United States* v. *White*, 356 F.3d 865, 870 (8th Cir. 2004) ("[w]e allow a [fact finder] to infer a connection between drugs and firearms when a defendant distributes quantities of illegal drugs because firearms are viewed as a tool of the trade for drug dealers"). Thus, the jury and the trial court reasonably could have inferred that the defendant had the means to kill Y with a firearm.

Lastly, following the murder, the defendant did not call the police or summon emergency medical assistance to treat Y's grievous injuries; instead, he fled the

apartment and was found four days later out of state. Under certain circumstances, "[f]light, when unexplained, tends to prove a consciousness of guilt. . . . The flight of the person accused of a crime is a circumstance [that], when considered together with all the facts of the case, may justify an inference of the accused's guilt." (Citations omitted; internal quotation marks omitted.) *State* v. *Rosa*, 170 Conn. 417, 432–33, 365 A.2d 1135, cert. denied, 429 U.S. 845, 97 S. Ct. 126, 50 L. Ed. 2d 116 (1976). The defendant's flight from the scene of Y's murder, coupled with his incriminatory statements that he was "sorry" and "on the run," as well as his inquiry into "[h]ow much time do you get," constituted indirect evidence of the defendant's guilt. See *State* v. *McClain*, 324 Conn. 802, 819, 155 A.3d 209 (2017) (consciousness of guilt is "indirect evidence of the defendant's guilt"); *State* v. *Groomes*, 232 Conn. 455, 474, 656 A.2d 646 (1995) (jury may use consciousness of guilt evidence "as independent evidence of guilt *along with the other facts of the case* to determine whether . . . [the defendant] has been proven guilty" (emphasis in original; internal quotation marks omitted)).

We recognize that there was no direct evidence, such as eyewitness testimony, or physical evidence, such as DNA, linking the defendant to Y's murder. The absence of such evidence, however, does not preclude a finding of guilt on the basis of circumstantial evidence that satisfies the constitutional standard. As we previously have explained, "[w]hen reviewing the sufficiency of the evidence, we must focus on the evidence presented, not the evidence that the state failed to present . . . . Additionally, we do not draw a distinction between direct and circumstantial evidence so far as probative force is concerned . . . . Indeed, [c]ircumstantial evidence . . . may be more certain, satisfying and persuasive than direct evidence. . . . It is not one fact . . .

but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Abraham*, supra, 343 Conn. 477. On the basis of our review of the record, we conclude that the cumulative impact of the circumstantial evidence was sufficient to satisfy the state's burden of proving beyond a reasonable doubt that it was the defendant who murdered Y with a firearm.

II

The defendant contends that he was deprived of his due process right to a fair trial because the prosecutor repeatedly commented on his post-*Miranda* silence during closing argument, in violation of *Doyle* v. *Ohio*, supra, 426 U.S. 610.[4] The following additional facts are relevant to this claim. The defendant was arrested four days after the murder, on April 11, 2017, at which time he was advised of his right to remain silent pursuant to *Miranda* v. *Arizona*, supra, 384 U.S. 478–79. Following his arrest, the defendant exercised his right to remain silent.

At trial, the defendant broke his silence and testified in his own defense as to what occurred on the night of April 7, 2017. The defendant explained that he arrived at his New Britain apartment at approximately 9 p.m. to find Y dead and $83,000 in cash and 600 grams of heroin missing. The defendant was afraid, so he grabbed his daughter, P, and fled with her to New York, where he dropped her off at his sister's house. The defendant's testimony raised the possibility that Y had been killed

[4] The defendant also claims that the prosecutor's comments on the defendant's silence impermissibly shifted the burden to the defendant to prove his innocence, in violation of *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Because we agree with the defendant that some of the prosecutor's challenged comments referred to the defendant's post-*Miranda* silence, in violation of *Doyle*, we do not address the defendant's burden shifting claim.

in a robbery gone wrong and that his flight was prompted by fear of the perpetrators rather than his own guilt.

During closing argument, the prosecutor repeatedly sought to cast doubt on the credibility of the defendant's testimony by emphasizing the defendant's delay in telling his story. The prosecutor first invoked this theme, i.e., the belated timing of the defendant's disclosure, by arguing: "Now, the defendant told you today [that] his fear [was] the reason for taking the child to New York. Considering your common sense, would it be reasonable to tell your close family about the event? *I submit to you* [*that*] *the first time we're hearing anything about this sequence of events or the basis was this morning through* [*the defendant's*] *testimony*." (Emphasis added.) The prosecutor asked the jury whether the defendant's "reaction, this fear reaction and the actions that [the defendant] testified to you today that he took, does that fit your commonsense view of how a parent would behave in the wake of the violent death of [his] spouse, or would that parent be taking every step possible to comfort, to shield [P] from what had just happened, and to try very hard, if there were an alternative theory, and I submit to you that there isn't . . . to make sure that that theory was properly investigated? But [the defendant] didn't do that." Instead, he "went to New London, and he hung out with some woman for a couple days," and then went to Massachusetts.

The prosecutor soon returned to the theme that the version of events to which the defendant testified at trial was a recent fabrication: "Now, today you heard *for the first time* about this subsequent meeting where [the defendant] goes to Hartford to see . . . Thomas, gets some marijuana, change[s] cars, get[s] the car that has the trap set up in it so that he could secure the money for the ride down to New York.

* * *

"Now, *this morning you hear about* the trip to New London, you hear about the ultimate trip to Massachusetts to the friend's relative's house, and you hear, *for the first time this morning*, the mention of this large quantity of drug money. The follow-up trip to Hartford *is the first time you heard about that this morning.* And common sense would show you that this information, closer to the time of the crime, might be important to direct the investigation." (Emphasis added.)

The prosecutor also argued that the defendant "can't really have it both ways"; he cannot criticize the police for their failure to investigate a robbery while at the same time refus[e] to disclose that a robbery occurred. "*If* [*the police*] *had information closer to the time of this incident that this was a robbery* involving a very large quantity, essentially more than most people's annual income was on this kitchen table, if you're to believe that, the police probably would have changed the tactics that they used to investigate this crime. We'll never know because they didn't know that because *the first time you heard about it was this morning.*" (Emphasis added.)

During his closing argument, defense counsel pointed out alleged deficiencies in the investigation of Y's murder and questioned the credibility of Jones' testimony, in part because she waited four months after the defendant threatened her with a gun to come forward and "finally [tell] her story." In response, the prosecutor stated in rebuttal argument that "there's an old saying, 'what's good for the goose is good for the gander.' Counsel commented about the four month . . . delay in . . . Jones' statement. That's just what it is . . . that's when the interview took place. *There was a much bigger delay in hearing* [*from the defendant*] *about the missing large quantity of money.*" (Emphasis added.)

Following closing argument and the excusal of the jury, defense counsel objected to the prosecutor's statements that the defendant's "silen[ce] can be used against him." The trial court overruled defense counsel's objection, concluding that, "as phrased—and I was cognizant of the twice that was done was not in the context of telling a certain story—it was refined. It was used once, and then again on rebuttal. That is noted." The court explained that commentary on a defendant's silence has "been deemed improper . . . [when] it was phrased in terms of what the defendant could have told the police, that sort of thing, and when. That was not the case here . . . ."

After the defendant was found guilty, defense counsel filed a motion for a new trial, claiming in relevant part that the prosecutor had violated the defendant's constitutional rights pursuant to *Doyle* v. *Ohio*, supra, 426 U.S. 610, by commenting on the defendant's post-*Miranda* silence and "highlighting that [the defendant's] exculpatory story was told for the first time at trial." The trial court denied the motion, concluding that the prosecutor's statements "did not specifically involve comment on the defendant's postarrest silence, as opposed to [his] prearrest silence, which is allowed . . . ."

On appeal, the defendant renews his claim that he was deprived of his due process right to a fair trial by the prosecutor's commentary on his post-*Miranda* silence. The state concedes that the prosecutor's rebuttal comment that "[t]here was a much bigger delay in hearing about the missing large quantity of money" was improper under *Doyle* because the context of that statement reveals that it referred both to the defendant's pre-*Miranda* and post-*Miranda* silence. The state maintains, however, that this improper comment was harmless beyond a reasonable doubt and contends that the prosecutor's other comments during initial closing argu-

ment did not violate *Doyle* because they focused solely on the defendant's pre-*Miranda* silence.

We begin our analysis with *Doyle* v. *Ohio*, supra, 426 U.S. 611, in which the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. As we have previously recognized, the holding in *Doyle* was based on two considerations: "First, [*Doyle*] noted that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value. Second and more important[ly], it observed that [although] it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[5] (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 523, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126

[5] "This court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt . . . ." (Citation omitted.) *State* v. *Lockhart*, 298 Conn. 537, 581, 4 A.3d 1176 (2010). It is unclear, however, whether pre-*Miranda* silence may be used as affirmative proof of guilt. See *State* v. *Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009) ("there is a division of authority as to whether the use of a defendant's prearrest silence as substantive evidence of his guilt is constitutionally permissible under the fifth amendment, an issue that we need not consider"); see also *Combs* v. *Coyle*, 205 F.3d 269, 282 (6th Cir.) ("The [federal courts of appeals] that have considered whether the government may comment on a defendant's prearrest silence in its [case-in-chief] are . . . divided. Three circuits have held that such use violates the privilege against self-incrimination found in the [f]ifth [a]mendment . . . . Three circuits, on the other hand, have reached the opposite conclusion." (Citations omitted; footnote omitted.)), cert. denied sub nom. *Bagley* v. *Combs*, 531 U.S. 1035, 121 S. Ct. 623, 148 L. Ed. 2d 533 (2000). We need not address this issue because the defendant's claim is limited to the prosecutor's commentary on the defendant's post-*Miranda* silence.

S. Ct. 773, 163 L. Ed. 2d 600 (2005). Use of a defendant's *pre-Miranda* silence, by contrast, does not raise the same constitutional concerns: "evidence of prearrest, and specifically pre-*Miranda*, silence is admissible to impeach the testimony of a defendant who testifies at trial, since the rule of *Doyle* v. *Ohio*, supra, [619], is predicated on the defendant's reliance on the implicit promise of *Miranda* warnings." *State* v. *Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009); see *Jenkins* v. *Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (if "[t]he failure to speak occurred before the [defendant] was taken into custody and given *Miranda* warnings . . . [then] the fundamental unfairness present in *Doyle* is not [implicated]," and "impeachment by use of prearrest silence does not violate the [f]ourteenth [a]mendment").[6]

To resolve the issue presented on appeal, we must determine whether the prosecutor permissibly com-

[6] As these cases suggest, a distinction exists between postarrest silence and post-*Miranda* silence. In *Fletcher* v. *Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the United States Supreme Court held that a defendant's due process rights are not violated when the government adduces evidence of the defendant's postarrest silence unless the record affirmatively "indicate[s] that [the defendant] received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." Id., 605. The court explained that, "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a [s]tate to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A [s]tate is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony." Id., 607. But see *State* v. *Leecan*, 198 Conn. 517, 526, 504 A.2d 480 (holding "that postarrest silence is inadmissible under principles of the law of evidence . . . [b]ecause many persons, even in the absence of a *Miranda* warning, are aware of their right to remain silent and are frequently advised by counsel to exercise that right when arrested"), cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986). In the present case, it is undisputed that the defendant received *Miranda* warnings at the time of his arrest, and, therefore, any reference to the defendant's postarrest silence also was a reference to his post-*Miranda* silence.

mented on the defendant's pre-*Miranda* silence or impermissibly and unconstitutionally commented on the defendant's post-*Miranda* silence. The defendant argues that the prosecutor's challenged remarks plainly referred to his post-*Miranda* silence because the prosecutor repeatedly emphasized that the defendant's in-court testimony, which occurred more than two years after his arrest, was the "first time" that he had disclosed his exculpatory story. The state disagrees and argues that the context of the prosecutor's challenged remarks reveal that they referred to the defendant's pre-*Miranda* silence because the prosecutor "focused on what the defendant could have told the police before he was arrested." We conclude that the prosecutor's references to the defendant's silence were ambiguous because they were not confined to a defined point in time within the pre-*Miranda* period but, instead, referred generally to the defendant's delay in disclosing his version of events without limitation. That delay, when referenced by the prosecutor in an unspecified and, therefore, unrestricted manner, could reasonably have been understood to include both the four days of pre-*Miranda* silence and the much lengthier period between the defendant's arrest and his trial. This fact makes the prosecutor's comments ambiguous. See, e.g., *State* v. *Courtney G.*, 339 Conn. 328, 345–46, 260 A.3d 1152 (2021) (recognizing that prosecutorial statements are ambiguous if their meaning is unclear and susceptible to more than one reasonable interpretation).

We have not previously addressed how to construe ambiguous prosecutorial remarks that reasonably can be interpreted to refer either to a defendant's pre-*Miranda* or post-*Miranda* silence. Some courts hold that "general references . . . to a defendant's silence" that encompass both "a pre-*Miranda* and post-*Miranda* [time frame]" necessarily violate a defendant's right to a fair trial, reasoning that prosecutors should not be

allowed "to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence." *State* v. *Lofquest*, 227 Neb. 567, 570, 418 N.W.2d 595 (1988); see *United States* v. *Lopez*, 500 F.3d 840, 844 (9th Cir. 2007) ("[a] prosecution closing argument that broadly condemn[s] [the defendant's] silence . . . pre-*Miranda* and post-*Miranda* violate[s] due process" (internal quotation marks omitted)), cert. denied, 552 U.S. 1129, 128 S. Ct. 950, 169 L. Ed. 2d 782 (2008); *United States ex rel. Allen* v. *Franzen*, 659 F.2d 745, 748 (7th Cir. 1981) ("the prosecutor's remarks were phrased broadly, without distinguishing between pre- and [postarrest] silence," and, "[t]herefore, the fact that the questions may have permissibly referred in part to the [prearrest] silence does not alter the conclusion that the references to [postarrest] silence were unconstitutional"), cert. denied sub nom. *Lane* v. *Allen*, 456 U.S. 928, 102 S. Ct. 1975, 72 L. Ed. 2d 444 (1982).

Other courts take a more contextualized approach, inquiring "whether the manifest intent was to comment on the defendant's [post-*Miranda*] silence or, alternatively, whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's [post-*Miranda*] silence." (Internal quotation marks omitted.) *United States* v. *Laury*, 985 F.2d 1293, 1303 (5th Cir. 1993); see *United States* v. *May*, 52 F.3d 885, 890 (10th Cir. 1995) ("[T]he test for determining if there has been an impermissible comment on a defendant's right to remain silent at the time of his arrest is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent. . . . The court must look to the context in which the statement was made in order to determine the manifest intention [that] prompted it and its natural and neces-

sary impact on the jury." (Internal quotation marks omitted.)); *United States* v. *Ramos*, 932 F.2d 611, 616 (7th Cir. 1991) (to establish *Doyle* violation, defendant must prove that "it was the prosecutor's manifest intention to refer to the defendant's silence" or that "the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence" (internal quotation marks omitted)); *United States* v. *Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986) ("[a] comment is deemed to be a reference to a defendant's silence if either . . . (1) it was the prosecutor's manifest intention to refer to the defendant's silence; or (2) the remark was of such a character that the jury would 'naturally and necessarily' take it to be a comment on [the] defendant's silence"), cert. denied, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987), and cert. denied sub nom. *Stewart* v. *United States*, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987), and cert. denied sub nom. *Junker* v. *United States*, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987). Under this approach, "[b]oth the intent of the prosecutor and the character of the remarks are determined by reviewing the context in which they occur, and the burden of proving such intent is on the defendant." (Internal quotation marks omitted.) *United States* v. *Laury*, supra, 1303. "The standard is strict; virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation." *United States* v. *Rosenthal*, supra, 1243.

We adopt the contextualized approach for two reasons. First, this approach is consistent with our case law, which evaluates a prosecutor's remarks or questions in context to determine whether a *Doyle* violation occurred. See, e.g., *State* v. *Jeffrey*, 220 Conn. 698, 721, 601 A.2d 993 (1991) (concluding that no *Doyle* violation occurred because "[t]he state's line of inquiry leading up to [the challenged] question concerned the defendant's

conduct when the police arrived at his home *before they placed him under arrest*" (emphasis in original)), cert. denied, 505 U.S. 1224, 112 S. Ct. 3041, 120 L. Ed. 2d 909 (1992); *State* v. *Devito*, 159 Conn. App. 560, 572, 124 A.3d 14 (concluding that no *Doyle* violation occurred because, "[g]iven the context in which the question was asked . . . it is more probable that it would have been understood to refer to the defendant's prearrest silence"), cert. denied, 319 Conn. 947, 125 A.3d 1012 (2015).

Second, we consistently have applied the naturally and necessarily test to determine whether a prosecutor's ambiguous references to a defendant's failure to testify violate a criminal defendant's constitutional right against self-incrimination. See, e.g., *State* v. *Jose R.*, 338 Conn. 375, 389, 258 A.3d 50 (2021) ("[w]hen it is unclear whether the prosecutor's comments at issue referred to the defendant's failure to testify, a reviewing court appl[ies] what is known as the naturally and necessarily test to determine whether a fifth amendment violation occurred" (internal quotation marks omitted)); *State* v. *A. M.*, 324 Conn. 190, 202, 152 A.3d 49 (2016) ("[t]he 'naturally and necessarily' standard applies only when it is unclear whether the prosecutor's comments at issue referred to the defendant's failure to testify"); *State* v. *Lemon*, 248 Conn. 652, 660, 731 A.2d 271 (1999) ("we consistently have applied the 'naturally and necessarily' test in resolving claims of improper prosecutorial comment on the defendant's failure to testify"). We can perceive no reason to treat ambiguous references to a defendant's post-*Miranda* silence differently from ambiguous references to a defendant's silence at trial. See, e.g., *United States* v. *Mora*, 845 F.2d 233, 235 (10th Cir.) (observing that naturally and necessarily test "is the same test employed for the analogous situation of prosecutorial commentary on a defendant's failure to testify at trial"), cert. denied, 488 U.S. 995, 109 S. Ct.

562, 102 L. Ed. 2d 587 (1988); *United States ex rel. Smith* v. *Rowe*, 618 F.2d 1204, 1210 (7th Cir.) ("we see no reason why the same standard should not be equally applicable" to determine "when ambiguous prosecutorial comments will constitute an invasion of the defendant's right to remain silent after his arrest" and when they will "constitute impermissible comment [on] the defendant's failure to testify at trial"), vacated on other grounds sub nom. *Franzen* v. *Smith*, 449 U.S. 810, 101 S. Ct. 57, 66 L. Ed. 2d 13 (1980).

Accordingly, to determine whether a *Doyle* violation occurred in the present case, we must analyze "whether the language used [by the prosecutor was] manifestly intended to be, or was . . . of such a character that the jury would *naturally and necessarily* take it to be a comment on the [defendant's post-*Miranda* silence]. . . . [I]n applying this test, we must look to the context in which the statement was made in order to determine the manifest intention [that] prompted it and its natural and necessary impact [on] the jury." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Jose R.*, supra, 338 Conn. 389. The defendant bears the burden of proving that a *Doyle* violation occurred. See, e.g., *United States* v. *Laury*, supra, 985 F.2d 1303; see also *State* v. *Reddick*, 174 Conn. App. 536, 556, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018). If the defendant fulfills his burden, then "the state assumes the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt." *State* v. *Reddick*, supra, 556.

We need not decide whether the prosecutor's ambiguous remarks were manifestly intended to refer to the defendant's post-*Miranda* silence because, viewing the remarks in the context in which they were made, we conclude that the jury naturally and necessarily would

have construed them to refer *both* to the defendant's pre-*Miranda and* post-*Miranda* silence. To be sure, some of the prosecutor's challenged remarks focused on the defendant's conduct during the four day time period between the commission of the crimes and the defendant's arrest, namely, the defendant's flight to New York with P, subsequent trip to New London, and ultimate journey to Massachusetts. The prosecutor argued that the defendant's pre-*Miranda* conduct was indicative of his consciousness of guilt and asked the jury to infer, on the basis of its common sense, that an innocent person would not have fled but, instead, would have notified his family and the authorities of Y's death to "make sure that [it] was properly investigated." To the extent that the natural and necessary meaning of these remarks was directed at the defendant's pre-*Miranda* silence, they were permissible.

But some of the prosecutor's comments, specifically the ones that emphasized that "today" or "this morning" was the "first time" that the defendant told his story, naturally and necessarily would have been construed by the jury as commentary on the defendant's post-*Miranda* silence. This conclusion is compelled by the repeated, unmistakable emphasis that the prosecutor placed on the recency of the defendant's disclosure of his exculpatory version of events. The prosecutor emphasized that the defendant failed to disclose his exculpatory story until the time of trial, repeatedly pointing out that "today" or "this morning," during the defendant's in-court testimony, was "the *first time* we're hearing anything about this sequence of events . . . ." See, e.g., *State* v. *Brunetti*, 279 Conn. 39, 83, 86, 901 A.2d 1 (2006) (*Doyle* violation occurred when prosecutor asked defendant, " 'when is the first time that you told someone in authority, like a judge, a prosecutor or a police officer, this story about your sweatpants being dipped in blood,' " and "the defendant

responded that he had provided that version of the events for the first time 'in this courtroom' "), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007); *State* v. *Boone*, 15 Conn. App. 34, 44, 544 A.2d 217 (*Doyle* violation occurred when prosecutor asked "the defendant, '[y]ou never told anyone what happened until today in court,' " and commented during closing argument that " '[the defendant] never gave a statement' "), cert. denied, 209 Conn. 811, 550 A.2d 1084 (1988). The prosecutor emphasized the recent nature of the defendant's disclosure, arguing that "common sense would show you that this information, *closer to the time of the crime*, might be important to direct the investigation." (Emphasis added.) The prosecutor highlighted that, "[i]f [the police] had information *closer to the time of this incident* that this was a robbery involving a very large quantity, essentially more than most people's annual income was on this kitchen table, if you're to believe that, the police probably would have changed the tactics that they used to investigate this crime. We'll never know because *they didn't know that because the first time you heard about it was this morning*." (Emphasis added.) Thus, the prosecutor informed the jury that the police had not investigated Y's death as a robbery gone wrong because at no time between the date of Y's death and the date on which the defendant testified did the defendant inform the police that a robbery had occurred. The prosecutor's remarks were not confined to the pre-*Miranda* or post-*Miranda* context but, instead, encompassed the full continuum of the defendant's silence.

The natural and necessary impact of the prosecutor's statements on the jury, moreover, was reinforced by the statement on rebuttal that the state admits violated *Doyle*. During rebuttal argument, the prosecutor reminded the jury that "[t]here was a much bigger delay [than four months] in hearing about the missing large quantity

of money." If there had been uncertainty about the time period referenced by the prosecutor's repeated reminder that the defendant's in-court testimony was the "first time" the defendant told his exculpatory story, that doubt was removed when the prosecutor explained that the defendant's silence far exceeded four months. The prosecutor's repeated rhetorical emphasis on the fact that the defendant remained silent until trial, the frequency of those references, and the explicit statement that the silence lasted much longer than four months lead us to conclude that the defendant's post-*Miranda* silence was used against him, in violation of *Doyle*.[7] We therefore conclude that the prosecutor's

[7] The state does not claim that the defendant opened the door to commentary on his post-*Miranda* silence by offering an explanation for that silence other than his reliance on the implicit promise of the *Miranda* warnings. See, e.g., *United States ex rel. Saulsbury* v. *Greer*, 702 F.2d 651, 656 (7th Cir.) (The court concluded that there was no *Doyle* violation because, on direct examination, the defendant "assign[ed] a reason for [his] silence immediately after arrest" and, by doing so, "chose to indicate to the jury that silence had probative weight and removed that subject from the realm of insoluble ambiguity about which there could be no comment. Having ventured that far, the defense could not erect a constitutional barrier against the state exploring the soundness of that explanation . . . ."), cert. denied, 461 U.S. 935, 103 S. Ct. 2104, 77 L. Ed. 2d 310 (1983); *State* v. *Anglin*, 751 A.2d 1007, 1010 (Me. 2000) (there was no *Doyle* violation because "[d]efense counsel opened the door for the [s]tate's questions and the court did not err in allowing the answer [into] evidence"); *State* v. *Cockrell*, 306 Wis. 2d 52, 69–70, 741 N.W.2d 267 (App.) (There was no *Doyle* violation because the defendant "chose to volunteer what he did and did not say to the police and why. In these circumstances it is not fundamentally unfair to permit the [s]tate to explor[e] the soundness" of the defendant's explanation.), review denied, 306 Wis. 2d 46, 744 N.W.2d 295 (2007). Nor does the state argue that the prosecutor's commentary on the defendant's post-*Miranda* silence was a " 'fair response' " to the defendant's testimony or the arguments of defense counsel criticizing the adequacy of the police investigation. See *State* v. *Anglin*, supra, 1010; cf. *United States* v. *Robinson*, 485 U.S. 25, 32, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988) ("[When] the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* [v. *California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)] holds that the privilege against compulsory self-incrimination is violated. But [when] . . . the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by [the] defendant or his counsel, we think there is no violation of the privilege."). We therefore do not address these issues.

remarks were "fundamentally unfair," in violation of the defendant's fourteenth amendment right to due process. *State* v. *Montgomery*, 254 Conn. 694, 716, 759 A.2d 995 (2000).

Our inquiry does not end there, however, because *Doyle* violations are subject to harmless error analysis. See id., 717. Whether an error is harmful, as always, depends on its impact on the trier of fact and the result of the case. When the error involves a *Doyle* violation, "[t]he state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. . . . That determination must be made in light of the entire record [including the strength of the state's case without the *Doyle* violation]. . . .

"A *Doyle* violation may, in a particular case, be so insignificant that it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible question or comment [on] a defendant's silence following a *Miranda* warning. Under such circumstances, the state's use of a defendant's [post-*Miranda*] silence does not constitute reversible error. . . . The [error] has similarly been [found to be harmless when] a prosecutor does not focus [on] or highlight the defendant's silence in his cross-examination and closing remarks and [when] the prosecutor's comments do not strike at the jugular of the defendant's story. . . . The cases [in which] the error has been found to be prejudicial disclose repetitive references to the defendant's silence, reemphasis of the fact [during] closing argument, and extensive, [strongly worded] argument suggesting a connection between the defendant's silence and his guilt." (Internal quotation marks omitted.) Id., 718.

The state's harmless error argument erroneously focuses exclusively on the rebuttal argument and fails to consider the impact of the similar remarks the prose-

cutor made during his initial argument. It argues that the "single *Doyle* violation during rebuttal argument was harmless" but does not explain how the prosecutor's repeated emphasis on the defendant's post-*Miranda* silence during initial closing argument, which struck at the jugular of the defendant's exculpatory story that Y was killed during the course of a robbery, was harmless beyond a reasonable doubt. We therefore conclude that the state has failed to fulfill its burden of demonstrating harmlessness.[8] See, e.g., *State* v. *Tomlinson*, 340 Conn. 533, 548–64, 264 A.3d 950 (2021); *State* v. *Jacques*, 332 Conn. 271, 294, 210 A.3d 533 (2019). Accordingly, we

[8] Although the evidence was sufficient to support the defendant's conviction; see part I of this opinion; we disagree with the state that it was overwhelming. As we previously noted, there was no direct, physical, or forensic evidence implicating the defendant in Y's murder; instead, the state's case against the defendant was largely circumstantial, resting on the defendant's motive, means, and opportunity to commit the crime and his flight from the scene. At trial, the defendant testified that his flight was motivated by fear, rather than guilt, because someone else killed Y during the course of a robbery in which a large quantity of money and illicit drugs was stolen. As to the identity of the perpetrator, the defendant raised a third-party culpability defense, arguing that Thomas also had the motive, means, and opportunity to murder Y. Defense counsel pointed out that, after the murder, Thomas was in possession of the defendant's cell phone and the gray Chevrolet Malibu captured on video leaving the scene of the crime. Defense counsel argued that Thomas was motivated by greed because he knew that the defendant had money and drugs stashed away inside the apartment. Thus, the defendant raised a plausible, alternative theory of culpability. On the present evidentiary record, we cannot conclude that the evidence of the defendant's guilt was overwhelming or that the defendant's exculpatory story was transparently frivolous. See *State* v. *Brunetti*, supra, 279 Conn. 82–86 (*Doyle* violation was harmless beyond reasonable doubt because defendant confessed to crime, police found clothing soaked in victim's blood in defendant's home, and defendant's exculpatory story that he removed his clothing and that someone else dipped it in victim's blood "was 'transparently frivolous' "); *State* v. *Montgomery*, supra, 254 Conn. 718–20 (*Doyle* violation was harmless beyond reasonable doubt, in part because of overwhelming evidence of defendant's guilt, which consisted of eyewitness testimony identifying him as perpetrator with " '100 percent' " certainty, his purchase of murder weapon, his confession to his cellmate, and discovery of "other incriminating evidence in [his] car, including a knife, a can of Mace, latex gloves, duct tape, and an ice pick").

reverse the defendant's conviction and remand for a new trial.

III

Although our analysis in part II of this opinion is dispositive of the defendant's appeal, we nonetheless address the defendant's evidentiary claim because it is likely to arise on remand. The following additional facts and procedural history are relevant to this claim. Prior to trial, the state filed notice of its intent to present evidence of the defendant's prior uncharged misconduct for the purpose of demonstrating the defendant's intent and identity, pursuant to § 4-5 (c) of the Connecticut Code of Evidence. In particular, the state intended to elicit testimony from Jones "that she was romantically involved with [Y]" and that, "in early 2017, at a funeral, [the] defendant threatened her with a small black firearm." The defendant filed a motion in limine seeking to exclude this evidence, arguing in relevant part that it was irrelevant and more prejudicial than probative.

The trial court deferred ruling on the defendant's motion until trial, at which time it heard an offer of proof, outside the presence of the jury, with respect to the content of Jones' proposed testimony. During the offer of proof, Jones testified that she dated Y from June, 2011, until July, 2012. After they broke up, Jones and Y "remained friends, even though [they] were not together," until they rekindled their romantic relationship "around the end of 2016" while Y was married to the defendant. In early 2017, Jones attended a funeral on Barber Street in Hartford. After the funeral, she and her siblings were standing outside talking when the defendant "pulled up in . . . a Pepsi blue, BMW two door . . . driving really fast . . . ." The defendant "almost hit the cur[b], and he jumped out" of the car, saying, "let me . . . talk to you, let me talk to you."

Jones refused to talk to the defendant, who then drove away.

The defendant later returned while Jones and her siblings were still standing around talking. Jones did not see the defendant approach, but, when she turned around, the defendant was approximately one and one-half feet away, fumbling in his jacket. The defendant pulled out a gun and said, "I told you I wasn't no punk. I told you I wasn't no punk." After threatening Jones, the defendant left. The incident was not reported to the police.

The trial court determined that Jones' testimony was relevant and material to the defendant's motive to commit the crimes with which he was charged. Balancing the probative value of the evidence against its prejudicial effect, the court concluded that "there is no unfair surprise" and that neither the admission of the evidence nor any counterproof would "consume an undue amount of time . . . ." Additionally, the court found "that no side issue [would be] created and that, with the appropriate limit[ing] instruction, the facts offered would not unduly arouse the jurors' emotions, hostility or sympathy . . . ." The court further found that the uncharged misconduct was not remote in time, that it was "substantially less shocking than the crimes charged, [and] that the evidence [was] important to the case if the jury credit[ed] it. It is not cumulative in that there isn't in the evidence so far . . . similar evidence before the jury. And, although motive is not a factor in the crime charged, the court will likely charge the jury as to the importance of motive if [the jurors] believe it." On this basis, the court determined that the evidence was not unduly prejudicial.

Jones subsequently testified in front of the jury in substantial conformance with the testimony elicited

during the offer of proof.[9] Jones also testified about another incident that occurred on March 26, 2017, in which the defendant abruptly entered her apartment unannounced to find her, Y, and P lying in bed. The defendant started yelling, "y'all doing this dyke shit in front of my daughter? This what y'all doing?" As the defendant approached the bed, Y called 911, and the defendant fled.[10]

After the close of evidence and closing arguments, the trial court instructed the jury that it could consider Jones' testimony regarding the funeral incident "solely to show or establish . . . the motive for the commission of the crime alleged." The court warned the jury that it "may not consider such evidence as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity. You may consider such evidence, if you believe it, and further find [that] it logically, rationally, and conclusively supports the issues for which it is being offered by the state but only as it may bear on the [issue] of . . . motive on the part of the defendant."

On appeal, the defendant claims that Jones' testimony about the funeral incident improperly was admitted because it was irrelevant to the issue of motive. The defendant argues that his threatening conduct toward Jones did not reflect his animosity toward Y and, therefore, was not probative of his motive for committing the crimes charged. Alternatively, the defendant contends that the probative value of the evidence was outweighed

[9] In front of the jury, Jones testified that the funeral incident occurred in late 2016, whereas, during the offer of proof, she testified that it occurred in early 2017. Her description of the defendant's threatening conduct, however, was the same.

[10] Defense counsel moved to exclude Jones' testimony about the bedroom incident, but the trial court overruled counsel's objection, concluding that the evidence was relevant to prove the defendant's malice and motive and was not unduly prejudicial. The defendant does not challenge the admission of this evidence on appeal.

by its prejudicial effect because it "portrayed the defendant as an aggressive, impulsive, out of control man who easily flew into a rage and who had access to a gun."[11] We disagree.

Although "[e]vidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime," such evidence is admissible if it "is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime." (Internal quotation marks omitted.) *State* v. *Kalil*, 314 Conn. 529, 539–40, 107 A.3d 343 (2014). To determine whether evidence of prior uncharged misconduct is admissible for a proper purpose, we have adopted a two-pronged test: "First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Internal quotation marks omitted.) Id., 540; see Conn. Code Evid. § 4-5 (a) and (c) ("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person" but is admissible for other purposes, "such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an

[11] The defendant also claims that, even if the evidence of uncharged misconduct was probative of his motive to commit the crimes of conviction, the trial court should have redacted Jones' reference to the defendant's use of a gun. The defense did not seek redaction in the trial court and, therefore, failed to preserve this claim for our review. See, e.g., *State* v. *Tomlinson*, supra, 340 Conn. 571 (declining to review unpreserved claim "that the trial court should have redacted portions of the rap music video or allowed only limited screenshots of the video into evidence" because defense counsel "did not preserve a request for redaction"); *State* v. *Komisarjevsky*, 338 Conn. 526, 616 n.65, 258 A.3d 1166 (declining to review unpreserved claim regarding redaction), cert. denied, U.S. , 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021).

element of the crime, or to corroborate crucial prosecution testimony").

"Our standard of review on such matters is well established. The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only [when] abuse of discretion is manifest or [when] an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 517, 180 A.3d 882 (2018).

The evidence of uncharged misconduct clearly was relevant to the issue of motive. Although motive is not an essential element of the crimes with which the defendant was charged, "[w]e previously have recognized the significance that proof of motive may have in a criminal case. . . . [S]uch evidence is both desirable and important. . . . It strengthens the state's case when an adequate motive can be shown. . . . Evidence tending to show the existence or nonexistence of motive often forms an important factor in the inquiry as to the guilt or innocence of the defendant. . . . This factor is to be weighed by the jury along with other evidence in the case." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 430, 64 A.3d 91 (2013). "Evidence of prior misconduct that tends to show that the defendant harbored hostility toward the intended victim of a violent crime is admissible to establish motive." *State* v. *Lopez*, 280 Conn. 779, 795, 911 A.2d 1099 (2007). Of course, evidence of uncharged misconduct involving the same victim is especially relevant to demonstrate motive; see *State* v. *Gonzalez*, 167 Conn. App. 298, 310, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016); but evidence involving a different victim may be relevant if it has a logical tendency to explain the defendant's motive for the commission of the crime

charged. See, e.g., *State* v. *Lopez*, supra, 793–97 (evidence that defendant threatened certain individual with gun was admissible to prove defendant's motive for crimes of murder and attempted murder because jury reasonably could have inferred that that individual was intended target); *State* v. *Hoyeson*, 154 Conn. 302, 304, 307, 224 A.2d 735 (1966) (evidence of defendant's rape of and threat to " 'get' . . . a girl named Lucy" was admissible to demonstrate motive for "a vicious assault on [the victim]" because "the jury could infer that the defendant, in the darkness of the bedroom, mistook [the victim] for Lucy and committed the assault because of that mistake in identity"); *State* v. *Marrero-Alejandro*, 159 Conn. App. 376, 387, 122 A.3d 272 (2015) (evidence of defendant's threats toward victim's girlfriend and of "a love triangle" among victim, defendant, and victim's girlfriend was admissible to prove defendant's motive to murder victim), appeal dismissed, 324 Conn. 780, 154 A.3d 1005 (2017).

Evidence of Jones' romantic relationship with Y and the defendant's threatening conduct was relevant to explain to the jury the defendant's motive to kill Y. On the basis of Jones' testimony, the jury reasonably could have found that the defendant blamed the breakdown of his marriage on Y's romantic relationship with Jones, at least in part. Jones testified that Y had "left [the defendant]" and was "living together [with Jones] pretty much by" March, 2017. The demise of the defendant's marriage was corroborated by text messages exchanged between the defendant and Y on the day of her death, in which the defendant pleaded with Y to "change [her] mind" about their relationship and to give him one more chance.

Jones' testimony that the defendant had threatened her with a gun supported a reasonable inference that the defendant was willing to resort to violence to end Y's relationship with Jones. The jury also could have

inferred that this willingness to use violence extended to Y herself, in light of evidence that the defendant had threatened to kill Y and that Y had called the police after the defendant burst in on her in bed with Jones. We therefore conclude that the defendant's threatening conduct toward Jones was relevant and admissible for the purpose of establishing the defendant's motive to commit the crimes of conviction. See, e.g., *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005 ("Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis in original; internal quotation marks omitted.)), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

We next address whether the evidence was unduly prejudicial. To determine whether the prejudicial effect of evidence outweighs its probative value, a trial court is required to consider whether the evidence may (1) "unduly arouse the jury's emotions, hostility or sympathy," (2) "create a side issue that will unduly distract the jury from the main issues," (3) "consume an undue amount of time," or (4) unfairly surprise the defendant, who, "having no reasonable ground to anticipate the evidence, is . . . unprepared to meet it." (Internal quotation marks omitted.) Id., 587. We defer to the ruling of the trial court because of its "unique position to [observe] the context in which particular evidentiary issues arise" and its preeminent "position to weigh the potential benefits and harms accompanying the admission of particular evidence." (Internal quotation marks omitted.) Id., 593 n.24.

The defendant's claim focuses on the first consideration, namely, whether the evidence of uncharged mis-

conduct unduly aroused the emotions, hostility or sympathy of the jurors.[12] "This court has repeatedly held that [t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative viciousness in comparison with the charged conduct." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 562, 254 A.3d 874 (2020); see also *State* v. *Collins*, supra, 299 Conn. 588. The reasoning underlying this comparative analysis "is that the jurors' emotions are already aroused by the more severe crime of murder, for which the defendant is charged, and, thus, a less severe, uncharged crime is unlikely to arouse their emotions beyond that point." *State* v. *Raynor*, supra, 563.

The defendant's threatening conduct toward Jones was less severe than the charged crime of murder and, therefore, was unlikely to unduly arouse the emotions of the jurors. See, e.g., *State* v. *Campbell*, supra, 328 Conn. 523 ("It is beyond debate that, by comparison, shooting at the home where the defendant believed [the mother of his son] to be staying is less vicious than shooting the three victims in the head at close range.

[12] The defendant also claims that this evidence was cumulative of other evidence of the defendant's motive and, therefore, should have been excluded. See, e.g., *State* v. *Onofrio*, 179 Conn. 23, 29–30, 425 A.2d 560 (1979) ("if the issue to be proved is competent *but can just as well be demonstrated by other evidence*, or if the evidence is of but slight weight or importance [on] that point, a trial judge is justified in excluding the evidence entirely, if its probative value is marginal and its prejudicial tendencies clear" (emphasis added)). Specifically, the defendant argues that Jones' testimony regarding the bedroom incident—in which the defendant broke down the door to Jones' apartment and, upon finding Jones and Y in bed, yelled, "[y]'all doing this dyke shit in front of my daughter? This what y'all doing?"—was sufficient "to prove that the defendant was unhappy about the relationship between . . . Jones and [Y] . . . ." We reject this claim because the defendant's threatening conduct during the funeral incident was different, both in nature and degree, from his threatening conduct during the bedroom incident. Therefore, the challenged evidence "was not cumulative because it . . . presented the jury with *new* material, not heard from any other witness . . . ." (Emphasis in original.) *State* v. *Fernando V.*, 331 Conn. 201, 219, 202 A.3d 350 (2019).

. . . Accordingly, the trial court acted within its discretion in admitting the prior misconduct evidence."); *State* v. *Beavers*, 290 Conn. 386, 405, 963 A.2d 956 (2009) ("it is significant that the prior misconduct evidence admitted involved only the defendant's actual, claimed or threatened damage of property for personal gain, as compared to the charged crime . . . [of] killing . . . a person for financial reasons"); *State* v. *Mooney*, 218 Conn. 85, 131, 588 A.2d 145 ("the seriousness of the subsequent crime, a larceny, pales in comparison to the robbery and felony murder charges for which the defendant was standing trial"), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). Additionally, the trial court issued a limiting instruction, which "minimize[d] any prejudicial effect that [the uncharged misconduct] evidence otherwise may have had . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, 313 Conn. 325, 342, 96 A.3d 1238 (2014). Considering the record as a whole, we cannot conclude that the trial court abused its discretion in determining that the probative value of this evidence outweighed its prejudicial effect.[13]

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

In this opinion the other justices concurred.

[13] The trial court has "some degree of choice" in balancing the probative value of uncharged misconduct evidence against its prejudicial effect; (internal quotation marks omitted) *State* v. *Collins*, supra, 299 Conn. 593 n.24; and, on remand, a different trial court might arrive at a different conclusion. We hold only that, on the present record, the trial court's decision to admit the challenged evidence was not arbitrary or unreasonable. See, e.g., *State* v. *Smith*, supra, 313 Conn. 336 ("[T]he question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Internal quotation marks omitted.)).

BOARD OF EDUCATION OF THE CITY OF NEW HAVEN *v.* COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES ET AL.

(SC 20696)

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

Syllabus

Pursuant to statute (§ 46a-58 (a)), "[i]t shall be a discriminatory practice . . . for any person to subject . . . any other person to the deprivation of any rights, privileges or immunities, secured or protected by the . . . laws of this state or of the United States, on account of . . . mental disability [or] physical disability . . . ."

Pursuant further to statute (§ 46a-64 (a) (1)), "[i]t shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation . . . because of . . . intellectual disability [or] mental disability . . . ."

The defendant M filed a complaint with the named defendant, the Commission on Human Rights and Opportunities, on behalf of his minor child, A, alleging that the plaintiff board of education had discriminated against A on the basis of A's mental disability. A, who had been diagnosed with several mental and cognitive disorders, attended a public magnet school, where he initially was enrolled as a special education student who was entitled to an individualized education plan and special accommodation services under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.). The school subsequently determined, against the wishes of A's parents, that A would no longer be designated as a special education student under the IDEA. Thereafter, A sustained a concussion during an incident at school, and A's parents kept A out of school until he was symptom free on the basis of the recommendation of A's physician. During A's absence, the board sent a habitual truancy notice to A's parents and held a planning and placement team meeting, which was attended by M and various representatives of the board, among other individuals, to discuss A's eligibility for special education services. At that meeting, M attempted to offer a letter from A's physician regarding A's post-concussion syndrome, but the board declined to accept it because it was purportedly illegible and undated. Immediately thereafter, a representative of the board initiated A's withdrawal from the magnet school. M alleged in his complaint that the board had discriminated against A in violation of § 46a-64 (a) (1) and the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), as enforced by § 46a-58 (a). After a hearing before the commission, a human rights

referee concluded, inter alia, that a public school is a place of public accommodation for purposes of § 46a-64 and that the board unlawfully had discriminated against A by withdrawing him from school on the basis of his disability. The board filed an administrative appeal with the trial court, which remanded the case for a determination of whether the board had violated the ADA. On remand, the board claimed that the complaint was actually seeking relief for the denial of a free and appropriate public education under the IDEA and that M had failed to exhaust his administrative remedies for an IDEA violation before seeking relief pursuant to the ADA. The referee noted that the board had not raised that claim previously but concluded that M's complaint did not raise a free and appropriate education claim. The referee also concluded that A was physically disabled under the ADA due to his post-concussion syndrome and that the board had violated § 46a-58 (a) by unilaterally withdrawing him from school on the basis of that disability. The trial court upheld the decision of the referee. The court rejected the board's claims that the commission lacked subject matter jurisdiction to adjudicate claims brought pursuant to the ADA and that it lacked jurisdiction over M's complaint on the ground that M failed to exhaust his remedies pursuant to the IDEA. The court also declined to consider the board's claim that the referee incorrectly determined that a public school is a place of public accommodation because the board did not raise that issue before the referee. The trial court rendered judgment dismissing the board's appeal, from which the board appealed. *Held*:

1. The board could not prevail on its claim that the trial court incorrectly determined that the commission had subject matter jurisdiction to adjudicate the claim that the board violated the ADA and to identify ADA violations for purposes of determining whether § 46a-58 (a) had been violated; the board conceded at oral argument before this court that its claim was controlled by this court's recent conclusion in *Connecticut Judicial Branch* v. *Gilbert* (343 Conn. 90), made in the context of a discrimination claim predicated on a violation of Title VII of the Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991 (42 U.S.C. § 2000e et seq.), that the language of § 46a-58 (a) unambiguously confers on the commission the authority to identify violations of federal civil rights laws for the purpose of determining whether state law has been violated and that, when the commission finds a violation of federal antidiscrimination law as a factual predicate to a violation of § 46a-58 (a), it does so as a matter of state law.
2. The trial court correctly determined that M was not required to exhaust his administrative remedies before filing the complaint with the commission on A's behalf: although the board failed to raise the exhaustion issue in the proceedings before the referee, that claim implicated the commission's subject matter jurisdiction, an issue that could be raised at any time, and, therefore, that issue properly was before the trial court and this court; moreover, although a party is required to exhaust his or

her available administrative remedies provided by state law (§ 10-76h) before he or she may file a civil action seeking relief for the denial of a free and appropriate public education, M's complaint did not seek such relief, as the claims therein could have been brought outside of the school setting, and the fact that A was unable to take advantage of the educational services at the magnet school as a result of the board's unilateral actions did not convert M's claim for discrimination on the basis of A's disability into a claim for a denial of a free and appropriate education; furthermore, the history of the proceedings in the present case bolstered this court's conclusion that the complaint did not seek relief for the denial of a free and appropriate education, as A's parents never invoked formal procedures pursuant to § 10-76h, they did not ask the referee during the proceedings on the complaint to order the board to reenroll A at the magnet school, to designate him as a special education student, or to provide him with appropriate educational services, and there was no reason to believe that they wanted or would be entitled to such relief in light of the fact that A had since been enrolled in a school in another district, where he was receiving a free and appropriate education.

3. The board's claim that the referee incorrectly determined that a public school is a place of public accommodation pursuant to § 46a-64 did not implicate the commission's subject matter jurisdiction and, therefore, was not reviewable: contrary to the board's contention that its claim could be raised at any time because it implicated the board's subject matter jurisdiction, the claim regarding the proper interpretation of the phrase "place of public accommodation" alleged that the commission had failed to establish an element of a statutory remedy, which implicated the commission's statutory authority and the legal sufficiency of the complaint, not the commission's jurisdiction, and, in the present case, the claim that M raised in his complaint, that the board had violated § 46a-64 by discriminating against A on the basis of his disabilities in a place of public accommodation, was within the class of claims that the commission has authority or competence to decide.

Argued April 27—officially released September 6, 2022

Procedural History

Appeal from the decision of the human rights referee for the named defendant, the Commission on Human Rights and Opportunities, awarding damages to the claimant in an action alleging discrimination by the plaintiff, brought to the Superior Court in the judicial district of New Britain, where the court, *Cohn, J.*, rendered judgment dismissing the appeal, from which the plaintiff appealed. *Affirmed.*

Proloy K. Das, with whom was *Emily McDonough Souza*, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, with whom was *Megan K. Grant*, human rights attorney, for the appellee (named defendant).

Opinion

KAHN, J. A was a student with disabilities enrolled in the John C. Daniels Interdistrict Magnet School of International Communication (John Daniels), a public school located in New Haven. His father, M, filed a complaint with the named defendant, the Commission on Human Rights and Opportunities (commission), alleging that the plaintiff, the Board of Education of the City of New Haven (board), had discriminated against A on the basis of his disabilities by unilaterally withdrawing him from the school. A human rights referee concluded that the board had discriminated against A on the basis of his disabilities and awarded damages of $25,000. The board appealed to the trial court, which dismissed the appeal. The board then filed this appeal,[1] claiming that the trial court incorrectly determined that (1) the commission had subject matter jurisdiction to adjudicate A's claim, pursuant to General Statutes § 46a-58 (a),[2] that the board had violated the Americans with

[1] The board appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[2] General Statutes § 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran."

Although § 46a-58 (a) was the subject of amendments in 2017; see Public Acts 2017, No. 17-127, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46a-58.

Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.; (2) the commission had subject matter jurisdiction over A's claims when M failed to exhaust his administrative remedies pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.; and (3) the issue of whether the referee had incorrectly concluded that a public school is a place of public accommodation for purposes of General Statutes § 46a-64 (a)[3] was not reviewable. We reject the first two claims and conclude that the third claim is not reviewable. Accordingly, we affirm the trial court's judgment.

The record reveals the following facts that were found by the commission or that are undisputed. In February, 2010, M submitted an application for A to attend kindergarten at John Daniels. John Daniels is open to all state residents, and admission is determined by a lottery system. See General Statutes § 10-66bb (d) (8) (D) ("if there is not space available for all students seeking enrollment" in public charter school, "the school may give preference to siblings but shall otherwise determine enrollment by a lottery").

A was diagnosed with several mental and cognitive disorders, including Asperger's syndrome, childhood disintegrative disorder, attention deficit and hyperactivity disorder and "anxiety [disorder not otherwise speci-

[3] General Statutes § 46a-64 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran, of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons . . . ."

Although § 46a-64 (a) was the subject of amendments in 2017; see Public Acts 2017, No. 17-127, § 5; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46a-64.

fied].'' As the result of these disorders, A had difficulty coping with large groups of children and with overstimulating or chaotic environments. His symptoms included ''inconsistent regression in normal development, poor social skills, sensory issues, difficulty managing feelings, auditory and visual hallucinations, challenges with concentration and focus, poor processing skills and difficulty with transitions.'' A also physically manifested these disorders in a variety of ways, including shaking his hands up and down, making unusual facial expressions and using distorted speech.

A was accepted as a student at John Daniels and began attending in September, 2010. Because of his various disorders, A was enrolled as a special education student entitled under the IDEA to an individualized education plan and special accommodation services. Between September, 2010, and March, 2011, A's parents sought and received a number of accommodations for him, including transportation to and from school on a smaller school bus and an additional snack during the school day.

On September 16, 2010, M sent an email to the principal of John Daniels, Gina Wells, in which he thanked her for informing him about the ''buddy'' who had been assigned to A and indicating that, if Wells had provided the information earlier, much confusion and misunderstanding could have been avoided. Wells forwarded the email to the assistant principal, Marlene Baldizon, with the comment, ''I will not be able to contain myself much longer—you may have to take over, Marlene.'' In November, 2010, the school determined, against the wishes of A's parents, that A would no longer be designated as a special education student but would be subject to a ''§ 504'' plan.[4]

[4] Section 504 of the Rehabilitation Act of 1973; see Pub. L. No. 93-112, § 504, 87 Stat. 355, 394; as amended, provides in relevant part: ''No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be

On March 29, 2011, A was injured at school when another child pulled on his clothing and he fell. A's mother took him to the emergency department at Yale New Haven Hospital, where it was determined that he had suffered a concussion. Upon his discharge, A's parents were given a "return to school certificate," indicating that he could return to school when he was symptom free for twenty-four hours. In the days following his injury, A continued to have symptoms, including disorientation, malaise and headaches. A's parents spoke to his primary care physician, who recommended that he stay at home until he was symptom free.

When A failed to return to school, Wells and the board's truancy department made several phone calls to his parents. On April 8, 2011, the board requested a "student absence inquiry" report, which indicated that, during the school year, A had had sixteen excused absences and ten unexcused absences. Eight of the unexcused absences occurred after A's injury. After obtaining the report, the board sent a habitual truancy notice to A's parents, which indicated that a copy of the notice would be sent to court. M retained an attorney, Patricia Kaplan, to represent him in the truancy proceeding.

Meanwhile, A's parents had requested a planning and placement team meeting to discuss whether A was eligible for special education services. On April 8, 2011, Lou

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794 (a) (2018).

For students with special disabilities that require special instruction, the IDEA controls the procedural requirements, and an individualized educational plan is developed. See *K.E.* v. *Northern Highlands Regional Board of Education*, Docket No. CV-18-12617 (KM) (SCM), 2019 WL 5617788, *2–3 (D.N.J. October 30, 2019), vacated on other grounds, 840 F. Appx. 705 (3d Cir. 2020). For students with disabilities who do not require specialized instruction, a "§ 504 plan" may be created to outline specific accessibility requirements. See id., *2 n.2.

Faiella, a certified legal intern with the Quinnipiac Law School legal clinic, which represented A and his parents, sent an email to Kathleen Cassell, a board administrator, requesting that the meeting be cancelled because A's parents had decided that "this [was] not the route that they would like to take at this time."[5] On April 13, 2011, Amy Vatner, an advocate with African Caribbean American Parents of Children with Disabilities, sent an email to Wells and Maralyn Klatzkin, a special education teacher, indicating that A's parents would be filing a request for mediation with the state Department of Education. Wells forwarded the email to Baldizon, stating in her email that "this is the student who lives in West Haven and went to the mayor. The mayor has never heard about the student. Anyway, who responds to this? He is a magnet student from West Haven who has been absent over [thirty] days this year. Quite honestly, I think that we should withdraw him from New Haven schools." On April 14, 2011, a request for a mediation to discuss A's eligibility for special education and for an alternative educational placement in light of his concussion was submitted to the state Department of Education's Bureau of Special Education.

A planning and placement team meeting took place at the office of the board's superintendent on May 5, 2011. M, Cassell, Klatzkin, Lorna Link, a school psychologist, Kasey Masa, a teacher, Donna Kosiorowski, a nurse and § 504 coordinator, Michelle Laubin, attorney for the board, Wells, Virginia Bauer, assistant director

[5] Although Faiella's note used the word "cancel," M testified at the hearing before the human rights referee that he had asked for a postponement of the planning and placement team meeting so that the meeting could take place at the board's office instead of at John Daniels. He also testified that he had not asked that the meeting be cancelled, and he and A's mother were still interested in having A designated as a special education student. The respective roles of Kaplan and Faiella with respect to providing legal representation to A and his family are not entirely clear from the record.

of West Haven[6] pupil services, Typhanie Jackson, the board's director of student services, and Vatner attended the meeting. M indicated that he was concerned that A was no longer designated as a special education student and, therefore, was no longer entitled to an individualized education plan. He also stated that A would not be returning to school until he was cleared to do so by his physicians and expressed an interest in obtaining homebound services for A. When M was questioned about A's continued absence from school, he attempted to present a handwritten letter from A's physician regarding his medical status and his diagnosis of post-concussion syndrome. The board declined to accept the letter because, according to the planning and placement team, it was illegible, undated, and not on the physician's letterhead. Upon leaving the meeting, M understood that he needed to obtain another letter from A's physician and that A would return to John Daniels as soon as his physicians medically cleared him.

Immediately after the meeting, however, Jackson, acting on behalf of the New Haven board, obtained a form for withdrawal from John Daniels, filled it out with A's information and signed it. Although the form had signature lines for the parents of the withdrawing student, neither of A's parents was asked to sign it. The board did not notify A's parents that he had been withdrawn.

On May 16, 2011, A's physician prepared a typewritten note indicating that A was still having symptoms from his concussion and recommending that he return to school at the beginning of the next school year. M faxed

[6] A and his parents lived in West Haven up until May, 2011, at which time they moved to New Haven. The board's superintendent testified at the hearing before the human rights referee that, when a special education student from a district other than New Haven attends John Daniels, the district in which the student resides coordinates the student's special educational services.

the note to Kaplan, who forwarded it to John Daniels on or about June 2, 2011.

Later in June, 2011, M learned that A had been withdrawn from John Daniels when he stopped by the board's office and an unidentified woman informed him of the withdrawal. He also was shown a copy of the withdrawal form at that time. After speaking to Jackson about the withdrawal and questioning her about its legality, it appeared to him that the board was not going to allow A to return to John Daniels. Because A's parents believed that A would not be allowed to return to John Daniels, and because they were uncertain at the time whether they would still be living in New Haven; see footnote 6 of this opinion; or, instead, would be living in West Haven during the following school year, they requested a residency hearing to determine what school A would be attending. It was ultimately determined that A was a West Haven resident and would attend Edith E. Mackrill Elementary School (Mackrill School) in West Haven.[7] A started attending first grade at Mackrill School that fall.

On November 1, 2011, M filed a complaint with the commission alleging that the board had engaged in unlawful discrimination on the basis of mental disability when it withdrew A from John Daniels. On October 4, 2013, M filed an amended complaint, alleging, inter alia, that the board had discriminated against A in violation of § 46a-64 and the ADA, as "enforced through . . . § 46a-58 (a)." After assessing the complaint pursuant to General Statutes § 46a-83 (c) (2), the commission ordered a public hearing before a human rights referee.

Will Clark, the board's chief operating officer, testified at the hearing before the human rights referee that the board did not have a policy in 2011 of withdrawing

[7] The human rights referee did not indicate the basis for the finding that A was a West Haven resident.

students for habitual truancy. Jackson testified that a child never would be withdrawn from school on the basis of a medical condition. She further testified that a child who was receiving homebound services would not be withdrawn.[8]

The human rights referee concluded that a public school is a place of public accommodation for purposes of § 46a-64, that A suffered from a mental disability, as defined in General Statutes § 46a-51 (20), and that his post-concussion symptoms were either a physical disability as defined in § 46a-51 (15), or were perceived to be one. She further concluded that the board unlawfully had discriminated against A when it unilaterally withdrew him from John Daniels. She ordered the board to pay damages for emotional distress in the amount of $25,000, to remove the notation of habitual truancy from A's school records, to cease and desist from all acts of discrimination, and to ensure that the board and its employees would not retaliate against A or his family.

The board appealed from the referee's ruling to the trial court. After hearing oral arguments, the trial court remanded the matter to the human rights referee for a determination of whether the board had violated the ADA.[9] On remand, the board claimed that, because the complaint was actually seeking relief for the denial of a free and appropriate education (FAPE) under the IDEA, M was required to exhaust his remedies for an IDEA violation before he could seek relief pursuant to

[8] Jackson also testified that M specifically had requested at the planning and placement team meeting that A be withdrawn from school. The human rights referee discredited that testimony, stating that it "was not corroborated; nor did it comport with facts and circumstances leading up to the withdrawal."

[9] The trial court noted in the remand order that the parties agreed at oral argument that the human rights referee had determined that the board violated § 46a-64 by discriminating against A in a place of public accommodation but that she had made no specific ruling as to whether the board violated the ADA for purposes of A's claim pursuant to § 46a-58.

the ADA. In her articulation, the human rights referee noted that the board had not raised that claim previously, and the trial court had not requested that she address the issue in the remand order. Nevertheless, the referee concluded that the complaint did not raise "a FAPE claim." The referee further noted that, to the extent that the claim was properly before her, the exhaustion requirement was excused because the board had not advised A of his rights under the IDEA.[10] The referee then concluded that A was physically disabled under the ADA as a result of his post-concussion syndrome and that the board had unilaterally withdrawn him from John Daniels on the basis of that disability, in violation of § 46a-58 (a). Accordingly, A was entitled to damages pursuant to General Statutes § 46a-86 (c).

The trial court upheld the decision of the human rights referee. With respect to the board's claim that the commission had no jurisdiction over A's claim because he failed to exhaust his remedies pursuant to the IDEA, the court concluded that there was no exhaustion requirement because the claim raised in the complaint was properly characterized as a claim of discrimination on the basis of physical disability, not a claim for a FAPE. The court also rejected the board's claim that the commission had no jurisdiction to adjudicate claims pursuant to the ADA. The court declined to consider the board's claim that that the human rights referee had incorrectly determined that a public school is a place of public accommodation because the board did not raise that issue in the proceedings before the referee. After considering the board's other claims, the

[10] The human rights referee cited *Quackenbush* v. *Johnson City School District*, 716 F.2d 141, 147 (2d Cir. 1983), cert. denied, 465 U.S. 1071, 104 S. Ct. 1426, 79 L. Ed. 2d 750 (1984), in support of this proposition. We express no opinion as to whether this reading of *Quackenbush* is correct, as it has no bearing on our analysis.

trial court concluded that they were without merit and dismissed the appeal.[11]

This appeal followed. The board claims on appeal that the trial court incorrectly determined that the commission had subject matter jurisdiction to adjudicate the claim that the board violated the ADA and that M was not required to exhaust his administrative remedies pursuant to the IDEA before he could bring his claims pursuant to §§ 46a-58 (a) and 46a-64 (a). The board further contends that the trial court should have addressed its unpreserved claim that a public school is not a place of public accommodation for purposes of § 46a-64 (a) because the claim implicates the commission's subject matter jurisdiction, and the human rights referee incorrectly determined that John Daniels is a place of public accommodation.

I

We first address the board's claim that the trial court incorrectly determined that the commission had subject matter jurisdiction to adjudicate the claim that the board violated the ADA. In support of this claim, the board makes two arguments. First, it contends that, to the extent that the commission has been designated as a "deferral agency" under federal law with the authority to adjudicate ADA claims, its authority is coextensive with the authority of the federal Equal Employment Opportunity Commission (EEOC).[12] According to the

[11] After the trial court issued its decision, the commission filed a motion for reconsideration, contending that the court improperly relied on federal case law holding that compensatory damages are available for a violation of the ADA to support its conclusion that the human rights referee properly had awarded damages for emotional distress. The commission contended that the court should modify its decision to reflect the fact that the referee determined that the board had violated § 46a-58 (a), not that it had violated the ADA, and, therefore, damages properly were awarded pursuant to § 46a-86 (c). The trial court denied the motion.

[12] "The [commission] is a deferral agency under which it has a work-sharing arrangement with the EEOC, whereby it is authorized to accept charges for the EEOC. [When] both the EEOC and [the commission] have jurisdiction, two charges are taken so that the matter may be dual-filed,

board, in a proceeding under Title II of the ADA (Title II), § 42 U.S.C. § 12131 et seq., governing discrimination in the provision of public services, the EEOC has authority only to conduct an investigation, to reach a voluntary resolution, or to file a lawsuit; see *Mach Mining, LLC* v. *Equal Employment Opportunity Commission*, 575 U.S. 480, 483–84, 135 S. Ct. 1645, 191 L. Ed.

thus preserving both the state and federal rights of the charging party." (Internal quotation marks omitted.) *Ortiz* v. *Prudential Ins. Co.*, 94 F. Supp. 2d 225, 231 (D. Conn. 2000).

The board contends that the EEOC is charged with enforcement of the rights established by Title II of the ADA (Title II), § 42 U.S.C. § 12131 et seq., governing discrimination in the provision of public services, because "such enforcement is coextensive with the enforcement of rights available in a private cause of action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5b . . . ." See 42 U.S.C. § 12133 (2018) (incorporating rights and remedies set forth in 29 U.S.C. § 794a for violation of Title II); see also 29 U.S.C. § 794a (a) (1) (2018) (incorporating rights and remedies set forth in 42 U.S.C. 2000e-16, which is contained in Title VII of Civil Rights Act of 1964 and governs employment discrimination). The commission does not dispute this assertion but claims only that, regardless of the scope of the EEOC's authority, the commission has authority under state law to identify ADA violations. We note, however, that 29 U.S.C § 794a (a) (2) provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) [governing discrimination on the basis of race, color or national origin in federally assisted programs] (and in subsection (e) (3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." A number of courts have held that subsection (a) (2) of 29 U.S.C. § 794a applies to violations of Title II of the ADA, not subsection (a) (1), which applies to violations of Title I of the ADA, governing discrimination in the employment setting. See *Ability Center of Greater Toledo* v. *Sandusky*, 385 F.3d 901, 905 (6th Cir. 2004) ("the remedies, procedures, and rights available under Title II of the ADA parallel those available under Title VI of the Civil Rights Act of 1964"); id., 905 n.7 ("the remedies enumerated [in] § 794a (a) (2) apply in Title II cases"); *Davoll* v. *Webb*, 943 F. Supp. 1289, 1296 n.3 (D. Colo. 1996) ("Title II of the ADA adopts the enforcement procedures of [§] 505 of the Rehabilitation Act of 1973, i.e., Title VI"), aff'd, 194 F.3d 1116 (10th Cir. 1999). We need not resolve this issue, however, because, regardless of what federal procedures and remedies are available for a violation of Title II of the ADA, and regardless of whether the EEOC has authority to enforce Title II or, if it does, the scope of any such authority, we conclude that the commission has authority to identify ADA violations as the basis for finding a violation of § 46a-58 (a).

2d 607 (2015);[13] but not to adjudicate a claim pursuant to the ADA. Therefore, the board contends, the commission also has no such authority. Second, and derivatively, the board claims that, to the extent that the commission contends that, even if it does not have the authority to directly adjudicate an ADA claim, it has the authority to determine whether a violation of *§ 46a-58 (a)* occurred as the result of an ADA violation, that contention is also incorrect because the commission has no authority to adjudicate whether the ADA was violated in the first instance.[14]

[13] *Mach Mining, LLC*, involved a claim pursuant to Title VII of the Civil Rights Act of 1964. See *Mach Mining, LLC* v. *Equal Opportunity Employment Commission*, supra, 575 U.S. 483. As we explained, the procedures governing a claim pursuant to Title VII do not appear to apply to a claim made pursuant to Title II of the ADA. See footnote 12 of this opinion. As we also explained, this fact has no bearing on our analysis. See id.

[14] The board contends that the trial court's judgment upholding the human rights referee's decision was "based exclusively on [the court's] conclusion that the [commission] had the authority to adjudicate claims brought under the ADA," and the court did not address the issue of whether the board violated § 46a-58 (a). We disagree. The trial court cited *Connecticut Judicial Branch* v. *Gilbert*, Superior Court, judicial district of New Britain, Docket No. HHB-CV-18-6048927 (October 15, 2019) (69 Conn. L. Rptr. 229), rev'd and vacated in part, 343 Conn. 90, 272 A.3d 603 (2022), for the proposition that the commission "could consider a [federal discrimination] claim as a predicate to [a] claim under § 46a-58 (a)." As we discuss subsequently in this opinion, we recently affirmed in relevant part the judgment of the trial court in *Gilbert*; see *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 150, and the board concedes that this decision is controlling in the present case. Because our decision in *Gilbert* was released after the commission filed its primary appellate brief, it requested permission to file a notice of supplemental authority addressing this decision, which we granted.

We recognize that, even though the trial court recognized that the referee had found a violation of *§ 46a-58 (a)*, it apparently based its conclusion that the human rights referee properly awarded damages for emotional distress exclusively on federal cases holding that such damages are proper for a violation of the *ADA*. See footnote 11 of this opinion. The board does not dispute on appeal that, if this court concludes that the referee properly found that the board had violated § 46a-58 on the basis of conduct that would constitute a violation of the ADA, the damages award would be proper under § 46a-86 (c). Accordingly, any error by the trial court in this respect was harmless.

Whether the commission has the authority to identify violations of the ADA presents a legal question subject to plenary review. See, e.g., *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 101, 272 A.3d 603 (2022). "To the extent that the issue requires us to interpret the commission's enabling statutes and the state antidiscrimination laws that the commission is responsible for enforcing, we accord deference to the agency's formally articulated interpretation of those statutes when that interpretation is both time-tested and reasonable." Id., 101–102.

At oral argument before this court, the board conceded that this court's recent decision in *Gilbert* is controlling in the present case. In *Gilbert*, the plaintiff, the Connecticut Judicial Branch (branch), contended that the commission had no authority under § 46a-58 (a) to adjudicate claims pursuant to Title VII of the federal Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991 (Title VII), 42. U.S.C. § 2000e et seq.[15] Id., 105. This court concluded that the language of § 46a-58 (a) providing that "[i]t shall be a discriminatory practice . . . for any person to subject . . . any other person to the deprivation of any rights . . . secured or protected by the . . . laws . . . of the United States"; (emphasis omitted; internal quotation marks omitted) id., 102; unambiguously "conferred on the commission the authority to identify violations of federal civil rights laws . . . ." Id., 103. With respect to the branch's contention that, because the relevant federal statute authorized only federal courts to formally resolve Title VII claims, the EEOC had no such authority and, in turn, the commission had no such authority; see id., 105–106; this court concluded that "the branch [relied] on a non sequitur insofar as the commission has never purported to adjudicate Title VII

[15] *Gilbert* involved a claim of sexual discrimination. See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 97.

claims . . . .'' Id., 107. Rather, ''§ 46a-58 (a) . . . deems a violation of Title VII to be a violation of *state* antidiscrimination law . . . .'' (Emphasis in original.) Id. This court further concluded that nothing in the federal statutes or legislative history of Title VII evinced ''an intention to bar *state* agencies from identifying Title VII violations for purposes of determining whether *state* law has been violated.''[16] (Emphasis in original.) Id., 109. Accordingly, the court concluded that, ''when the commission finds a Title VII violation as the factual predicate to a violation of § 46a-58 (a), it does so as a matter of Connecticut state law . . . .'' Id., 114.

As we indicated, the board concedes in the present case that our reasoning in *Gilbert* with respect to Title VII claims applies equally to the board's claim that the commission has no authority to adjudicate claims pursuant to Title II of the ADA. Accordingly, we conclude that the trial court correctly determined that the commission has the authority to identify ADA violations for purposes of determining whether § 46a-58 (a) has been violated.

II

We next address the board's contention that the commission lacked jurisdiction over the ADA claim because the substance of the claim is that A was denied a FAPE under the IDEA, and, therefore, M was required by 20

[16] Thus, in addition to relying on the plain and unambiguous language of § 46a-58 (a), the court in *Gilbert* relied on cases construing Title VII and the legislative history of that statutory scheme to support its conclusion that the commission had the authority to identify Title VII violations as a basis for finding a violation of § 46a-58 (a). See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 109–15. Neither the board nor the commission has referred us to comparable case law and legislative history regarding Congressional intent with respect to the ADA. As we indicated, however, the board has conceded that its claim is indistinguishable from the claim that we rejected in *Gilbert* and does not contend that Congress intended to bar state agencies from identifying violations of Title II of the ADA for purposes of providing a state remedy.

U.S.C. § 1415 (*l*)[17] to exhaust his administrative remedies under the IDEA before filing a complaint with the commission on A's behalf, and he failed to do so. We disagree.

As a preliminary matter, we consider whether this issue is properly before us when the board failed to raise the issue in the proceedings before the human rights referee.[18] See, e.g., *Ferraro* v. *Ridgefield European Motors, Inc.*, 313 Conn. 735, 759, 99 A.3d 1114 (2014) (rule that reviewing court is not required to consider claim unless it was distinctly raised before initial decision maker applies to appeals from administrative proceedings). Because the board claims that M failed

[17] Title 20 of the 2018 edition of the United States Code, § 1415 (*l*), provides: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

[18] As we explained, after the trial court remanded the matter to the human rights referee to address the question of whether the board had violated the ADA, the referee observed that the board had not raised the exhaustion claim at the initial public hearing on the complaint and that the trial court had not requested that the referee address the issue in its remand order. Nevertheless, after receiving the referee's articulation, the trial court addressed the issue and concluded that M was not required to exhaust his remedies under the IDEA because the claim did not involve a request for a FAPE. For reasons that are unclear to us, the commission makes no claim that this issue is not reviewable because the board failed to exhaust its administrative remedies by raising the issue in the initial proceedings before the human rights referee, even though it does raise that claim with respect to the board's claim that a public school is not a place of public accommodation. Although the commission has not raised the issue of whether the board's exhaustion claim is reviewable on appeal, the parties have briefed the issue of the reviewability of unpreserved jurisdictional claims in administrative appeals in their briefs relating to the place of public accommodation claim. We address the issue in order to clarify the legal principles governing the review of unpreserved jurisdictional claims in administrative appeals and because addressing that issue will not prejudice the board or the commission.

to exhaust his remedies under the IDEA before filing his complaint with the commission, the claim implicates the commission's subject matter jurisdiction. Cf., e.g., *Garcia* v. *Hartford*, 292 Conn. 334, 338–39, 972 A.2d 706 (2009) (failure to exhaust administrative remedies implicates trial court's subject matter jurisdiction). A claim that an agency lacked subject matter jurisdiction may be raised at any time. E.g., *Ross* v. *Planning & Zoning Commission*, 118 Conn. App. 55, 60, 982 A.2d 1084 (2009). We conclude, therefore, that the issue was properly before the trial court and is properly before this court.

In reaching this conclusion, we are mindful that, as the commission points out, this court has held that an agency is competent, and must be given the opportunity, to determine its own jurisdiction before a party can challenge the agency's jurisdiction in court.[19] See *Cannata* v. *Dept. of Environmental Protection*, 215 Conn. 616, 622, 577 A.2d 1017 (1990). In *Cannata*, the named defendant, the Department of Environmental Protection (department), ordered the plaintiffs to cease and desist from cutting down trees in an area subject to certain environmental regulations because they had failed to obtain a permit. Id., 619–20. The plaintiffs appealed from the order to the trial court, which dismissed the appeal because they had failed to exhaust

[19] The board cites *Aaron* v. *Conservation Commission*, 178 Conn. 173, 179, 422 A.2d 290 (1979), for the proposition that "resort to administrative agency procedures will not be required when the claims sought to be litigated are jurisdictional." In *Cannata* v. *Dept. of Environmental Protection*, 215 Conn. 616, 621 n.7, 577 A.2d 1017 (1990), the court expressly stated that this court's decision in *Greater Bridgeport Transit District* v. *Local Union 1336, Amalgamated Transit Union*, 211 Conn. 436, 559 A.2d 1113 (1989), had overruled this holding in *Aaron*. See id., 439; see also *Sastrom* v. *Psychiatric Security Review Board*, 105 Conn. App. 477, 483 n.3, 938 A.2d 1233 (2008) (*Greater Bridgeport Transit District* overruled *Aaron* as applied in cases in which adequate administrative remedy is available, but plaintiff need not exhaust administrative remedy if there is no mechanism for judicial review of agency's jurisdictional ruling).

their administrative remedies by applying for a permit. Id., 620. The plaintiffs then appealed to this court, claiming that the department had no jurisdiction over their activities. We observed that, "[w]hen a particular statute authorizes an administrative agency to act in a particular situation it necessarily confers [on] such agency authority to determine whether the situation is such as to authorize the agency to act—that is, to determine the coverage of the statute—and this question need not, and in fact cannot, be initially decided by a court." (Internal quotation marks omitted.) Id., 623. Accordingly, we affirmed the judgment of the trial court. Id., 633.

We conclude that *Cannata* is distinguishable from the present case. First, unlike the plaintiffs in *Cannata*, the board did not deliberately bypass an *administrative proceeding* that could have provided adequate administrative relief when it raised the exhaustion claim in the trial court.[20] Rather, its failure to raise the claim before the human rights referee appears to have been the result of an oversight during the course of the only administrative procedure in which the board could have raised the claim, which itself was pursued to its conclusion. In other words, we conclude that there is a difference between bypassing an administrative procedure on the ground that the agency has no jurisdiction over the matter, which raises an exhaustion issue, and failing, within the context of an administrative proceeding, to

[20] In other cases in which this court or the Appellate Court has concluded that an agency must determine its own jurisdiction in the first instance, the plaintiffs also bypassed available administrative procedures. See *O & G Industries, Inc.* v. *Planning & Zoning Commission*, 232 Conn. 419, 425, 655 A.2d 1121 (1995); *Greater Bridgeport Transit District* v. *Local Union 1336, Amalgamated Transit Union*, 211 Conn. 436, 439, 559 A.2d 1113 (1989); *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 511, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018); *Sastrom* v. *Psychiatric Security Review Board*, 105 Conn. App. 477, 482, 938 A.2d 1233 (2008).

preserve for review a claim that the agency has no jurisdiction. When a party has failed to preserve a claim before an administrative agency, the exhaustion doctrine does not apply; instead, we apply the ordinary rules governing appellate review of unpreserved claims.

Second, we emphasized in *Cannata* that the jurisdictional issue in that case involved "factual determinations best left to the [department]. This is precisely the type of situation that calls for agency expertise. Relegating these determinations to the [department] in the first instance will provide a complete record containing the [department's] interpretation of the relevant statutory provisions for judicial review." Id., 627. In the present case, the jurisdictional claim involves the proper interpretation of state and federal statutory schemes that are not administered by the commission and that this court is equally competent to interpret.[21] Moreover, there is no claim that the record is inadequate for review of the issue. Accordingly, we conclude that we may review the claim.

We turn, therefore, to the merits of the board's claim that the commission lacked jurisdiction to entertain the complaint because M was required by 20 U.S.C. § 1415 (*l*) to exhaust his administrative remedies under the IDEA before filing a complaint with the commission. A determination as to an agency's subject matter jurisdiction is a question of law subject to plenary review. E.g., *Ross* v. *Planning & Zoning Commission*, supra, 118 Conn. App. 58.[22] "In this regard, a court must take

[21] Specifically, as we discuss more fully hereinafter, we must determine the applicability of the requirement that parties claiming that they were denied a FAPE exhaust their remedies under General Statutes § 10-76h, which is administered by the commissioner of education. In making this determination, we are guided by case law construing the IDEA exhaustion requirement.

[22] We stated in *Gilbert* that, "[t]o the extent that the issue requires us to interpret the commission's enabling statutes and the state antidiscrimination laws that the commission is responsible for enforcing, we accord deference to the agency's formally articulated interpretation of those statutes when

the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether . . . subject matter jurisdiction [exists], every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Graham* v. *Friedlander*, 334 Conn. 564, 571, 223 A.3d 796 (2020).

The IDEA requires that, "before the filing of a civil action under such laws seeking relief that is also available under this subchapter [of the IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415 (*l*) (2018). The board contends that this court held in *Graham* v. *Friedlander*, supra, 334 Conn. 564, that "the IDEA's exhaustion rule applies to state law causes of action." To the contrary, this court concluded in *Graham* that the plain language of 20 U.S.C. § 1415 (*l*) provides that exhaustion of IDEA remedies is required *only* when a civil action seeking relief for the denial of a FAPE is brought under "the United States [c]onstitution, the [ADA] . . . [T]itle V of the Rehabilitation Act of 1973, and the [IDEA] itself," *not* when a party has raised state law claims. (Internal quotation marks omitted.) *Graham* v. *Friedlander*, supra, 573. We also concluded in *Graham* that, although the IDEA's exhaustion rule did not apply, "our state legislature created an exhaustion requirement for state law claims that seek relief from the denial of a FAPE." Id., 574. Specifically,

that interpretation is both time-tested and reasonable." *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 101–102. In the present case, our determination is guided by the implicit exhaustion requirement contained in General Statutes § 10-76h and by the United States Supreme Court's interpretation of the IDEA's exhaustion requirement. Because the commission is not responsible for implementing § 10-76h or the IDEA, its interpretation is entitled to no deference.

persons who raise such claims must exhaust the remedies provided by General Statutes § 10-76h.[23] Id., 574–75. Accordingly, we agree with the board to the extent that it claims that M would be required to exhaust the available state remedies provided by § 10-76h before he could file the complaint, *if* the complaint to the commission actually sought relief for the denial of a FAPE.

We must determine, therefore, whether the complaint filed with the commission, in fact, sought relief for the denial of a FAPE. "To make this determination, we look to the recent decision of the United States Supreme Court in *Fry* v. *Napoleon Community Schools*, [580 U.S. 154, 137 S. Ct. 743, 197 L. Ed. 2d 46 (2017)], for guidance . . . ." *Graham* v. *Friedlander*, supra, 334 Conn. 580. Under *Fry*, courts making this determination should consider two factors. Id. "The first factor requires consideration of whether the claim could have been

[23] "Under § 10-76h (a) (1), a parent of a child requiring special education and related services 'may request a hearing of the local or regional board of education or the unified school district responsible for providing such services whenever such board or district proposes or refuses to initiate or change the identification, evaluation or educational placement of or provision of a free appropriate public education to such child or pupil.' The request must be made in writing, contain a statement of the specific issues in dispute, and be requested within two years of the board's proposal or refusal to initiate a change in the child's education plan. General Statutes § 10-76h (a) (1) through (4).

"Upon receipt of the written request, 'the Department of Education shall appoint an impartial hearing officer who shall schedule a hearing . . . pursuant to the [IDEA] . . . .' General Statutes § 10-76h (b). Section 10-76h requires the Department of Education to provide training to hearing officers, delineates who may act as hearing officers and members of hearing boards, identifies the parties that shall participate in a prehearing conference to attempt to resolve the dispute, and describes the authority that the hearing officer or board of education shall have. See General Statutes § 10-76h (c) and (d). Section 10-76h also establishes the processes for appealing from decisions of the hearing officer or the board of education. Section 10-76h (d) (4) provides in relevant part: 'Appeals from the decision of the hearing officer or board shall be taken in the manner set forth in section 4-183 . . . .' " *Graham* v. *Friedlander*, supra, 334 Conn. 574–75.

brought outside the school setting. . . . The second factor requires consideration of the history of the proceedings prior to the filing of the complaint." (Citation omitted.) Id., 580–81.

"The first factor—whether the claim could have been brought outside the school setting—can be evaluated in the form of two hypothetical questions: First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? . . . If the answer to both questions is yes, then it is unlikely that the complaint is about the denial of a FAPE." (Citation omitted; internal quotation marks omitted.) Id., 581.

Applying these factors in the present case, we conclude that M's complaint did not, in fact, seek relief for the denial of a FAPE. We acknowledge at the outset that our analysis is somewhat hampered by the informal and nontechnical pleading requirements in discrimination proceedings before the commission. We note, for example, that M was not required to, and did not, specify the relief that he was seeking in the complaint that he filed on A's behalf. Nevertheless, viewing the complaint and the proceedings before the commission in their entirety and in the light most favorable to a finding of jurisdiction, we are persuaded that M was not required to exhaust his remedies under § 10-76h before filing the complaint.

In reaching this conclusion, our decision in *Graham* v. *Friedlander*, supra, 334 Conn. 564, is instructive. In *Graham*, we concluded that the plaintiffs' complaint alleging that the defendants, including the Norwalk Board of Education, had engaged in negligent hiring and supervision of various persons and entities that

had provided autism related services to the plaintiffs' children, was not, in fact, a claim for the denial of a FAPE; id., 566–67; because "the plaintiffs could have brought essentially the same claim if they attended a municipal summer camp that touted a unique special needs program . . . [but] was run by uncertified and unqualified staff." Id., 581. Similarly, in the present case, M could have filed a complaint with the commission containing the same claim if a municipal summer camp for children with special needs had unilaterally dismissed A on the basis of his post-concussion syndrome.

We further concluded in *Graham* that "an adult participating in a municipally funded behavioral therapy treatment program offered in the evenings at a school could also bring the same claim for regression resulting from services provided by an uncertified and unqualified behavior therapist." Id., 582. Similarly, in the present case, an adult could bring the same claim if he or she were unilaterally dismissed from such a program on the basis of a physical disability.

The board disputes these conclusions and contends that, because the gravamen of M's complaint was that A was deprived of special education services, M was seeking relief for the denial of a FAPE. Specifically, the board contends that, "[b]ecause this case ultimately involves [A's] disenrollment from the school immediately after a [planning and placement team] meeting was held to discuss [A's] designation as a special education student, the alleged conduct is limited to the school setting. No other public facility can designate a student as 'special education' or provide a student with access to special education services, and, conversely, no other public facility can withdraw a student from those services." We disagree. In *Graham*, the defendants similarly claimed that, because the plaintiffs' complaint focused on the children's receipt of inadequate special education services, they were seeking relief for the

denial of a FAPE. *Graham* v. *Friedlander*, supra, 334 Conn. 584. We rejected this claim, concluding that "[t]he fact that the plaintiffs used the words inability to provide adequate services, does not automatically transform the claim into one alleging the denial of a FAPE or automatically subject the claim to an exhaustion requirement. The court in *Fry* warned against this kind of magic word approach. . . . The use (or [nonuse]) of particular labels and terms is not what matters. . . . What matters is the substance of the complaint." (Citations omitted; internal quotation marks omitted.) Id., 586.

We used the following hypothetical to illustrate this point: "If a teacher hits a special education student over the head and the student misses school for two weeks due to a concussion, the child could still bring an assault claim against the teacher, even though one of the harms alleged in the complaint could be that the child did not receive special education services for two weeks while recovering from the injury. The mere acknowledgment that the child received inadequate services for two weeks would not [however] make the claim one for the denial of a FAPE. The claim would remain one for assault." Id., 586–87. Similarly, in the present case, the fact that A was unable to take advantage of the educational services offered at John Daniels when the board unilaterally withdrew him from the school because of his post-concussion syndrome does not convert his claim for discrimination on the basis of disability into a claim for a denial of a FAPE. The former claim "implicate[s] those . . . intangible consequences of discrimination . . . such as stigmatization and deprivation of opportunities for enriching interaction with [his former] fellow students"; (internal quotation marks omitted) *Lawton v. Success Academy Charter School, Inc.*, 323 F. Supp. 3d 353, 362 (E.D.N.Y. 2018); whereas the latter claim implicates a loss of educational services.

The second *Fry* factor—the history of the proceedings—bolsters our conclusion. Although A's parents were undoubtedly seeking a FAPE while A was enrolled at John Daniels, including filing a request for a mediation with the state Board of Education to restore A's designation as a special education student, they never invoked the formal procedures for filing a due process complaint or requesting a hearing pursuant to § 10-76h. See *Graham* v. *Friedlander*, supra, 334 Conn. 588 (fact that plaintiffs never invoked formal procedures for seeking relief for denial of FAPE supported court's conclusion that they were seeking relief for something else). Moreover, M never asked the human rights referee during the proceedings on the complaint to order the board to reenroll A at John Daniels, to designate him as a special education student, or to provide him with appropriate educational services. Indeed, there is no reason to believe that they wanted or would be entitled to such relief because, before the beginning of the school year immediately following his withdrawal from John Daniels, A's parents enrolled him in another school where, as far as the record shows, he received a FAPE.[24]

[24] The complaint does allege that the board "failed to readmit" A, and it is arguable that, if the matter had been adjudicated promptly, A's parents could have sought readmission. It is also arguable that A's parents could have asked for educational services to compensate for the fact that A did not receive homebound educational services for the several weeks of the 2010–11 school year following his withdrawal from John Daniels. See, e.g., *Branham* v. *District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005) (compensatory education awards, such as tutoring to compensate for past failure to provide FAPE, may be available for IDEA violations if "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (internal quotation marks omitted)). There is no indication in the record, however, that A's parents had any intention to seek such remedies, and the *Fry* inquiry is designed to determine "whether a lawsuit in fact seeks relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit *could have* sought relief available under the IDEA (or, what is much the same, whether any remedies are available under that law)." (Emphasis added; internal quotation marks omitted.) *Fry* v. *Napoleon Community Schools*, supra, 580 U.S. 169. The board makes no claim that a different standard applies to the requirement under state law

We further note that, for reasons that are unclear from the record, the human rights referee did not hold a hearing on the complaint until March, 2016, almost five years after A was withdrawn from John Daniels. The board has not explained precisely what relief would have been available under § 10-76h to remedy the harm done as a result of A's withdrawal at that time, much less when and how such relief was actually requested. We conclude, therefore, that M was not required to exhaust his administrative remedies before he filed the complaint with the commission on A's behalf.

To support its claim to the contrary, the board relies on the Appellate Court's recent decision in *Phillips* v. *Hebron*, 201 Conn. App. 810, 244 A.3d 964 (2020).[25] In *Phillips*, the minor plaintiff, who had been diagnosed with Down syndrome and was without functional speech, attended kindergarten in an elementary school in the town of Hebron. Id., 812. During a visit to the school, the plaintiff's father discovered that the plaintiff's desk and chair were located in the coatroom of the kindergarten classroom. Id., 813. Subsequent inquiries revealed that the plaintiff slept 2.5 hours per day in the

that remedies pursuant to § 10-76h must be exhausted before seeking relief in other state forums.

We are mindful that "a disabled student claiming deficiencies in his or her education may not ignore the administrative process, then later sue for damages." *Polera* v. *Board of Education*, 288 F.3d 478, 488 (2d Cir. 2002). This simply means, however, that the student may not ignore the administrative process for the denial of a FAPE and later sue for damages *for that specific harm*; it does not mean that a disabled student may not seek damages outside of the administrative process *for some other harm* that happened to also result in the denial of a FAPE. See *Graham* v. *Friedlander*, supra, 334 Conn. 586–87 (student who is deprived of FAPE as result of physical assault by teacher may seek damages for injuries caused by assault without exhausting remedies for denial of FAPE, even if assault resulted in deprivation of FAPE).

[25] Because the Appellate Court's decision in *Phillips* was released after the commission filed its primary appellate brief, the commission requested permission to file a supplemental brief addressing the decision, which we granted.

coatroom and spent 40 minutes per day on average working on classwork or projects in that space. Id., 813–14. The plaintiff's father submitted a special education complaint form (state complaint) and a request for a due process hearing to the Bureau of Special Education. Id., 815. The state complaint sought, among other things, modifications to the plaintiff's individualized education plan. Id. After the defendant Hebron Board of Education filed a motion to dismiss the request for a due process hearing, the plaintiff's father withdrew the request and asked the department to investigate the state complaint. Id., 816. Upon concluding its investigation, the department issued a report in which it found that the plaintiff had not been denied a FAPE and stated that the parties were entitled to request a due process hearing if they disagreed with the report's conclusions. Id. The plaintiff's father did not file a request for a hearing but, instead, brought an action against the Hebron Board of Education and certain of its employees, alleging, among other things, that they had discriminated against him on the basis of his disability in violation of § 46a-58 (a) and General Statutes § 46a-75 (a) and (b). Id., 819. The defendants filed a motion to dismiss the complaint on the ground that the plaintiff's father had failed to exhaust his administrative remedies for the denial of a FAPE, which the trial court granted. Id., 822–24.[26]

On appeal, the Appellate Court concluded that, read in the context of the core allegations of the complaint;

[26] The defendants in *Phillips* contended that the plaintiff was required to exhaust his remedies pursuant to the IDEA, and trial court agreed. *Phillips* v. *Hebron*, supra, 201 Conn. App. 823–84. Thereafter, this court released its decision in *Graham* v. *Friedlander*, supra, 334 Conn. 564, which held that the IDEA's exhaustion requirement did not apply to claims made pursuant to state law but, instead, that plaintiffs raising state law claims alleging the denial of a FAPE are required to exhaust the remedies provided by § 10-76h. During oral argument before the Appellate Court, the plaintiff in *Phillips* conceded that there is a state exhaustion requirement for state claims seeking a remedy for the denial of a FAPE. *Phillips* v. *Hebron*, supra, 829 n.16.

namely, that the defendants had violated the plaintiff's rights under the IDEA; id., 835; the plaintiff's purported discrimination claims, in fact, sought "redress for the defendants' failure to provide a FAPE . . . ." (Footnote omitted.) Id., 839. The court reasoned that, under the first *Fry* factor, "the plaintiff could not sue a public facility for failing to educate him in the least restrictive environment; nor could an adult sue the school on such a basis." Id. Applying the second *Fry* factor, the history of the proceedings, the court observed that, before the plaintiff's father filed the complaint, he sought a due process hearing on the ground that the plaintiff had been denied a FAPE. Id., 841. Accordingly, the Appellate Court affirmed the trial court's judgment with respect to the exhaustion issue. Id., 845.

We are not persuaded by the board's contention that the Appellate Court's decision in *Phillips* supports its position. As we explained, unlike the complaint in *Phillips*, the complaint in the present case did not allege that the board had violated A's rights under the IDEA or, indeed, make any reference to the IDEA or to A's right to a FAPE, and, unlike the plaintiff in *Phillips*, neither A nor his parents ever invoked the administrative proceedings designed to remedy the denial of a FAPE. We conclude, therefore, that the trial court correctly determined that M was not required to exhaust his remedies pursuant to § 10-76h before he filed the complaint with the commission on A's behalf.

III

Finally, we address the board's claim that the commission lacked jurisdiction over M's claim pursuant to § 46a-64 because a public school is not a place of public accommodation. The board concedes that it did not raise this claim before the human rights referee but contends that the trial court improperly declined to address the claim because it was jurisdictional, and a

jurisdictional claim may be raised at any time. See, e.g., *Ross* v. *Planning & Zoning Commission*, supra, 118 Conn. App. 60. The commission contends that, to the contrary, the board's claim does not implicate its subject matter jurisdiction and the claim is, therefore, unreviewable. See *Ferraro* v. *Ridgefield European Motors, Inc.*, supra, 313 Conn. 759 (rule that reviewing court is not required to consider claim unless it was distinctly raised before initial decision maker applies to appeals from administrative proceedings). We agree with the commission that the claim is not reviewable.

This court previously has had occasion to discuss the "ongoing confusion as to whether the failure to plead or prove an essential fact [for purposes of invoking a statutory remedy] implicates the [tribunal's] subject matter jurisdiction or its statutory authority." *In re Jose B.*, 303 Conn. 569, 572, 34 A.3d 975 (2012). We noted in *In re Jose B.* that, "[o]nce it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Internal quotation marks omitted.) Id. 574. We further noted that the question of whether the action belongs to the class of cases that the tribunal has authority to decide is "[s]eparate and distinct from . . . the question of whether a [tribunal] . . . properly exercises its statutory authority to act." (Internal quotation marks omitted.) Id., 574–75. A challenge to the tribunal's statutory authority "raises a claim of statutory construction that is not jurisdictional." (Internal quotation marks omitted.) Id., 573. After discussing a number of cases in which this court and the Appellate Court applied these principles with disparate results, we concluded that a claim that a party has failed to allege or to establish an element of a statutory remedy implicates the tribunal's statutory authority and the legal suffi-

ciency of the complaint, not the tribunal's subject matter jurisdiction.[27] Id., 579.

In the present case, the complaint alleged that the board had violated § 46a-64 by discriminating against A on the basis of his disabilities in a place of public accommodation. Such a claim is within the class of cases that the commission has authority or competence to decide. We conclude, therefore, that the commission had subject matter jurisdiction to entertain the complaint. See id., 574.

In support of its claim to the contrary, the board essentially contends that, because a public school is *not* a place of public accommodation *as a matter of law*, the commission lacked subject matter jurisdiction. We disagree. In the cases that we cited in our discussion in *In re Jose B.* regarding the distinction between statutory authority and subject matter jurisdiction, the alleged jurisdictional deficiencies also involved questions of law.[28] We concluded that the trial court's juris-

[27] Thus, we implicitly overruled the cases that had reached a contrary conclusion on that point, namely, *Amore* v. *Frankel*, 228 Conn. 358, 636 A.2d 786 (1994), and *Kennedy* v. *Kennedy*, 177 Conn. 47, 411 A.2d 25 (1979). See *In re Jose B.*, supra, 303 Conn. 575–76 (discussing *Kennedy*); id., 577–79 (discussing *Amore*); id., 579 ("to the extent that the cases are inconstant, the better rule is set forth in" cases holding that failure to allege essential facts under particular statute goes to legal sufficiency of complaint, not to subject matter jurisdiction (internal quotation marks omitted)).

[28] See *In re Jose B.*, supra, 303 Conn. 574 (citing *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999), in which court considered whether Appellate Court correctly determined, sua sponte, that trial court did not have jurisdiction to modify support order pursuant to General Statutes § 46b-86 (a) because support agreement precluded modification unless defendant's weekly income exceeded $900); *In re Jose B.*, supra, 575 (citing *New England Retail Properties, Inc.* v. *Maturo*, 102 Conn. App. 476, 482, 925 A.2d 1151, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007), in which court considered whether, under statute prohibiting commencement of action against estate unless legal claim has been rejected by estate, claim that estate had not rejected legal claim implicated court's subject matter jurisdiction); *In re Jose B.*, supra, 575 (citing *Kennedy* v. *Kennedy*, 177 Conn. 47, 49, 411 A.2d 25 (1979), in which trial court concluded that it lacked jurisdiction to issue support orders pertaining to children over age of eighteen when legislature had lowered age of majority from twenty-one years of age to eighteen); *In*

diction was not implicated in any of these cases, but, instead, the claims implicated the trial court's statutory authority and the legal sufficiency of the complaints. Id., 579. We conclude, therefore, that the board's claim that the trial referee incorrectly determined that a public school is a place of public accommodation is not reviewable because it does not implicate the commission's subject matter jurisdiction.[29]

In summary, we conclude that the trial court correctly determined that the commission had jurisdiction to

re Jose B., supra, 576 (citing *Gurliacci* v. *Mayer*, 218 Conn. 531, 543–44, 590 A.2d 914 (1991), in which defendant claimed that trial court lacked subject matter jurisdiction over claim because plaintiff had not alleged statutory exception to Workers' Compensation Commission's exclusive jurisdiction over intraworkplace claims); *In re Jose B.*, supra, 577–79 (citing *Amore* v. *Frankel*, 228 Conn. 358, 362, 636 A.2d 786 (1994), in which defendant claimed that trial court lacked jurisdiction over claim because it did not fall with statutory exception to sovereign immunity).

[29] We note, for the benefit of future litigants, that, regardless of whether a public school is a place of public accommodation for purposes of § 46a-64, students who claim that they were discriminated against in a public school on the basis of a protected characteristic, including a disability, may seek the remedies provided by § 46a-86 by filing a complaint pursuant to § 46a-58 alleging that they have been discriminated against in violation of General Statutes § 10-15c. See *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 701, 706, 855 A.2d 212 (2004) (student who claimed that he was discriminated against on basis of race in public school in violation of § 10-15c could file complaint with commission pursuant to § 46a-58 and seek remedies provided by § 46a-86); see also General Statutes § 10-15c (a) ("[t]he public schools shall be open to all children five years of age and over . . . and each such child shall have . . . an equal opportunity to participate in the activities, programs and courses of study offered in such public schools . . . without discrimination on account of race, as defined in section 46a-51, color, sex, gender identity or expression, religion, national origin, sexual orientation or disability"); General Statutes § 46a-58 (a) (it is discriminatory practice to deprive person of right protected by law of this state on basis of protected status); General Statutes § 46a-86 (providing remedies for violation of § 46a-58).

The provision of § 10-15c prohibiting discrimination in public schools on the basis of a disability was added to the statute in 2021; see Public Acts, Spec. Sess. June, 2021, No. 21-2, § 405; and, therefore, a claim pursuant to that statute was not available in the present case but would be for claims after the 2021 amendment.

identify violations of the ADA for the purpose of determining whether the board violated § 46a-58 (a) and that it correctly determined that M was not required to exhaust the remedies provided by § 10-76h before filing his discrimination complaint with the commission. We further conclude that the board's claim that the human rights referee incorrectly determined that a public school is not a place of public accommodation for purposes of § 46a-64 (a) is not reviewable.

The judgment is affirmed.

In this opinion the other justices concurred.

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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

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PAUL HARRIGAN *v.* FIDELITY NATIONAL TITLE INSURANCE COMPANY (AC 44424)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The plaintiff property owner sought to recover damages from the defendant title insurance company for an alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), based on a violation of the Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.), in connection with a title insurance policy issued by the defendant to the plaintiff. The plaintiff brought the present action after protracted negotiations between the parties regarding the value of the plaintiff's claim as to a disputed property title. The plaintiff alleged that the defendant engaged in unfair and deceptive acts or practices in its administration of the policy and in its handling of the plaintiff's claim. Following a trial, the trial court found that the plaintiff had failed to demonstrate any unfair claim settlement practices under CUIPA by the defendant. On appeal, the plaintiff claimed, inter alia, that the evidence he presented at trial established that the defendant's unfair practices in failing to acknowledge and act with reasonable promptness upon communications with respect to his claim, in violation of the applicable provision (§ 38a-816 (6) (B)) of CUIPA, were part of a general business practice by the defendant, as required under § 38a-816 (6). *Held* that the trial court correctly rendered judgment in favor of the defendant with respect to the CUTPA claim, as the plaintiff, having failed to establish a general business practice of delaying communications by the defendant, failed to set forth a valid CUIPA claim, which was fatal to the plaintiff's CUTPA claim: the evidence presented by the plaintiff did not establish the existence of a general business practice by the defendant for purposes of § 38a-816 (6), as the cases relied on by the plaintiff to show a general business practice were factually distinguishable and had questionable evidentiary value in light of their differences, and the plaintiff failed to present any testimony or other documentary evidence relating to the alleged business practice of the defendant; moreover, the delays in the plaintiff's case were caused by both the plaintiff and the defendant, and, although some delays resulted from corporate inefficiencies and mismanagement by the defendant, a fair portion of the delays in the present case were due, in part, to other causes, including the plaintiff's own delayed responses to communications and his insistence on receiving compensation for the potential relocation of a replacement septic system, an issue that prolonged the negotiations and that the court

ultimately found to be of tenuous relevance to the diminution in value of the property.

Argued February 3—officially released September 6, 2022

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Unfair Trade Practices Act, based on a violation of the Connecticut Unfair Insurance Practices Act, in connection with a title insurance policy issued by the defendant to the plaintiff, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abrams*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Edward M. Schenkel, for the appellant (plaintiff).

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

Opinion

VERTEFEUILLE, J. The plaintiff, Paul Harrigan, appeals from the judgment of the trial court, following a bench trial, rendered in part in favor of the defendant, Fidelity National Title Insurance Company, in connection with a title insurance policy (title policy) issued by the defendant to the plaintiff. On appeal, the plaintiff challenges the judgment in favor of the defendant only with respect to count two of the operative complaint, the third revised complaint, which alleges that the defendant's conduct in handling an insurance claim filed by the plaintiff pursuant to the title policy violated the Connecticut Unfair Insurance Practices Act (CUIPA); General Statutes § 38a-815 et seq.; and that such unfair and deceptive acts or practices of the defendant thereby violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Specifically, the plaintiff claims on appeal that (1) the court applied an incorrect standard in its analysis of whether the defendant violated CUIPA by requiring

a finding of common-law bad faith by the defendant for the plaintiff to establish a violation of CUIPA, (2) when the proper standard is applied, the record sufficiently demonstrates that the defendant violated the relevant provisions of CUIPA, and (3) the evidence submitted by the plaintiff establishes that the defendant's unfair practices were part of a general business practice, as required under General Statutes § 38a-816 (6).[1] We affirm the judgment of the court, albeit on different grounds.

The court found the following facts in its memorandum of decision: "The plaintiff . . . is the owner of a 1.52 acre piece of residential property known as 27 Brook Road . . . in Woodbridge . . . . The western boundary of [the plaintiff's] . . . property abuts a piece of residential property known as 25 Brook Road. . . . The aforementioned properties known as 25 Brook Road and 27 Brook Road were once one parcel . . . . On September 29, 1969, Helen Greene transferred the properties to James [Weir] and Margery Weir. . . . On March 6, 1979, James Weir quitclaimed his interest in the properties to Margery Weir. . . . In 1998, Margery Weir subdivided the properties into parcels of relatively equal size and transferred the 25 Brook Road parcel to Woodbridge Country Homes. She retained ownership of the 27 Brook Road parcel. . . .

"The aforementioned transfer of the 25 Brook Road parcel from Margery Weir to Woodbridge Country Homes included an area approximately 0.2 acres . . . in size that runs along the boundary between the 25 Brook Road and 27 Brook Road properties and is shaped like a long, thin football . . . [disputed area]. This area is undeveloped, featuring trees and brush.

[1] Although § 38a-816 (6) was the subject of technical amendments in 2012; see Public Acts 2012, No. 12-145, § 37; 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.

. . . By warranty deed dated August 18, 1999, Woodbridge Country Homes transferred the 25 Brook Road property, including the disputed area, to Ron [Nudel] and Debra Nudel. . . . By warranty deed dated July 23, 2008, Margery Weir transferred the 27 Brook Road property to [the plaintiff] . . . in this matter. The warranty deed's description of the 27 Brook [Road] property's boundary with the 25 Brook Road property lacks clarity, making it unclear whether the deed purports to transfer the disputed area to [the plaintiff]. . . .

"At the time of [the plaintiff's] purchase of the 27 Brook Road property, he was under a good faith belief that his purchase included the disputed area. . . . As part of the foregoing transfer, [the defendant] . . . issued [an] owner's title insurance policy . . . to [the plaintiff] in relation to his ownership interest in the 27 Brook Road property. . . . [The plaintiff] purchased the 27 Brook Road property with the intention of renovating and expanding the existing house on the property and then selling it. . . . In furtherance of [his] efforts to improve the existing house on the property, [the plaintiff] commissioned a survey that resulted in the creation of a site plan dated March 26, 2009. . . . Upon reviewing the site plan, [the plaintiff] first recognized that a potential issue existed regarding ownership of the disputed area, but he continued to possess a good faith belief that he held title to the area. . . .

"[The plaintiff] eventually completed a renovation that nearly doubled the size of the existing house on the 27 Brook Road property. He entered into a listing agreement with Coldwell Banker on May 20, 2011, marketing the property for $1.2 million . . . . During the period when [the plaintiff] had the 27 Brook Road property on the market, he contacted James Nugent, the attorney who represented him when he purchased the property, and inquired about whether issues regarding

ownership of the disputed area could potentially interfere with a closing were he to secure a buyer. . . .

"Sometime in the late fall of 2011, [the plaintiff] conclusively learned that he did not, in fact, hold title to the disputed area. . . . By letter to [the defendant] dated December 3, 2011, [the plaintiff] made a claim upon his title insurance policy regarding the disputed area. . . . [The defendant] initially assigned Senior Claims Counsel Jeffrey Hansen to handle [the plaintiff's] claim. . . . By letter to [the plaintiff] dated January 5, 2012, [the defendant] acknowledged receipt of his claim. . . . By letter to [the plaintiff] dated February 3, 2012, [the defendant] essentially accepted his claim. At no time during the subsequent protracted negotiations between the parties regarding [the plaintiff's] claim did [the defendant] indicate any unwillingness to pay the claim. Rather, the issue between the parties always involved the claim's value. . . .

"[The defendant] subsequently decided to commission an appraisal designed to yield a figure representing the diminution in value of [the plaintiff's] property as a result of the loss of the disputed area. . . . Subsequent to [the defendant's] decision to commission the appraisal, its personnel engaged in internal discussions regarding what date should be considered the date of loss upon which the diminution in value figure should be based. They attempted to reach out to [the plaintiff] regarding the issue without apparent success. . . . There is no evidence that [the defendant] actively pursued the possibility of purchasing the disputed area from the owners of 25 Brook Road. . . .

"The appraisal commissioned by [the defendant] eventually issued on June 5, 2012. It was prepared by Barbara Pape . . . [Pape appraisal] and quantified the property's [diminution in] value by virtue of the loss of the disputed area as $17,500, assigning the property a

value of $332,000 with the disputed area and $314,500 without it. At [the defendant's] direction . . . Pape used March 26, 2009, as the date of loss, which was the date the plaintiff first recognized that a potential issue existed regarding ownership of the disputed area based on his review of the aforementioned site plan. . . .

"On July 6, 2012, [the defendant] forwarded to [the plaintiff] a copy of the Pape appraisal, together with a check in the amount of $17,500. Apparent difficulties arose surrounding delivery of the appraisal and the check, so [the plaintiff] did not receive them until several weeks later. . . . By letter to [the defendant] dated September 7, 2012, [the plaintiff] took exception, in great detail, to the methods . . . Pape employed in arriving at the [diminution in] value figure in her appraisal. . . . By letter dated October 10, 2012 . . . Pape responded to some of the concerns regarding her appraisal that [the plaintiff] raised in his September 7, 2012 letter. [The defendant] did not forward . . . Pape's letter to [the plaintiff] until December 22, 2012. . . . Over the next few months, the parties exchanged frequent correspondence in an attempt to reach an agreement regarding the [diminution in] value of the property. . . . One of [the plaintiff's] major concerns during this period was the alleged impact that the loss of the disputed area had on the property's septic system. While the evidence indicates that the [septic] system is not located in the disputed area, [the plaintiff] repeatedly expressed concern that the disputed area is the location where a replacement system could be most economically located in the event the current system needs to be replaced. . . .

"By letter dated March 13, 2013, [the defendant] informed [the plaintiff] that [it was] reassigning responsibility for his claim to Assistant Claims Counsel Cassandra Dorr. . . . By letter dated April 29, 2014, [the defendant] offered [the plaintiff] $29,500 to resolve his

claim. . . . By email dated June 26, 2014, [the defendant] offered [the plaintiff] an additional $500. . . . At some point prior to February 4, 2015, [the plaintiff] made a demand of $73,456 to resolve his claim. . . . In May, 2015, [the plaintiff] retained appraiser Charles Liberti to perform a diminution in value appraisal on the property. Around the same time, [the plaintiff] also retained Attorney Max Case to represent him [with] regard to his claim. . . .

"Liberti produced an appraisal dated February 10, 2016 . . . [Liberti appraisal], which quantified the property's [diminution in] value as $92,000 by virtue of the loss of the disputed area, assigning the property a value of $920,000 with the disputed area and $828,000 without it. At [the plaintiff's] direction . . . Liberti used December 3, 2011, as the date of loss, which was the date the plaintiff indicates that he conclusively learned that he did not own the disputed area and made his claim to [the defendant]. . . . Liberti did not factor in any issues regarding the septic system in arriving at the $92,000 [diminution in] value figure. He attributed the vast difference in the property values between the appraisals almost entirely to the significant improvements [the plaintiff] made to the property between the different dates of loss. . . .

"By letter dated March 21, 2016 . . . Case forwarded the Liberti appraisal to [the defendant] along with a demand of $92,000 to resolve the claim. . . . Not long thereafter, [the defendant] reassigned responsibility for [the plaintiff's] claim to Associate Claims Counsel Victoria Mack. . . . Between March . . . and November, 2016 . . . Case made repeated efforts to get [the defendant] to respond to . . . Liberti's appraisal and the accompanying $92,000 demand. . . . By email dated November 9, 2016, from . . . Mack to . . . Case, she informed him that part of the cause of [the defendant's] delay in responding was that the appraiser assigned to

conduct a review of the Liberti appraisal had mistakenly reviewed, and found fault with, the Pape appraisal instead. . . . Subsequent correspondence reveals that [the defendant] concluded that there were problems with both the Pape appraisal and the Liberti appraisal. As a result, it commissioned a third appraisal performed by Robert Marsele. . . . By letter dated December 2, 2016, [the defendant] informed [the plaintiff] that it had reassigned responsibility for his claim to Associate Claims Counsel Robert Fregosi. . . .

"On February 13, 2017 . . . Marsele produced an appraisal that quantified the property's [diminution in] value as $25,000 by virtue of the loss of the disputed area, assigning the property a value of $335,000 with the disputed area and $310,000 without it. At [the defendant's] direction . . . Marsele used March 26, 2009, as the date of loss, which was the date the plaintiff first recognized that a potential issue existed regarding ownership of the disputed area based on his review of the aforementioned site plan. . . .

"By letter from . . . Fregosi to . . . Case dated March 14, 2017, [the defendant] offered $31,000 to settle the claim and took issue with the December 3, 2011 date of loss contained in the Liberti appraisal. . . . By letter from . . . Case to . . . Fregosi dated April 24, 2017, [the plaintiff] renewed his demand of $92,000 and took issue with the March 26, 2009 date of loss contained in the Pape and Marsele appraisals. . . . By email from . . . Fregosi to . . . Case dated June 5, 2017, [the defendant] offered $40,000 to settle the claim. . . . By letter from . . . Fregosi to . . . Case dated August 7, 2017, [the defendant] offered $50,000 to settle the claim. . . . By letter from . . . Case to . . . Fregosi dated August 24, 2017, [the plaintiff] lowered his demand. It is unclear from the letter whether the new demand was $77,000 or $87,000. Regardless . . . Fregosi refused the demand by email to . . . Case dated

October 2, 2017. . . . The plaintiff brought this [action] against [the defendant] by complaint dated November 13, 2017."

In a third revised complaint, the plaintiff alleges four counts against the defendant. The second count, which alleges a violation of CUTPA, is the only count at issue in this appeal.[2] In count two, the plaintiff alleges that "[t]he defendant is involved in the trade or commerce of [providing] title insurance coverage to individuals and entities who hold title to real property" and that "[t]he defendant engaged in unfair and deceptive acts or practices in its administration of the [title] policy and handling of the plaintiff's claim . . . in violation of . . . [CUIPA] . . . ." The defendant's alleged unfair and deceptive acts included, but were not limited to, the following: "(a) misrepresenting pertinent facts and policy provisions relating to the coverage at issue, in violation of . . . § 38a-816 (6) (A); (b) failing to acknowledge and act with reasonable promptness upon the plaintiff's initiation of the claim, in violation of . . . § 38a-816 (6) (B); (c) refusing to pay the claim without conducting a reasonable investigation based upon all available information, in violation of . . . § 38a-816 (6) (D); (d) not attempting in good faith to effectuate a prompt, fair and equitable settlement of the claim, where liability is clear, in violation of . . . § 38a-816 (6) (F); and (e) failing to promptly provide a reasonable explanation of the basis in the [title] policy for denial of the claim, in violation of . . . § 38a-816 (6) (N)." The plaintiff further alleges in count two that the defendant "engaged in similar unfair and deceptive conduct on numerous other occasions," in violation of CUIPA, and that such conduct "was committed and performed with

[2] The other counts allege claims for breach of contract (count one), breach of the implied covenant of good faith and fair dealing (count three), and unjust enrichment (count four).

such frequency as to indicate a general business practice of the defendant . . . .''

The matter was tried to the court, which rendered judgment in part[3] in favor of the defendant with respect to counts two, three and four of the third revised complaint. With respect to count two, the court concluded that the plaintiff had failed to demonstrate any unfair claim settlement practices under CUIPA by the defendant. The plaintiff thereafter filed this appeal challenging the judgment only with respect to count two. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff argues that (1) the court applied an incorrect standard in its analysis of whether the defendant violated CUIPA by requiring the plaintiff to prove common-law bad faith by the defendant to establish a violation of CUIPA, (2) when the proper standard is applied, the record sufficiently demonstrates that the defendant violated the relevant provisions of CUIPA, and (3) the evidence submitted by the plaintiff establishes that the defendant's unfair practices were part of a general business practice, as required under § 38a-816 (6). Although the plaintiff has raised three claims on appeal, we address the third claim only, as its resolution is dispositive of this appeal.

Before addressing the merits of this claim, we set forth general principles governing CUIPA claims and our standard of review. ''CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . To give effect to its provisions, [General Statutes §] 42-110g (a) of [CUTPA] establishes a private cause of action,

[3] The court rendered judgment in favor of the plaintiff with respect to his claim of breach of contract in count one of the third revised complaint, awarding him damages in the amount of $92,000.

available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . . CUIPA, which specifically prohibits unfair business practices in the insurance industry and defines what constitutes such practices in that industry; see General Statutes § 38a-816; does not authorize a private right of action but, instead, empowers the [insurance] commissioner to enforce its provisions through administrative action. See General Statutes §§ 38a-817 and 38a-818. . . . [Our Supreme Court, however, has] determined that individuals may bring an action under CUTPA for violations of CUIPA. In order to sustain a CUIPA cause of action under CUTPA, a plaintiff must allege conduct that is proscribed by CUIPA." (Internal quotation marks omitted.) *Dorfman* v. *Smith*, 342 Conn. 582, 614, 271 A.3d 53 (2022). "[I]f a plaintiff brings a claim pursuant to CUIPA alleging an unfair insurance practice, and the plaintiff further claims that the CUIPA violation constituted a CUTPA violation, the failure of the CUIPA violation is fatal to the CUTPA claim." *State* v. *Acordia, Inc.*, 310 Conn. 1, 31, 73 A.3d 711 (2013); see also *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 624, 119 A.3d 1139 (2015) ("a plaintiff cannot bring a CUTPA claim alleging an unfair insurance practice unless the practice violates CUIPA").

Section 38a-816 (6) of CUIPA prohibits unfair claim settlement practices, which are defined in relevant part as "[c]ommitting or performing with such frequency as to indicate a general business practice any of the following: (A) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; (B) failing to acknowledge and act with reasonable promptness upon communications with respect to claims arising under insurance policies . . . (D) refusing to pay claims without conducting a reasonable

investigation based upon all available information . . . (F) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; [and] . . . (N) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement . . . .'' The issue of whether the evidence presented demonstrates that the insurer engaged in unfair settlement practices with such frequency as to indicate a general business practice involves a question of law over which we exercise plenary review.[4] See generally *Lees* v. *Middlesex Ins. Co.*, 229 Conn. 842, 847, 643 A.2d 1282 (1994) (affirming trial court's determination on motion for summary judgment, as matter of law, that undisputed evidence did not demonstrate general business practice by defendant); see also *Volpe* v. *Paul Revere Life Ins. Co.*, Docket No. 3:98-CV-972 (CFD), 2001 WL 1011955, *2 (D. Conn. August 29, 2001) (evidence presented was insufficient as matter of law to demonstrate general business practice). We are also mindful that ''[t]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, 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.) *State* v. *Acordia, Inc.*, supra, 310 Conn. 15–16.

[4] In the present case, the trial court did not reach the issue of whether the evidence established a general business practice by the defendant, as the court resolved the action by concluding that the plaintiff had failed to demonstrate any unfair claims settlement practices by the defendant. We, nevertheless, reach the issue in light of our plenary review of this question of law. See part II of this opinion.

I

In order for this court to reach the merits of whether the evidence establishes a general business practice by the defendant, we first must address two preliminary issues: (1) which provisions of CUIPA are at issue in this appeal, and (2) what evidence was appropriately before the court as to whether a general business practice has been established.

A

With respect to the first issue, we first note that count two of the third revised complaint alleges violations by the defendant of subdivisions (A), (B), (D), (F), and (N) of § 38a-816 (6). The court, after referencing those same allegations in its memorandum of decision,[5] stated: "It must be kept in mind that the issue in this case is not [the defendant's] denial of [the plaintiff's] claim, which is frequently the issue in CUIPA cases. The facts indicate that [the defendant] essentially accepted [the plaintiff's] claim not long after receiving his demand letter. The only issue during the protracted negotiations between the parties in this matter was the value of [the plaintiff's] claim, not its legitimacy, and, as a result, the value of the claim is the only issue before the court. As a result, the court finds, based on the evidence presented at trial, that the only CUIPA violations *cited by the plaintiff* that could potentially apply in this case are the claim[s] that [the defendant] failed

[5] Specifically, the court stated: "[The plaintiff] specifically claims that [the defendant] violated CUIPA in the following ways: (1) By misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue [§ 38a-816 (6) (A)]; (2) by failing to acknowledge and act with reasonable promptness upon communications with respect to his claim [§ 38a-816 (6) (B)]; (3) by refusing to pay his claim without conducting a reasonable investigation based upon all available information [§ 38a-816 (6) (D)]; (4) by not attempting in good faith to effectuate prompt, fair and equitable settlement of his claim [§ 38a-816 (6) (F)]; and (5) by failing to promptly provide a reasonable explanation of the basis in the policy for the denial of his claim [§ 38a-816 (6) (N)]."

to acknowledge and act with reasonable promptness upon communications with respect to [the plaintiff's] claim [in violation of § 38a-816 (6) (B)], and that [the defendant] did not attempt in good faith to effectuate prompt, fair and equitable settlement of [the plaintiff's] claim [in violation of § 38a-816 (6) (F)]." (Emphasis added; footnote omitted.)

On appeal, the defendant argues that the plaintiff has not challenged the court's finding that only subdivisions (B) and (F) of § 38a-816 (6) potentially could apply to this case and that the finding is not clearly erroneous. Although the plaintiff has not specifically challenged the court's finding, such a challenge could be implied from the plaintiff's arguments on appeal that the evidence presented establishes violations of other provisions of CUIPA. Thus, we must examine the record to determine whether it supports the court's finding.

"If the factual basis of a trial court's decision is challenged, the clearly erroneous standard of review applies. . . . While conducting our review, we properly afford the court's findings a great deal of deference because it is in the unique [position] to view the evidence presented in a totality of circumstances . . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The legal conclusions of the trial court will stand, however, only if they are legally and logically correct and are consistent with the facts of the case." (Citations omitted; internal quotation marks omitted.) *Li* v. *Yaggi*, 212 Conn. App. 722, 731, A.3d (2022).

At trial, the plaintiff submitted forty-three exhibits into evidence. A large portion of those exhibits consists of copies of email communications between the plaintiff

or his attorney and representatives of the defendant, and their subjects cover many topics, including settlement offers, the date of loss, requests for updates regarding the status of the plaintiff's claim, issues regarding the septic system and appraisals that were performed, and estimates for work relating to the septic, driveway, and landscape. A number of witnesses also testified at the trial, including the plaintiff; Cynthia Baines, a senior claims counsel for the defendant who explained the steps taken in handling the plaintiff's claim and testified regarding the communications in the exhibits; owners of various businesses relating to excavating, driveways, trees, and landscaping; the three appraisers; and Robert P. Pryor, a professional engineer and land surveyor.

On the basis of our careful review of that evidence and testimony, there was no evidence presented that could have supported a finding that the defendant violated subdivision (D) of § 38a-816 (6)—"refusing to pay claims without conducting a reasonable investigation based upon all available information"—or subdivision (N)—"failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement"—as the defendant neither refused to pay nor denied the claim. Indeed, the court specifically found that the primary issue in the case "was the value of [the plaintiff's] claim, not its legitimacy," that at no time did the defendant "indicate any unwillingness to pay the claim," and that the defendant never denied the claim and, in fact, "essentially accepted [the plaintiff's] claim not long after receiving his demand letter."

We similarly conclude that the evidence presented by the plaintiff could not have supported a finding that the defendant violated subdivision (A) of § 38a-816 (6)—"[m]isrepresenting pertinent facts or insurance

policy provisions relating to coverages at issue . . . .'' The evidence presented by the plaintiff, which shows that the parties disagreed about various matters such as the date of loss, the relocation of the septic system, and the value of the plaintiff's claim, simply does not demonstrate any misrepresentations by the defendant, nor did the court find any. In fact, the court specifically found, on the basis of the testimony of Baines, whom the court found to be credible, ''that at no time during the claims settlement process did [the defendant's] personnel act in bad faith or come within close proximity of doing so.'' It is not for this court to second-guess the credibility determinations of the trial court. See *Bayview Loan Servicing, LLC* v. *Gallant*, 209 Conn. App. 185, 193, 268 A.3d 119 (2021).

Moreover, the evidence presented shows numerous communications between the plaintiff and representatives of the defendant concerning the status of the plaintiff's claim and why its resolution had been delayed for more than five years, which could support a finding of a violation of subdivisions (B) and (F) of § 38a-816 (6), both of which relate to delays in communications and settling the claim. We, therefore, conclude that the court's finding ''that the only CUIPA violations *cited by the plaintiff*[6] that could potentially apply in this case''

[6] To the extent that the plaintiff references on appeal other provisions of CUIPA, namely, § 38a-816 (1) and (2), as well as § 38a-816 (6) (C), (G), and (M), we do not address them. First, those provisions were never cited in the plaintiff's operative complaint. ''It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of [his] complaint. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . A complaint should fairly put the defendant on notice of the claims against him. . . . In other words, [a] plaintiff may not allege one cause of action and recover upon another. . . . In addition, in the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded cause of action actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In that circumstance, provided the plaintiff has produced sufficient evidence to prove the elements of his unpleaded claim, the defendant will be deemed to have waived any defects

are the claims relating to subdivisions (B) and (F) of § 38a-816 (6) is not clearly erroneous. (Footnote added.)

Furthermore, in light of the court's finding that the defendant did not act in bad faith at any time during the settlement process, which was based on the court's credibility assessment of the testimony of the defendant's claims counsel, Baines, there can be no violation of § 38a-816 (6) (F), which requires a showing that the defendant did not attempt "in good faith to effectuate prompt, fair and equitable settlements" of the plaintiff's

in notice. . . . Put another way, a court may not render a judgment for a plaintiff on a theory that is neither pleaded nor pursued by the plaintiff at trial." (Citations omitted; internal quotation marks omitted.) *Gleason* v. *Durden*, 211 Conn. App. 416, 430–31, 272 A.3d 1129, cert. denied, 343 Conn. 921, 275 A.3d 211 (2022).

Second, the trial court stated in its memorandum of decision that the matter was tried over the course of seven days. The appellate record does not contain transcripts for two of those days—February 27 and March 4, 2020. In our review of the transcripts provided, we have not found any reference to those additional provisions or to arguments or evidence relating to them. To the extent that arguments concerning those additional provisions may have been raised in the transcripts not provided to this court, the record is not adequate for this court to make such a determination. See *Ng* v. *Wal-Mart Stores, Inc.*, 122 Conn. App. 533, 537, 998 A.2d 1214 (2010) (it is appellant's burden to provide this court with adequate record on which to decide issues on appeal, which includes necessary transcripts); see also Practice Book § 61-10.

Moreover, although the plaintiff referenced those additional provisions in his posttrial brief, the court never mentioned them in its memorandum of decision, which expressly referenced the provisions of CUIPA "cited by the plaintiff . . . ." It logically follows from that statement that the court was referring to the provisions cited in the third revised complaint. The plaintiff did file a motion for articulation, which was denied, and the plaintiff filed a motion for review with this court, which granted the motion but denied the relief requested therein. Notably, though, the motion for articulation simply asked the court if it found violations of § 38a-816 (1) and (2), and § 38a-816 (6) (A), (B), (C), (D), (F), (G), (M), and (N); the plaintiff never asked the court to articulate what provisions the court specifically considered when it found that only subdivisions (B) and (F) of § 38a-816 (6) potentially could apply, even though the court's decision, in substance, referenced only the provisions of CUIPA cited in the complaint and not the additional ones raised in the plaintiff's posttrial brief.

claim. The intrinsic component of bad faith in subdivision (F) precludes its applicability given the court's finding of no bad faith, the substance of which the plaintiff has not challenged on appeal.[7]

Accordingly, we conclude that the only provision of CUIPA relevant to this appeal is § 38a-816 (6) (B).

B

The following additional facts are relevant to the second preliminary issue we must address, namely, what evidence was appropriately before the court as to whether a general business practice has been established.

[7] The plaintiff's primary claim on appeal is that the court employed an incorrect standard when it required a showing of bad faith to establish a violation of CUIPA. In making that claim, however, the plaintiff has not challenged the finding itself of no bad faith conduct by the defendant. That is further evidenced by the fact that the plaintiff has not challenged on appeal the judgment rendered in favor of the defendant on count three alleging a breach of the implied covenant of good faith and fair dealing, which necessarily requires a showing of bad faith. Significantly, the court stated in its decision that "[a] finding of bad faith on [the defendant's] part is an essential element of the plaintiff's claim that [the defendant] breached the covenant of good faith and fair dealing, and, as a result, the plaintiff could not recover under that claim . . . ." Thus, its finding of no bad faith on the defendant's part was necessary to its resolution of the plaintiff's claim of breach of the implied covenant of good faith and fair dealing in the third revised complaint, regardless of whether it should have applied to the CUIPA claims.

Moreover, although the plaintiff argues in his brief that the defendant did not attempt in good faith to effectuate prompt, fair and equitable settlement of his claim, his analysis fails to specifically challenge the court's finding of no bad faith by the defendant. Instead, the plaintiff merely gives a few examples of conduct he claims demonstrates that the defendant did not attempt in good faith to settle his claim. Because the plaintiff has failed to provide any analysis or citation to authority demonstrating why the court's finding of no bad faith was improper, the brief is inadequate for this court to review that finding. See *Rosier* v. *Rosier*, 103 Conn. App. 338, 340 n.2, 928 A.2d 1228 ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.)), cert. denied, 284 Conn. 932, 934 A.2d 247 (2007).

As stated previously in this opinion, in count two of the third revised complaint the plaintiff alleges that the defendant "engaged in similar unfair and deceptive conduct on numerous other occasions," in violation of CUIPA, and that such conduct "was committed and performed with such frequency as to indicate a general business practice of the defendant . . . ." In support of that allegation, the third revised complaint references five complaints filed with the Insurance Department (department) involving the defendant and cites *Davis* v. *Fidelity National Ins. Co.*, 32 Pa. D. & C.5th 179 (2013) (*Davis I*), an adjudicated case from Pennsylvania involving the defendant.

During the trial, the plaintiff sought to admit into evidence exhibit 44, which consisted of the consumer complaints filed with the department alleging unfair insurance practices by the defendant that were referenced in count two. The court denied admission of exhibit 44 on the ground that it did not involve adjudicated matters.[8] Specifically, the court stated: "I have good news and bad news for you. If they are unadjudicated, I'm not letting them in. However, anything that's adjudicated, I . . . *could take* judicial notice of anything that's adjudicated. . . . You can give me a list of cases countrywide where [the defendant] has been . . . adjudicated having committed an unfair insurance practice. And *I could take judicial notice of it*." (Emphasis added.) The court thereafter admitted into evidence exhibits 41, 42, and 43, all of which concerned the *Davis I* case cited in count two.

On March 3, 2020, before trial resumed, the court heard arguments from the parties concerning a motion to dismiss filed by the defendant, in which the defendant sought, inter alia, to dismiss count two on the ground

[8] The plaintiff has not challenged that ruling on appeal.

that, as a matter of law, the plaintiff had failed to establish a general business practice by the defendant, as required by § 38a-816 (6). In his memorandum in opposition to the defendant's motion to dismiss, the plaintiff cited four instances in which the defendant allegedly engaged in bad faith settlement practices similar to its conduct in the present case (additional instances of insurance misconduct). Copies of those materials were attached as an exhibit to the plaintiff's memorandum.[9] At the hearing thereon on March 3, the defendant argued that the only evidence admitted in support of the plaintiff's claim of a general business practice by the defendant was the *Davis I* case, that the court declined to admit the other administrative matters handled by the department, and that any new allegations raised by the plaintiff should be excluded as a matter of law because the plaintiff already had rested his case without making a request for the court to take judicial notice of any matters, and the defendant would be prejudiced if the court considered any new evidence.

During argument, the parties addressed the additional instances of insurance misconduct cited by the plaintiff in his memorandum in opposition to the motion to dismiss, and the following colloquy transpired:

"[The Plaintiff's Counsel]: . . . And the court gave us clear instruction on Thursday, you said if we come back with more cases that demonstrate these—this repetitive conduct, the court will take judicial notice of those cases and they would come in. And that's what

[9] Those additional instances of insurance misconduct include three case citations and an official order from the Texas Commissioner of Insurance: *Fidelity National Title Ins. Co.* v. *Matrix Financial Services Corp.*, 567 S.E.2d 96 (Ga. App. 2002); *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, Docket No. 638367 (Cal. Super. August 13, 1992); *Davis* v. *Fidelity National Title Ins. Co.*, Docket No. 672 MDA 2014, 2015 WL 7356286 (Pa. Super. March 18, 2015); and Official Order, Tex. Commissioner of Ins. No. 2019-5951, In re Fidelity National Title Ins. Co., (May 3, 2019).

we did, Your Honor, over the weekend . . . [we] found all of these . . . cases, four or five more cases.

"So, we've . . . met [our] burden, it's . . . there. And I'm happy to give the court the citations to take judicial notice. . . .

"The Court: Haven't they been submitted as the exhibit?

"[The Plaintiff's Counsel]: Not yet, Your Honor, we were going to give you . . . our instruction was to give you citations and then the court would take . . . notice. . . .

"The Court: I think there's an exhibit with cases. I didn't . . . look at it, I just—

"[The Plaintiff's Counsel]: No, there's—Your Honor, there's one exhibit with . . . the case from Pennsylvania.

"The Court: Okay. . . . Let me—as a threshold, I agree with you, I think I opened the door and allowed you to do that. [The defendant's counsel] may not agree, but, I think I did. So . . . all right. Continue?

"[The Plaintiff's Counsel]: So, those are there, Your Honor. . . . [The defendant's counsel] . . . is free to argue the relevance and the applicability of each one of those cases. However, they do exist and are there. . . .

"[The Defendant's Counsel]: If I may, Your Honor, prior to resting, I don't believe there was any request by the plaintiff to allow this court to consider post-resting evidence. . . .

"The Court: I—it's my distinct recollection that I invited him to do so . . . ."

The court held off ruling on the motion to dismiss at that time. Thereafter, it rendered judgment in favor

of the defendant with respect to count two, which obviated the need for the court to reach the issue of whether the defendant's actions were part of a general business practice, as raised in the defendant's motion to dismiss.

On appeal, the plaintiff argues that "the record is clear that the trial court took judicial notice of the [additional instances of insurance misconduct]" referenced at the March 3, 2020 hearing and included in the exhibit to the plaintiff's memorandum in opposition to the defendant's motion to dismiss. The plaintiff further asserts that, even if this court finds that the trial court did not take judicial notice of the additional instances of insurance misconduct, "this court may judicially notice anything in the trial court's file, including exhibits to pleadings." The defendant counters that there is no evidence in the record demonstrating that the trial court was asked to take judicial notice of those additional instances of insurance misconduct, that it actually did so, or that it "provided the mandated notice to the parties and [an] opportunity to be heard." The defendant acknowledges the court's statements that it may have "invited" or "opened the door" to the additional evidence but argues that, "[i]n the discussion that followed, no request was made to submit these matters as exhibits, nor for the trial court to take judicial notice thereof. As such, these submissions are not evidence upon which the [plaintiff] can rely and should be afforded no consideration on whether a general business practice has been established."

We conclude that it is unclear from the record whether the court actually did take judicial notice of the additional instances of insurance misconduct. Although the court stated that it had "opened the door" to additional evidence, during that colloquy the plaintiff's counsel never made a request for the court to take judicial notice of the additional instances of insurance misconduct. The fact that the court previously had

stated to the plaintiff's counsel that counsel could bring other adjudicated cases to the court's attention and that the court *could* take judicial notice of them, there is simply nothing in the record aside from the court's vague statements demonstrating that, once the additional instances of insurance misconduct were brought to the court's attention, it actually did take judicial notice of them. Moreover, given that the court did not decide the issue of whether the evidence established a general business practice, it's memorandum of decision provides no guidance on this issue. Nevertheless, we need not decide whether the court took judicial notice of the additional instances of insurance misconduct because, even if we consider them together with the *Davis I* case,[10] for the reasons that follow we conclude, as a matter of law, that the plaintiff has failed to establish a general business practice by the defendant.

II

Having addressed those preliminary issues, we now turn to the issue of whether the evidence presented by the plaintiff establishes the existence of a general business practice by the defendant for purposes of § 38a-816 (6). We conclude that it does not.

We first note that, in their appellate briefs, the parties disagree as to whether the general business practice requirement is a condition precedent that must first be established or whether a plaintiff must first demonstrate a violation of one or more of the enumerated unfair settlement practices set forth in CUIPA. For example, the defendant argues that "the trial court [cannot] consider nor reach the issue of whether a CUIPA violation exists unless [the plaintiff] has proven that

[10] At the March 3, 2020 hearing, the defendant's attorney did address each of the additional instances of insurance misconduct and argued why they were not applicable and failed to demonstrate a general business practice by the defendant.

any alleged conduct of [the defendant] was committed with such frequency to constitute a 'general business practice.' " The plaintiff counters that the initial step a court must take concerning whether a defendant has violated CUIPA "is to first determine whether a . . . violation of CUIPA has been committed, not whether a general business practice has been established." We need not delve into that issue because a necessary element of a CUIPA claim is a finding of a general business practice, without which the CUIPA claim fails. Because § 38a-816 (6) requires the plaintiff to demonstrate that the defendant's alleged unfair claim settlement practices occurred with "such frequency as to indicate a general business practice," a determination by this court that the plaintiff has not met his statutory burden will be fatal to his CUIPA claim and dispositive of this appeal. Accordingly, for purposes of our analysis in this section, we assume that the plaintiff has demonstrated a violation of § 38a-816 (6) (B).

We next set forth general principles governing our resolution of this issue. "In requiring proof that the insurer has engaged in unfair claim settlement practices 'with such frequency as to indicate a general business practice,' the legislature has manifested a clear intent to exempt from coverage under CUIPA isolated instances of insurer misconduct." (Footnote omitted.) *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 849. Thus, our Supreme Court has concluded "that claims of unfair settlement practices under CUIPA require a showing of more than a single act of insurance misconduct." *Mead* v. *Burns*, 199 Conn. 651, 659, 509 A.2d 11 (1986); see also *Dorfman* v. *Smith*, supra, 342 Conn. 615.

Because the term "general business practice" is not defined in § 38a-816 (6), in *Lees* our Supreme Court looked "to the common understanding of the words as expressed in a dictionary. . . . 'General' is defined as 'prevalent, usual [or] widespread'; Webster's Third New

International Dictionary; and 'practice' means '[p]erformance or application habitually engaged in . . . [or] repeated or customary action.' Id." (Citation omitted.) *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 849 n.8. Thus, the court concluded that "the defendant's alleged improper conduct in the handling of a single insurance claim, without any evidence of misconduct by the defendant in the processing of any other claim, does not rise to the level of a 'general business practice' as required by § 38a-816 (6)." Id., 849.

"Where [a] [p]laintiff relies on other lawsuits in which those plaintiffs alleged similar conduct as [the] [p]laintiff alleges here, the [c]ourt may draw an inference that [the] [d]efendant engaged in that conduct with the frequency necessary for a 'business practice' under CUIPA." *Bilyard* v. *American Bankers Ins. Co. of Florida*, Docket No. 3:20CV1059 (JBA), 2021 WL 4291173, *3 (D. Conn. September 21, 2021). "To determine whether instances of insurance misconduct spanning different cases and different parties are sufficiently related to constitute a general business practice, courts . . . have considered the following factors: [T]he degree of similarity between the alleged unfair practices in other instances and the practice allegedly harming the plaintiff; the degree of similarity between the insurance policy held by the plaintiff and the policies held by other alleged victims of the defendant's practices; the degree of similarity between claims made under the plaintiff's policy and those made by other alleged victims under their respective policies; and the degree to which the defendant is related to other entities engaging in similar practices." (Internal quotation marks omitted.) *Preferred Display, Inc.* v. *Great American Ins. Co. of New York*, 288 F. Supp. 3d 515, 528–29 (D. Conn. 2018). Although those factors have been used by courts to determine "whether a plaintiff has made facially plausible factual allegations of a general business practice"

to survive a motion to dismiss under the federal rules of procedure; *Phillips* v. *State Farm Fire & Casualty Co.*, Docket No. 3:19-CV-623 (AWT), 2020 WL 3105485, *5 (D. Conn. February 28, 2020); they are equally applicable to whether the evidence presented, as a matter of law, establishes a general business practice by the defendant. This is particularly true in a case such as the present one, in which the plaintiff relies exclusively on published judicial decisions as evidence of the general business practice. In such a circumstance, we are in as good a position as was the trial court to determine whether, in light of the various factors courts have applied, the prior judicial determinations provide sufficient evidence of a general business practice.

Before we address the case cited in the third revised complaint as evidence of a general business practice of the defendant—*Davis* v. *Fidelity National Ins. Co.*, supra, 32 Pa. D. & C.5th 179—we first address the additional instances of insurance misconduct relied on by the plaintiff at the March 3, 2020 hearing to establish a general business practice by the defendant, which include *Davis* v. *Fidelity National Title Ins. Co.*, Docket No. 672 MDA 2014, 2015 WL 7356286 (Pa. Super. March 18, 2015) (*Davis II*); *Fidelity National Title Ins. Co.* v. *Matrix Financial Services Corp.*, 567 S.E.2d 96 (Ga. App. 2002) (*Matrix Financial*); Official Order, Tex. Commissioner of Ins. No. 2019-5951, In re Fidelity National Title Ins. Co. (May 3, 2019) (Texas order); and *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, California Superior Court, Docket No. 638367 (August13, 1992) (*Santa Fe*). Although those additional instances of insurance misconduct all involve Fidelity National Title Insurance Company or its affiliates as a party and claims pursuant to title policies issued by Fidelity National Title Insurance Company, they have little, if any, evidentiary value with respect to the issue of a general business practice by the defendant in the

present case, as the claims involved therein are not sufficiently similar to the one in the present case. See *Thomas* v. *Vigilant Ins. Co.*, Docket No. 3:21-CV-00211 (KAD), 2022 WL 844601, *8 (D. Conn. March 22, 2022) ("[p]rior instances of insurance misconduct offered to demonstrate a general business practice must be sufficiently similar to the allegations at issue to support such a conclusion" (internal quotation marks omitted)).

Davis II is an appeal to the Superior Court of Pennsylvania from the decision of the Court of Common Pleas in *Davis I*. *Davis II* involves a challenge to the determination by the Court of Common Pleas of lost profits and its award of punitive damages and addresses the issue of the delays by the insurer only with respect to the damages award. *Davis* v. *Fidelity National Ins. Co.*, supra, 2015 WL 7356286, *1, 4. It, thus, provides no support whatsoever for a finding of a general business practice of the defendant in relation to the facts of the present case.

Likewise, *Matrix Financial* provides little help with respect to this issue. That case involves an action brought against the insurer for breach of a title insurance contract and bad faith refusal to pay an insurance claim. See *Fidelity National Title Ins. Co.* v. *Matrix Financial Services Corp.*, supra, 567 S.E.2d 97. The Georgia Court of Appeals affirmed the summary judgment rendered against the insurer with respect to a claim that it had refused in bad faith to pay the title insurance claim in violation of a Georgia statute, which is not at issue in the present case. Id., 102. The issue in *Matrix Financial*—a bad faith failure to pay an insurance claim—is inapposite to the issue in the present case of whether the defendant engaged in a general business practice of failing to acknowledge and respond to communications regarding an insurance claim with reasonable promptness. Furthermore, unlike in *Matrix Financial*, in the present case the court found that the

defendant did not engage in bad faith, a finding not challenged by the plaintiff on appeal.

With respect to the Texas order, the insurer was found to have violated a number of provisions of the Texas Insurance Code in connection with a title policy it had issued, including failing to close the transaction, failing "to promptly investigate the validity of a title defect not excepted or excluded from the policy," and failing "to accept, deny, or conditionally accept a claim within [thirty] days or notify the insured of its inability to do so . . . ." Official Order, Tex. Commissioner of Ins. No. 2019-5951, supra, p. 4. Again, these findings bear little weight on whether the defendant in the present case, which from the outset accepted the claim, has engaged in a general business practice of delays in communicating regarding an insurance claim.

Finally, in *Santa Fe* the plaintiffs brought an action for breach of contract, breach of the implied covenant of good faith and fair dealing and negligent misrepresentation in connection with a title policy issued by the defendant insurer. *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, California Superior Court, Docket No. 638367, Complaint (August 16, 1991). As part of their claim that the insurer had breached the implied covenant of good faith and fair dealing, the plaintiffs alleged that the insurer "fail[ed] to acknowledge and act reasonably and promptly upon communications with respect to [the] [p]laintiffs' claims," a claim similar to the one in the present case. Id., p. 11. The matter was tried to a jury, which returned a verdict in favor of the plaintiffs. *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, supra, California Superior Court, Docket No. 638367. The verdict form reveals that the jury in *Santa Fe* found that the insurer acted unreasonably in handling the claim and that, with respect to the claim for breach of the implied covenant of good faith and fair dealing, it "acted with malice,

fraud, or oppression . . . .'' Id. Those findings fail to address the allegation relevant to the present case, namely, whether the insurer failed to acknowledge or act promptly with respect to communications regarding the claim filed by the plaintiffs. The materials submitted by the plaintiff in the present case include the allegations made against the insurer in *Santa Fe* and a jury verdict form; they do not show any substantive ruling on whether the insurer was found to have committed the particular alleged unfair settlement practice, especially when the count containing that claim included numerous other allegations of misconduct by the insurer. Allegations alone are not sufficient to demonstrate a general business practice. See *Moura* v. *Harleysville Preferred Ins. Co.*, Docket No. 3:18-cv-422 (VAB), 2019 WL 5298242, *9 (D. Conn. October 18, 2019). Accordingly, we conclude that the additional instances of insurance misconduct relied on by the plaintiff do not demonstrate a general business practice of delays by the defendant similar to the defendant's conduct in the present case.

We now address the case cited in the third revised complaint on which the plaintiff also relies to establish a general business practice by the defendant—*Davis* v. *Fidelity National Ins. Co.*, supra, 32 Pa. D. & C.5th 179. In that case, the plaintiff insureds (Davis plaintiffs) brought an action against the defendant insurer for bad faith and breach of contract arising out of a title insurance policy issued by the insurer. Id., 181. The Court of Common Pleas of Pennsylvania concluded that ''there were several known legal duties and fiduciary obligations recklessly disregarded by [the insurer], namely unreasonable delay in adjusting and resolving the claim [and] repeated violations of the Unfair Insurance Practices Act . . . .'' Id., 189. Of significance, the court found that the insurer had violated 40 Pa. Stat. and Cons. Stat. § 1171.5 (a) (10) (ii) (West 2006) by

"failing to acknowledge and act promptly upon written or oral communication with respect to claims arising under insurance policies"; id., 199; the language of which is nearly identical to that of § 38a-816 (6) (B). Although the court in *Davis I* found a similar unfair settlement practice as the one at issue in the present case, when the facts of *Davis I* are closely analyzed, the differences between *Davis I* and the present case become strikingly apparent.

In *Davis I*, the insurer did not deny coverage but, rather, took twenty months to complete its investigation and notify the Davis plaintiffs that the claim was covered under the policy, and subsequently delayed payment for three more years, extending an offer to settle only after the action against it was commenced. Id., 199–201. The court's conclusion that the insurer had violated 40 Pa. Stat. and Cons. Stat. § 1171.5 (a) (10) (ii) (West 2006) was premised on its finding that the insurer had "routinely ignored [the] [p]laintiffs, who initiated repeated communications . . . with [the] insurer over a period of years." Id., 200–201. In fact, the court referenced "a disturbing pattern of chronic delay" by the insurer. Id., 193. Moreover, in finding bad faith by the insurer, the court in *Davis I* found that the insurer acted with a reckless indifference to the rights of its insureds and in failing to resolve the claim during the five year period, which was evidenced by communications in which it recognized that it had no reasonable basis to continue to deny, by delay, the resolution of the claim and that it knowingly had threatened a meritless lawsuit as a way to delay resolution of the claim. Id., 194.

In contrast, in the present case, the court specifically found that the defendant's "actions in this case clearly [did] not represent shining examples of sterling claims management practices," and that "the issues that arose and the delay that resulted in this case were due, in no small part, to [the plaintiff's] unrealistic expectations

colliding with [the defendant's] maddening corporate inefficiency." The court further explained: "[The defendant's] shortcomings in this regard include, but are not limited to, the fact that four different claims counsel handled [the plaintiff's] claim in this matter, which was pending for almost six years before he filed suit. There was probably nothing more emblematic of [the defendant's] failings in this regard than when a report produced on [the defendant's] behalf mistakenly attacked the credibility of its own appraiser rather [than] [the plaintiff's] appraiser."

Furthermore, in the present case, a great deal of the delay was attributable to the issue raised by the plaintiff concerning the septic system, which the court found not to be relevant to the diminution in value figure. Specifically, the court stated: "As relates to the issue of the septic system that occupied so much of the parties' time and energy, both during the prolonged negotiations that culminated in this lawsuit and at trial, the court is of the opinion that it has little to no relevance to the [diminution in] value of the property. As a result, in arriving at a [diminution in] value figure, the court declines to consider [the plaintiff's] claims that the disputed area is the location where a replacement system could be most economically located in the event the current system needs to be replaced. While [the plaintiff's] assertion may, in fact, be accurate, the court finds the issue of the potential location of a new septic system that may or may not be needed sometime in the future to be of tenuous relevance to the [diminution in] value of the property."

The delays in the present case, therefore, were caused by both the plaintiff and the defendant and resulted, in part, from corporate inefficiencies and mismanagement of the defendant, whereas in *Davis I*, the insurer repeatedly *ignored* the Davis plaintiffs and its delays were purposeful and resulted from a reckless indifference to

their claim and a bad faith motive to delay paying in order "to find a cheaper way of escaping their liability to settle [the] claim . . . ." *Davis* v. *Fidelity National Ins. Co.*, supra, 32 Pa. D. & C.5th 195. The evidence in the present case does not support a finding that the defendant ignored communications from the plaintiff. In fact, the record shows numerous communications by agents of the defendant with the plaintiff, who, at times, took a great deal of time to respond. Baines testified to one such communication from Dorr to the plaintiff in February, 2015, in which she rejected a settlement offer of the plaintiff, tendered a new offer to settle from the defendant of $29,000, and requested that the plaintiff respond within thirty days. The plaintiff, however, did not respond until eight months later in October, 2015. The degree of similarity of the facts supporting the finding of an unfair settlement practice in both cases is lacking. *Davis I*, thus, does not provide support in the present case to show a general business practice of the defendant, which, as the court found, had less than stellar management practices that resulted, at times, in delayed communications regarding the plaintiff's claim.

Moreover, even if we construe *Davis I* as providing some support for the plaintiff's claim that the defendant had a general business practice of delaying communications, we conclude that the plaintiff, nevertheless, has not met his burden of demonstrating such a general business practice by the defendant. The plaintiff relies heavily on the statement of our Supreme Court in *Mead* "that claims of unfair settlement practices under CUIPA require a showing of more than a single act of insurance misconduct." *Mead* v. *Burns*, supra, 199 Conn. 659. We do not construe that statement in *Mead* as standing for the proposition that a plaintiff will necessarily meet his or her statutory burden simply by including a citation to at least one other decision in which the insurer has

been adjudicated to have committed a similar unfair insurance settlement practice. Rather, we construe *Mead* as clarifying the statutory requirement that the unfair claim settlement practice be performed or committed "with such frequency as to indicate a general business practice"; General Statutes § 38a-816 (6); that is to say, the words "with such frequency" indicate that more than a single act of misconduct is required, but that does not mean that a single additional act is sufficient.[11] Although no precise number of similar acts has been set by the appellate courts of this state and we decline to do so today,[12] we conclude that such a determination must be made on the basis of the facts of each

[11] The Federal District Court for the District of Connecticut commented on a similar issue in *Hartford Roman Catholic Diocesan Corp.* v. *Interstate Fire & Casualty Co.*, Docket No. 3:12cv1641 (JBA), 2017 WL 3172536 (D. Conn. July 26, 2017), aff'd, 905 F.3d 84 (2d Cir. 2018), stating: "It is undisputed that violation of [§] 38a-816 (6) 'requires proof that the unfair settlement practices were "with such frequency as to indicate a general business practice."' *Lees* [v. *Middlesex Ins. Co.*, supra, 229 Conn. 847–48 (quoting *Mead* v. *Burns*, [supra, 199 Conn. 651]). Still, the [plaintiff, Hartford Roman Catholic Diocesan Corporation (Archdiocese)], relying on *Lees* and quoting *Quimby* v. *Kimberly Clark* [*Corp.*], 28 Conn. App. 660, 671–72 [613 A.2d 838] (1992), argues that 'more than a singular failure' involving only the policyholder-plaintiff suffices to establish a general business practice. . . . [The defendant, Interstate Fire & Casualty Company (Interstate)] counters that although 'many cases have held that more than one act of misconduct is necessary . . . the Archdiocese is twisting those holdings to mean that anything more than one instance is sufficient to prove a CUIPA violation.' . . . This [c]ourt agrees with [Interstate]. While both *Quimby* (reviewing [S]uperior [C]ourt's grant of defendant's motion to strike) and *Lees* (reviewing [S]uperior [C]ourt's grant of summary judgment) found that 'isolated' or 'singular' instances of insurer misconduct were not sufficient to satisfy the 'general business practice' requirement where the respective plaintiffs failed to either allege facts or present evidence of misconduct by the defendant in processing any other claims, both cases noted the necessity for a plaintiff to show the practice was engaged in with some 'frequency.' " (Citations omitted; emphasis omitted.) *Hartford Roman Catholic Diocesan Corp.* v. *Interstate Fire & Casualty Co.*, supra, *3.

[12] See *Hartford Roman Catholic Diocesan Corp.* v. *Interstate Fire & Casualty Co.*, 905 F.3d 84, 96 (2d Cir. 2018) ("While a single instance of misconduct is insufficient to demonstrate a 'general business' practice under CUIPA; see *Mead* v. *Burns*, [supra, 199 Conn. 659], no Connecticut appellate court has said how many acts of misconduct would suffice, nor is 'general business practice' defined in . . . § 38a-816 (6). Acknowledging this, the

case and an examination of the evidence presented. See *Belz* v. *Peerless Ins. Co.*, 46 F. Supp. 3d 157, 165–66 (D. Conn. 2014) ("It is clear that a plaintiff must show more than a single act of insurance misconduct . . . [or] isolated instances of unfair settlement practices in order to successfully claim that the defendant has a general business practice of unfairly resolving disputes. . . . However, what constitutes a general business practice and the frequency with which the plaintiff needs to prove that the defendant has unfairly resolved claims are far less clear." (Citations omitted; internal quotation marks omitted.)).

In the present case, the cases relied on by the plaintiff to show a general business practice are factually distinguishable and have questionable evidentiary value in light of their differences, and the plaintiff has failed to present any testimony or other documentary evidence relating to the alleged business practice of the defendant. Also, the plaintiff is claiming a general business practice of delays by the defendant, when a fair portion of the delays in the present case were due, in part, to other causes, including the plaintiff's own delayed responses to communications and his insistence on receiving compensation for the potential relocation of a replacement septic system, an issue that prolonged the negotiations and that the court ultimately found to be of tenuous relevance to the diminution in value of the property. Under these circumstances, we cannot find that the plaintiff has met his statutory burden under § 38a-816 (6) of demonstrating a general business practice by the defendant as required under the statute. See *Gabriel* v. *Liberty Mutual Fire Ins. Co.*, Docket No. 3:14-cv-01435 (VAB), 2017 WL 6731713, *10 (D. Conn. December 29, 2017) (granting motion for summary judgment and concluding as matter of law that there was

Connecticut Supreme Court in *Lees* [v. *Middlesex Ins. Co.*, supra, 229 Conn. 849], advised that a court 'may look to the common understanding of the words as expressed in a dictionary.' ").

insufficient information in record to permit jury to conclude that defendant insurer violated CUTPA/CUIPA when plaintiffs offered evidence of lawsuits involving insurer but did not support CUTPA/CUIPA claim with other evidence such as "depositions with insurance company employees or other relevant individuals").

The plaintiff, having failed to establish a general business practice of the defendant, has failed to set forth a valid CUIPA claim, which is fatal to his CUTPA claim in count two. The court, therefore, properly rendered judgment in favor of the defendant with respect to the CUTPA claim in count two.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

K. D. *v.* D. D.*
(AC 44842)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for a civil restraining order pursuant to statute (§ 46b-15). At an evidentiary hearing, the plaintiff testified that there was a pending action for a dissolution of marriage between the parties and that she had been increasingly afraid of the defendant. The plaintiff testified that one evening, when she went to a restaurant with a group of people, she saw the defendant approach the hostess

[13] "We may affirm a judgment of the trial court albeit on different grounds." *Seminole Realty, LLC* v. *Sekretaev*, 192 Conn. App. 405, 416 n.16, 218 A.3d 198, cert. denied, 334 Conn. 905, 220 A.3d 35 (2019).

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

stand, he stared at her with a furrowed brow, locked eye contact with her, and that he seemed very agitated in his physical movements. After the defendant left the restaurant, he sent various text messages and emails to the plaintiff regarding the encounter. The trial court granted the application for a civil restraining order against the defendant, finding that the defendant's conduct created a pattern of threatening. On the defendant's appeal to this court, *held* that the trial court erred in failing to apply an objective standard to its determination when it issued the civil restraining order based on the pattern of threatening provision of § 46b-15 (a): the court viewed the evidence through the lens of the plaintiff's subjective reaction to the defendant's conduct, namely, her resulting fear, and stated that the plaintiff's testimony indicated a tone of hostility that she felt frightened her, and, although the reaction of an applicant can help provide context, subjective fear of an applicant is not a statutory requirement under § 46b-15, and, instead, what is required is the occurrence of conduct that constitutes a pattern of threatening; moreover, § 46b-15 does not contain any statutory language requiring a subjective-objective analysis, and there is nothing in the statutory language indicating that the legislature intended for courts to issue civil restraining orders under the pattern of threatening portion of § 46b-15 in situations other than where it is objectively reasonable to conclude, based on context, that the defendant had subjected the alleged victim to a pattern of threatening.

Argued April 6—officially released September 6, 2022

Procedural History

Application for a civil restraining order, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, granted the application and issued an order of protection, from which the defendant appealed to this court. *Reversed*; *order vacated.*

Reuben S. Midler, for the appellant (defendant).

Opinion

LAVINE, J. The defendant, D. D., appeals from the judgment of the trial court granting the application for a civil restraining order pursuant to General Statutes

§ 46b-15[1] filed by the plaintiff, K. D. On appeal, the defendant claims that the court improperly issued the civil restraining order because it applied an incorrect legal standard when it determined that he had subjected the plaintiff to a pattern of threatening. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On June 29, 2021, the plaintiff filed an application for relief from abuse pursuant to § 46b-15, seeking a civil restraining order against the defendant. On that same day, the court issued an ex parte restraining order against the defendant, which was to expire July 6, 2021, and scheduled a hearing for July 6, 2021. At the July 6, 2021 evidentiary hearing, the self-represented plaintiff testified that there was a pending action for a dissolution of marriage between the parties and that she had been "increasingly afraid" of the defendant. She testified that on the evening of June 24, 2021, she went to a restaurant with a group of others, including friends of the defendant.[2] The plaintiff "felt [the defendant] behind [her] shoulder," and noticed that "the hairs on the back of [her] neck stood up." In her testimony, the plaintiff described her encounter with the defendant at the restaurant as follows: "I saw him approaching the hostess stand very physically tense. He stared at me with his furrowed brow twitching and

[1] We note that § 46b-15 has been amended by the legislature since the events underlying this appeal. See Public Acts 2021, No. 21-78; see also General Statutes (Supp. 2022) § 46b-15. Hereinafter, unless otherwise indicated, all references to § 46b-15 in this opinion are to the current revision of the statute.

[2] The defendant testified that he had been paying for the plaintiff to stay at the hotel where the restaurant was located, but that prior to June 24, 2021, he had been notified by the hotel that his hotel reservation for the plaintiff had been cancelled and that she no longer was staying there. The plaintiff testified that she cancelled the defendant's hotel reservation for her at the hotel and put the reservation under a different name.

locked eye contact for, what, I mean, twenty-five seconds and I was frozen. He seemed very agitated in his physical movements." She further testified that during the incident the defendant's shoulders were "very high" and that he was "leaning in aggressively with his hands clenched and tight and it seemed like he was breathing very heavy." She explained that the defendant then moved away from the hostess desk "in a wide circle behind [her] slowly." She stated that she was "in shock." The defendant testified that he went to the restaurant in response to an invitation from a friend, but when the plaintiff arrived he became "very uncomfortable" and did not "feel safe" and, therefore, walked from the hostess stand area to the lobby where he waited for an Uber.

Subsequent electronic communications from the defendant to the plaintiff were admitted as a full exhibit at the hearing (exhibit 1). The plaintiff testified that, after the defendant left the restaurant, he communicated with her electronically and she detailed that while she was still at the restaurant, she received a text message from the defendant at 8:33 p.m., stating: "Enjoy your date!"[3] She further testified that the defendant sent her a series of emails on the night of June 25 and in the early morning of June 26, 2021. The first email stated: "You have 'fucked' all these 'dinner guests' while making me watch and abusing me. I will show you. Is that (unsafe) for those you have violated? Let me know when I should divulge your penchant for underage people." In a subsequent email, the defendant stated, "by underage, I meant legally permissible but young." In another email, the defendant explained that it was "unexpected" that the plaintiff would be at the restaurant and that, "upon seeing you, I left immediately. I

[3] The plaintiff received the same text message twice.

hope to never accidentally run into you again." The final email in exhibit 1 concerned childcare issues.

In an oral ruling issued at the conclusion of the July 6, 2021 hearing, the court granted the plaintiff's application for a civil restraining order. The court stated that the plaintiff's testimony "indicated a tone of hostility which the plaintiff felt frightened her. The defendant, the husband, says no hostility, he left and took an Uber. He did indicate he left because he did not feel comfortable to be in the same space as she was. He did not let it end there, however, as he sent the messages in exhibit 1. The wife, the applicant, testified at the restaurant that he stared at her, made eye contact for twenty-five seconds, leaned in aggressively making eye contact, and furrowing his brow, and he was breathing heavily and he was fussing as he walked behind her. The court finds that the plaintiff['s] exhibit 1, substantiates the conditions at the restaurant. If all he wanted to do was leave, he could have done so, but he extended the evening with the [plaintiff] in exhibit 1. In exhibit 1 it says, [enjoy] your date and the use of the F word and the reference to others involved leads this court to the conclusion that the testimony of the wife, the applicant, is more credible. The court finds the conduct of the [defendant] creates a pattern of threatening."[4] The court issued a restraining order, which expired on July 5, 2022.[5] This appeal followed.[6]

"[T]he standard of review in family matters is well settled.[7] An appellate court will not disturb a trial court's

[4] In its decision, the court inadvertently stated that the defendant texted "find" your date.

[5] Although the restraining order expired on July 5, 2022, the defendant's appeal is not moot due to adverse collateral consequences. See *L. D.* v. *G. T.*, 210 Conn. App. 864, 869 n.4, 271 A.3d 674 (2022).

[6] The plaintiff did not file a brief in this appeal. We, therefore, ordered that this appeal shall be considered on the basis of the record, the defendant's brief and appendix, and oral argument.

[7] "Section 46b-15 is part of title 46b, 'Family Law,' and chapter 815a, 'Family Matters,' and, as such, is specifically included as a court proceeding

orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal. . . .

"[I]ssues of statutory construction raise questions of law, over which we exercise 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. . . . General Statutes § 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute." (Citations omitted; footnote in original; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–12, 89 A.3d 896 (2014). Consequently, our standard of review depends on the nature of the defendant's claim on appeal.

The defendant claims that the court erred in failing to apply an objective standard to its determination when

in a family relations matter. See General Statutes § 46b-1 (5)." *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111 n.3, 89 A.3d 896 (2014).

it issued a civil restraining order based on the "pattern of threatening" provision in § 46b-15.[8] We agree.[9]

The defendant's claim requires us to determine the appropriate standard for assessing a pattern of threatening under § 46b-15 (a) and whether the trial court applied the required standard. Our standard of review is plenary. See *Putman* v. *Kennedy*, 104 Conn. App. 26, 31, 932 A.2d 434 (2007), cert. denied, 285 Conn. 909, 940 A.2d 809 (2008).

Section 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain

[8] The defendant also argues that the trial court lacked subject matter jurisdiction to entertain the plaintiff's application for a civil restraining order because the plaintiff's attached affidavit was not made under oath. "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. . . . [S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . and a judgment rendered without subject matter jurisdiction is void." (Citation omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, 199 Conn. App. 265, 275–76, 235 A.3d 589, cert. denied, 335 Conn. 968, 240 A.3d 284 (2020), and cert. denied, 335 Conn. 968, 240 A.3d 285 (2020). Governor Ned Lamont's Executive Order 7Q, dated March 30, 2020, which was extended through June 30, 2021, by Executive Order 12B, and was in place at the time of the plaintiff's June 28, 2021 affidavit, allowed for remote notarization. There is no indication in the record that the plaintiff's affidavit was notarized remotely or otherwise. The restraining order specifically referenced statements made by the plaintiff in her unsworn affidavit, which affidavit was not admitted as an exhibit at the hearing, despite that, during the hearing, the court struck from the record portions of the plaintiff's argument that were based on statements she had made in her unsworn affidavit that were not also testified to at the hearing. Although it is axiomatic that allegations not in evidence cannot properly be relied upon to support a judgment, we need not address the issue further as it does not impact the subject matter jurisdiction of the trial court. The defendant has not directed us to any case law, nor are we aware of any, stating that the attachment of an unsworn affidavit to an application for a restraining order somehow deprives a court of subject matter jurisdiction over that application. We, therefore, reject the defendant's argument that the trial court lacked subject matter jurisdiction.

[9] The defendant raises additional arguments in support of his claim, which we do not address in light of our resolution of his principal argument.

or physical injury, stalking or a pattern of threatening, including, but not limited to, a pattern of threatening, as described in section 53a-62, by another family or household member may make an application to the Superior Court for relief under this section. . . .'' In § 46b-15 (a), the legislature incorporated, by reference, the definition of threatening in the second degree under General Statutes § 53a-62 of the Penal Code. Section 53a-62 provides in relevant part: ''(a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person, or (B) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror . . . .'' In interpreting § 53a-62, this court has stated that ''[t]rue threats are among the limited areas of speech which properly may be restricted without violating the protections of the first amendment.'' (Internal quotation marks omitted.) *State* v. *Carter*, 141 Conn. App. 377, 399, 61 A.3d 1103 (2013), aff'd, 317 Conn. 845, 120 A.3d 1229 (2015); see also *State* v. *Krijger*, 313 Conn. 434, 450, 97 A.3d 946 (2014).

The definition of ''pattern of threatening'' in § 46b-15 is not limited to, but, rather, is broader than the definition of threatening provided in § 53a-62. Section 46b-15 does not define the ambit of this broader definition and, therefore, we look to commonly approved usage as expressed in dictionaries. See *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 113 (''[i]f a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary'' (internal quotation marks omitted)). According to common usage, the term ''threat'' is defined in Merriam-Webster's Collegiate Dictionary (11th Ed. 2014), as ''an expression of intention

to inflict evil, injury, or damage,"; id., p. 1302; and is defined in Webster's Third New International Dictionary (1993), as "an expression of an intention to inflict evil, injury, or damage on another usu[ally] as retribution or punishment for something done or left undone . . . ." Id., p. 2382. These definitions are not particularly useful in determining the proper standard to be applied. Significantly, however, in § 46b-15 (a), the legislature specifically referenced the threatening in the second degree statute, pursuant to which threats are assessed using an objective standard. See, e.g., *State* v. *Taveras*, 342 Conn. 563, 572, 271 A.3d 123 (2022) (true threats governed by objective standard); see also *State* v. *Meadows*, 185 Conn. App. 287, 302–308, 197 A.3d 464 (2018) (rejecting argument of defendant, who was convicted of violating § 53a-62, that true threats doctrine requires defendant to possess subjective intent to threaten victim), aff'd sub nom. *State* v. *Cody M.*, 337 Conn. 92, 259 A.3d 576 (2020). By so doing, the legislature indicated an intent that an objective standard should be used when assessing patterns of threatening under § 46b-15.

In the present case, the court viewed the evidence through the lens of the plaintiff's subjective reaction to the defendant's conduct, namely, her resulting fear, and stated that the plaintiff's testimony "indicated a tone of hostility which the plaintiff felt frightened her." Although the reaction of an applicant can help provide context, subjective fear of an applicant is not a statutory requirement under § 46b-15. In interpreting a provision similar for our purposes, in *Putman* v. *Kennedy*, supra, 104 Conn. App. 34–35, this court determined, when interpreting the phrase "continuous threat" under § 46b-15, that, although it is appropriate for a trial court to consider an applicant's subjective fear, it is not statutorily required for a finding of a "continuous threat" under § 46b-15. This reasoning in *Putman* applies with equal weight to the provision of § 46b-15 at issue in the

present case. It is not a requirement of § 46b-15 that an alleged threat causes an applicant any fear. What is required is the occurrence of conduct that constitutes a pattern of threatening. The legislature knows how to require a subjective-objective analysis, as it expressly did so when defining "fear" in the context of the issuance of protective orders for victims of stalking under General Statutes § 46b-16a. See *L. H.-S.* v. *N. B.*, 341 Conn. 483, 489–95, 267 A.3d 178 (2021) (fear under § 46b-16a requires subjective-objective analysis); see also *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011) ("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 upon any one of them" (internal quotation marks omitted)). Section 46b-15, unlike § 46b-16a, does not contain any statutory language requiring a subjective-objective analysis. There is nothing in the statutory language indicating that the legislature intended for courts to issue civil restraining orders under the pattern of threatening portion of § 46b-15 in situations other than where it is objectively reasonable to conclude, based on context, that the defendant had subjected the alleged victim to a pattern of threatening. We, therefore, conclude that, although a court may consider the subjective reaction of an alleged victim, the court must apply an objective standard. See *State* v. *Krijger*, supra, 313 Conn. 450 ("In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context,

including the surrounding events and reaction of the listeners." (Internal quotation marks omitted.)). Accordingly, we conclude that the court misconstrued the statute and applied an incorrect legal standard by limiting its analysis to a subjective standard rather than applying an objective standard in granting a restraining order on the basis that the defendant had subjected the plaintiff to a pattern of threatening under § 46b-15.

The judgment is reversed and the case is remanded with direction to vacate the civil restraining order.

In this opinion the other judges concurred.

VICTOR VELASCO *v.* COMMISSIONER OF CORRECTION (AC 44505)

Moll, Clark and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of the crimes of felony murder and conspiracy to commit robbery in the first degree, sought a writ of habeas corpus, claiming, inter alia, that his prior trial, habeas, and appellate counsel had provided ineffective assistance. The respondent Commissioner of Correction filed a motion to dismiss the habeas petition, arguing that the petitioner had released the state from all the claims set forth therein pursuant to a settlement agreement that the petitioner had entered into with the state after he filed the habeas petition. The settlement agreement related to an action filed by the petitioner in federal court against employees of the Department of Correction, in which he alleged that the conditions of confinement during his incarceration violated his constitutional rights. The settlement agreement contained a general release provision that released the state from all actions arising out of any matter that had occurred as of the date of the settlement agreement. The habeas court determined that the release encompassed the habeas petition and granted the respondent's motion to dismiss. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court, claiming that the settlement agreement was unenforceable because the terms of the release provision in the agreement were unconscionable. *Held* that the habeas court did not err when it dismissed the habeas petition: our Supreme Court in *Nelson* v. *Commissioner of Correction* (326 Conn.

772) rejected the argument that habeas rights should never be subject to waiver, stating that constitutional and appellate rights could be waived as long as the waiver was intentional; moreover, the settlement agreement between the state and the petitioner was not procedurally unconscionable, as the petitioner's counsel conceded that the petitioner entered into it knowingly and voluntarily, the petitioner was represented by attorneys who negotiated the settlement agreement on his behalf, and the petitioner failed to introduce any evidence to support his claims of procedural unconscionability; furthermore, although its release provision was broad, the settlement agreement was not substantively unconscionable with respect to the habeas petition because it was not limitless, barring only the petitioner's claims against the state that arose before the date of the settlement agreement, which included those raised in the habeas petition, by the time the parties executed the settlement agreement, the petitioner already had numerous opportunities to challenge his convictions, through appeals and collateral attacks spanning decades, and it was not so unreasonable or oppressive as to render it unenforceable, as, in exchange for the release, the petitioner received funds in his inmate trust account and the state agreed to forgo the collection of any amounts owed by the petitioner to the state for the cost of his incarceration from the proceeds of the settlement and to vacate a finding of guilty against the petitioner on a disciplinary report.

Argued April 4—officially released September 6, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

J. Christopher Llinas, assigned counsel, for the appellant (petitioner).

Susan M. Campbell, assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (respondent).

Opinion

CLARK, J. Following the granting of his petition for certification to appeal, the petitioner, Victor Velasco,

appeals from the judgment of the habeas court dismissing his amended petition for a writ of habeas corpus pursuant to Practice Book § 23-29. The court concluded that a certain "Settlement Agreement and Release" the petitioner had entered into with the state of Connecticut in 2018 (settlement agreement) barred the petitioner's habeas petition. On appeal, the petitioner argues that the settlement agreement is unenforceable because the terms of the release provision are unconscionable. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. The petitioner was charged with the crimes of felony murder in violation of General Statutes (Rev. to 1995) § 53a-54c and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (3). See *State* v. *Velasco*, 253 Conn. 210, 212–13, 751 A.2d 800 (2000). He also was charged under General Statutes § 53-202k with committing robbery in the first degree with a firearm. See id., 213. In 1998, following a jury trial, the defendant was found guilty on the first two counts. Id. "The trial court rendered judgment and sentenced the defendant to a term of imprisonment of sixty years on the felony murder conviction, execution suspended after fifty years, and a twenty year concurrent term of imprisonment on the conspiracy conviction. The trial court then determined, from the evidence presented at trial, that the defendant had used a firearm in violation of § 53-202k. Accordingly, the trial court also imposed a five year sentence to run consecutively with the other sentences for the conviction under § 53-202k." Id. On direct appeal, our Supreme Court vacated the § 53-202k sentence enhancement but affirmed the court's judgment in all other respects; id., 249; resulting in a sentence of sixty years' imprisonment, execution suspended after fifty years, and five years of probation. See id., 217.

Since the petitioner's conviction, he has filed numerous petitions for a writ of habeas corpus.[1] In addition, he has filed numerous lawsuits against the state of Connecticut alleging violations of his constitutional rights. See, e.g., *Velasco* v. *Hall*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040120-S; *Velasco* v. *Bennett*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040121-S. Pertinent to this appeal, the petitioner filed a 42 U.S.C. § 1983 action in the United States District Court for the District of Connecticut against prison officials at Corrigan Correctional Center alleging violations of his constitutional rights based, inter alia, on his conditions of confinement during his incarceration stemming from his designation as a gang member (federal case). See *Velasco* v. *Halpin*, United States District Court, Docket No. 3:11CV463 (JCH) (D. Conn. November 20, 2017).[2] The parties ultimately settled that case via the settlement agreement executed on April 4, 2018. The settlement agreement,

[1] The petitioner filed his first habeas petition on December 28, 1998, and withdrew it on November 8, 2002. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-98-0002825-S. He filed his second habeas petition on January 10, 2003, and the habeas court dismissed that petition without prejudice before reaching the merits. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-03-0473010-S (February 27, 2004). He filed his third habeas petition on January 25, 2005, and the habeas court denied that petition on the merits. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000321-S (August 13, 2008), aff'd sub nom. *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 987 A.2d 1031 (2010), cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010). He filed his fourth habeas petition on November 6, 2009, and the habeas court denied that petition on the merits. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-09-4003267-S (May 1, 2013), appeal dismissed sub. nom. *Velasco* v. *Commissioner of Correction*, 156 Conn. App. 901, 110 A.3d 547 (2015), cert. denied, 317 Conn. 903, 114 A.3d 1219 (2015).

[2] Although not provided in the parties' appendices, this court has taken judicial notice of the operative complaint in the federal case for background purposes. See, e.g., *Stuart* v. *Freiberg*, 316 Conn. 809, 812 n.4, 116 A.3d 1195 (2015); *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 739 n.10, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011).

which the petitioner entered into while the instant petition for a writ of habeas corpus was pending in the Superior Court, includes a general release that provides in relevant part: "The [petitioner] . . . for and in consideration of the fulfillment of the obligation of the State of Connecticut described above, and other valuable consideration, the receipt of which is hereby acknowledged, does herewith forever discharge and release . . . the State of Connecticut and each of its current or former officers, agents, servants, employees, successors, legal representatives and assigns, from any and all actions, causes of action, suits, claims, controversies, damages and demands of every nature and kind, including attorneys fees and costs, monetary and equitable relief, whether known or unknown, which he had or now has or may hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this agreement, including any acts arising out of, or in any way related to the incidents or circumstances which formed the basis for the [federal case], including such actions as may have been or may in the future have been brought in the federal courts, courts of the State of Connecticut or any other state or forum, any state or federal administrative agency, or before the Claims Commissioner pursuant to [General Statutes] § 4-141, et. seq. This release shall include but is not limited to causes of action alleging violations of [the petitioner's] state and/or federal constitutional rights, his rights arising under the statutes and laws of the United States, the State of Connecticut or any other state, any other source of rights that may exist, and such causes of action as may be available under the common law."

Prior to commencing his federal case and entering into the settlement agreement, the petitioner had filed the instant habeas petition on November 17, 2014. He

subsequently amended the petition on November 9, 2017; February 27, 2019; and October 4, 2019. The operative petition contains four counts, alleging (1) ineffective assistance of his trial counsel and prior habeas counsel, (2) ineffective assistance of his appellate counsel for his direct appeal, (3) a violation of the petitioner's constitutional rights arising from the state charging him with felony murder after he waived his right to a probable cause hearing, and (4) a lack of subject matter jurisdiction in the petitioner's criminal trial due to the petitioner's procedurally defective waiver of his right to a probable cause hearing.

On March 19, 2020, the respondent, the Commissioner of Correction, filed a motion to dismiss the petitioner's habeas petition on the basis that the settlement agreement from the federal case released "the state of Connecticut from all constitutional claims from the beginning of the world until the writing of the settlement agreement, April 4, 2018."[3] In response, the petitioner argued, inter alia, that the settlement agreement was intended to settle only the federal case and that the agreement's terms were ambiguous.

The petitioner filed a supplemental objection dated June 26, 2020, in which he reiterated some of his contract interpretation arguments and further argued that interpreting the settlement agreement to bar his instant habeas petition would be unconscionable.[4] On September 9, 2020, the court, *Oliver*, *J.*, held remote arguments

[3] The respondent also noted that two of the petitioner's other actions against the state's representatives had been dismissed based on the settlement agreement. See *Velasco* v. *Hall*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040120-S (March 7, 2019); *Velasco* v. *Bennett*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040121-S (September 25, 2018).

[4] The supplemental objection stated in relevant part: "Such interpretation of the settlement agreement by the respondent is unconscionable where: A.) the respondent implies that the petitioner agreed to terminate his habeas matter before this court; B.) the respondent implies that the petitioner agreed to terminate his rights under the federal constitution; C.) the respondent implies that the petitioner agreed to terminate his rights under the state

on the motion to dismiss.[5] During that proceeding, it came to the court's attention that the respondent never received a copy of the petitioner's supplemental objection. At the conclusion of the hearing, the respondent was permitted to file a reply to the petitioner's supplemental objection. The respondent filed his reply brief on October 1, 2020, arguing that the terms of the settlement agreement are clear and unambiguous and encompass the petitioner's habeas petition.

On December 2, 2020, the habeas court granted the respondent's motion to dismiss, concluding that "[t]he terms of the settlement agreement and release are clear and unambiguous and unquestionably encompass the instant matter." The habeas court subsequently granted the petitioner's petition for certification to appeal. This appeal followed.

In his principal brief on appeal, the petitioner argues that the habeas court erred when it dismissed his habeas petition. He contends that the settlement agreement on which the court based its decision is unconscionable due to the unequal bargaining positions of the parties and because the general release contained within the settlement agreement is unreasonable in its breadth and scope. The respondent counters that the settlement agreement is not unconscionable as it relates to the instant habeas petition because the petitioner was represented by counsel at the time he negotiated and

constitution; D.) the respondent implies that the petitioner agreed to terminate his state civil cases in which the petitioner, as the plaintiff, had already won by default; and E.) . . . that the respondent implies that the petitioner agreed to these terms from the beginning of time to the end of the world, in exchange for $2000 and the dismissal of a prison disciplinary report, which had no [e]ffect [on] his conditions. Your Honor, it is clear that the [respondent relies] on the ambiguous language of this settlement agreement as the respondent interprets it one way while the petitioner's attorneys advised the petitioner, rightly, that the settlement would not affect any of the petitioner's other cases, especially this habeas matter."

[5] Neither party sought an evidentiary hearing in connection with the motion to dismiss.

entered into the agreement and was well aware of the implication of the release. The respondent also argues that the settlement agreement is not in any way one-sided, as the petitioner received significant benefits. We agree with the respondent.

We begin by setting forth our standard of review. "[W]hen a habeas court considers a motion to dismiss a petition for a writ of habeas corpus, [t]he evidence offered by the [petitioner] is to be taken as true and interpreted in the light most favorable to [the petitioner], and every reasonable inference is to be drawn in [the petitioner's] favor. . . . It is equally well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action . . . [and it] is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Citations omitted; internal quotation marks omitted.) *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 780–81, 167 A.3d 952 (2017). "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 607, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021).

"A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811, 626 A.2d 729 (1993). With regard to our interpretation of a settlement agreement, we note that, "[a]lthough ordinarily the

question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007).

As for the doctrine of unconscionability, our courts have explained that "[t]he classic definition of an unconscionable contract is one which no [individual] in his senses, not under delusion, would make, on the one hand, and which no fair and honest [individual] would accept, on the other." (Internal quotation marks omitted.) *Grabe* v. *Hokin*, 341 Conn. 360, 371, 267 A.3d 145 (2021). "Substantive unconscionability focuses on the content of the contract, as distinguished from procedural unconscionability, which focuses on the process by which the allegedly offensive terms found their way into the agreement." (Internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 87 n.14, 612 A.2d 1130 (1992). "Procedural unconscionability is intended to prevent unfair surprise and substantive unconscionability is intended to prevent oppression. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998)." *Rockstone Capital, LLC* v. *Caldwell*, 206 Conn. App. 801, 809, 261 A.3d 1171, cert. denied, 339 Conn. 914, 262 A.3d 136 (2021). "Unconscionability is determined on a case-by-case basis, taking into account all of the relevant facts and circumstances." (Internal quotation marks omitted.) Id.

"[T]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case. . . . [O]ur review on appeal is unlimited by the clearly erroneous standard.

. . . [T]he ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and . . . the trial court's determination on that issue is subject to a plenary review on appeal. It also means, however, that the factual findings of the trial court that underlie that determination are entitled to the same deference on appeal that other factual findings command. Thus, those findings must stand unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) Id., 809–10.

With the foregoing principles in mind, we turn to the petitioner's claim on appeal. It is helpful to begin with what the petitioner is *not* arguing. First, the petitioner is no longer arguing (as he did before the habeas court) that the settlement agreement is ambiguous and that the release did not cover his habeas petition. The petitioner's counsel conceded at oral argument before this court that the settlement agreement is clear and unambiguous, thereby acknowledging that the petitioner's petition for a writ of habeas corpus falls within the release provision in the settlement agreement.[6] Second, the petitioner's counsel also conceded that the petitioner knowingly and voluntarily entered into the settlement agreement. To that end, the petitioner's counsel expressly conceded at oral argument that the petitioner is not arguing procedural unconscionability. Rather, the petitioner argues that the settlement agreement is substantively unconscionable and, therefore, unenforceable.

Citing to *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 353, he argues that, even in the absence of procedural unconscionability, a party can avoid being subject to a contractual provision

[6] We note that the petitioner's appellate brief also does not contain any arguments concerning whether the release provision of the settlement agreement applies to his petition.

if he can establish that the provision is substantively unconscionable. In his view, the unequal bargaining position of the parties and the "almost limitless breadth and scope of [the release provision], in the specific context of a prisoner's rights action, is substantively unconscionable." We are not persuaded.

As an initial matter, it does not appear that our appellate courts have fully and clearly resolved whether a contract must be both procedurally and substantively unconscionable for it to be unenforceable. Our appellate authority suggests that both must be present. See, e.g., *Bender* v. *Bender*, 292 Conn. 696, 732, 975 A.2d 636 (2009); *Rockstone Capital, LLC* v. *Caldwell*, supra, 206 Conn. App. 809. Each of those cases, however, cites to a quote from an opinion of our Supreme Court, stating that a determination of unconscionability "generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Internal quotation marks omitted.) *Bender* v. *Bender*, supra, 732; *Rockstone Capital, LLC* v. *Caldwell*, supra, 809; see also *Hirsch* v. *Woermer*, 184 Conn. App. 583, 589–90, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018); *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 29, 191 A.3d 212 (2018). That quote, however, originated in *Hottle* v. *BDO Seidman, LLP*, 268 Conn. 694, 719, 846 A.2d 862 (2004), in which our Supreme Court was citing, interpreting, and applying *New York law*. Indeed, the unconscionability quote widely cited from *Hottle* came from a New York decision, *Gillman* v. *Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 534 N.E.2d 824, 537 N.Y.S.2d 787 (1988). *Hottle* v. *BDO Seidman, LLP*, supra, 719–20.

Earlier Connecticut cases, on the other hand, one of which the petitioner points to, held that both prongs

of unconscionability are not necessary. See *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 353 ("[e]ven in the absence of procedural unconscionability, [the defendant] might avoid liability . . . if he could establish that the clause was substantively unconscionable"). Whether our Supreme Court in *Bender* implicitly overruled its earlier decision in *Smith* (and others) is not a question we need to grapple with today, however, because, as we discuss herein, we reject the petitioner's sole claim that the settlement agreement is substantively unconscionable.

As noted, "[s]ubstantive unconscionability focuses on the 'content of the contract'. . . ." *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 87 n.14. That is, whether the "contract terms . . . are unreasonably favorable to the other party . . . ." *R. F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 741, 3 A.3d 957 (2010). In general, the basic test is "whether, in the light of the general . . . background and the . . . needs of the particular . . . case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, supra, 184 Conn. App. 589. Substantive unconscionability is "intended to prevent oppression." *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 349.

At oral argument in this appeal, the petitioner argued that this court should hold that any settlement agreement that waives or releases a prisoner's habeas rights is per se unconscionable. Our Supreme Court, however, expressly rejected a similar argument in *Nelson* v. *Commissioner of Correction*, supra, 326 Conn. 772. In *Nelson*, the petitioner had filed a habeas action alleging that "he had received ineffective assistance of counsel at two criminal jury trials, both of which resulted in convictions and lengthy prison sentences." Id., 774. The

respondent moved to dismiss the action on the basis of "the terms of a stipulated judgment, filed by the petitioner and the respondent in connection with a previous habeas action concerning the same two trials, that barred the petitioner from filing any further such actions pertaining to those trials." Id.

The petitioner in that case argued, inter alia, that habeas rights should not be subject to waiver at all. Id., 785. Our Supreme Court flatly rejected that argument, holding that "[t]his court has concluded that both constitutional rights . . . and appellate rights . . . may be waived, if the waiver represents the intentional relinquishment of a known right. . . . The undisputed importance of the writ of habeas corpus notwithstanding . . . the petitioner has not persuaded us that a different rule should apply to such writs in this state." (Citations omitted.) Id., 785–86.

In the present case, the petitioner's counsel conceded that the petitioner entered into the settlement agreement knowingly and voluntarily. What is more, § 5 of the settlement agreement states that "[t]he parties hereto represent, warrant, and agree that each has been represented by or had opportunity to confer with his or her own counsel, that they have each thoroughly read and understood the terms of this Settlement Agreement and Release, have conferred with or had opportunity to confer with their respective attorneys to the extent they have any questions in regard to [the] same, and have voluntarily entered into [the] same to resolve all differences as stated herein."

The petitioner nevertheless contends in his appellate brief that the settlement agreement is substantively unconscionable because the bargaining positions of the parties were unequal. In his view, this case "involves parties who are, given the inherent structural nature of their relationship, incapable of dealing at arm's length,

with relatively equal bargaining positions." He argues that "[the Department of Correction (department)] is fully dominant" and "has all the power," and that "the inmate has none." That argument, however, goes to the question of procedural unconscionability, which the petitioner's counsel abandoned at oral argument in this appeal. See *Bender* v. *Bender*, supra, 292 Conn. 733 ("[w]ith respect to the procedural prong, the court found that 'the parties were in relatively equal positions as to their ability to bargain' "). Moreover, even if we were to consider the petitioner's procedural unconscionability argument, we would conclude that the record does not support his claim. First, it is undisputed that the petitioner was represented by two attorneys in the federal case, who negotiated the settlement agreement on his behalf. Second, the petitioner failed to introduce any evidence whatsoever in support of this claim.

With respect to the substance of the settlement agreement, the petitioner contends that the settlement agreement is substantively unconscionable because the release provision is "almost limitless" and applies "to any cause of action whatsoever that the inmate may have in the past, present, or future, whether known or unknown, whether related to the incident at issue or not." We disagree with the petitioner's characterization of the release provision. First, the release provision, although broad, is not limitless and does not bar the petitioner from bringing claims against the state in the future. The release provision bars all causes of action against the state arising from anything "from the beginning of the world to the date of [the settlement] agreement," which was executed on April 4, 2018. Nothing in the settlement agreement bars the petitioner from bringing claims against the state based on conduct occurring after the date the parties executed the agreement. This type of provision is commonly found in settlement agreements. Second, we need not decide

whether the release provision in this case is overly broad or unconscionable with respect to every conceivable claim to which it may apply. The narrow question before us is whether the settlement agreement is unconscionable and, therefore, unenforceable with respect to the instant habeas petition, which was pending when the parties entered into the settlement agreement. We conclude that it is not.

In return for the petitioner's agreement to release the state, the state agreed to pay the petitioner $2000 to be deposited in his inmate trust account and to forgo the collection of any sum owed by the petitioner to the state for the cost of his incarceration from the proceeds of the settlement. Additionally, the state agreed to vacate a guilty finding in a disciplinary report and to allow the petitioner possession of his hard covered legal resource books in his cell so long as the hard covers were removed.

On our review of the settlement agreement and the circumstances surrounding it, we cannot conclude that the settlement agreement is unreasonably favorable to the state or so oppressive as to render the settlement agreement unenforceable. By the time the parties executed the settlement agreement, the petitioner already had numerous opportunities to challenge his convictions, through appeals and collateral attacks spanning decades. None of those challenges was successful. Given the circumstances, it is reasonable to conclude that the petitioner might see the settlement offer of thousands of dollars in his inmate trust account, coupled with the state's agreement to forgo the collection of any sums owed by the petitioner to the state for the cost of his incarceration from the proceeds of the settlement and the vacatur of a guilty finding on a disciplinary report, in exchange for the aforementioned release, as favorable. Indeed, the petitioner's instant habeas petition, which was pending when he entered

into the settlement agreement and primarily claims ineffective assistance of his various counsel, is similar to habeas claims that he previously brought unsuccessfully. The only obvious benefit the state received in exchange for the consideration it provided was the release.

In support of his arguments, the petitioner directs this court to *Barfield* v. *Quiros*, United States District Court, Docket No. 3:18CV01198 (MPS) (D. Conn. May 17, 2021). He argues that in *Barfield*, the District Court denied a joint motion to approve a settlement on the ground that the release provision in that proposed agreement, which the petitioner argues was "virtually identical" to the release provision in the present case, was "overly broad and not fair, adequate, or reasonable." In his view, the same is true with the settlement agreement in the present case. We again are not persuaded.

The settlement agreement at issue in the *Barfield* case arose in a very different context. In *Barfield*, a plaintiff filed a class action on behalf of himself and all similarly situated inmates confined in a department facility, challenging the adequacy of medical screening, staging, and treatment for individuals in such custody, who have chronic hepatitis C infection. The parties in the case eventually entered into a settlement agreement, subject to final approval by the court. See Fed. R. Civ. P. 23 (e). Following a fairness hearing, the court denied the state's motion to approve the settlement agreement. A document contained in the petitioner's appendix indicates that the court determined that it would not "be a fair, adequate and reasonable settlement for *all* of the inmates at the [department] to release all of their claims from the beginning of the world to April 1 2020 . . . ." (Emphasis added; internal quotation marks omitted.)

Although the language of the proposed release in *Barfield* is similar to the release the petitioner challenges in the present case, the court in *Barfield* was required to answer a different legal question about an agreement that would apply to an entire class of individuals who had not negotiated the provision at arm's length. A court's determination that a general release in a particular class action settlement was not "fair, reasonable, and adequate" under the standard set forth in rule 23 (e) (2) of the Federal Rules of Civil Procedure, however, does not mean that the same release provision is substantively unconscionable for all purposes in every instance and as applied to all claims, including claims that were pending at the time the parties entered into a settlement agreement.[7]

For this reason, and the reasons previously discussed, we conclude that the settlement agreement is enforceable with respect to the instant habeas petition. We therefore conclude that the habeas court did not err in dismissing the petitioner's amended petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE POLICE CASE NUMBERS: MERIDEN PD 20-003903, 20-005055 AND BERLIN PD 2020-11662 (AC 44472)

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

Syllabus

An individual, L, sought to quash a search and seizure warrant in connection with a police matter in Meriden. The trial court dismissed L's motions

[7] We note that, although a federal District Court decision is persuasive authority, it is not binding on this court. See *Szewczyk* v. *Dept. of Social Services*, 275 Conn. 464, 475 n.11, 881 A.2d 259 (2005).

on the ground that it lacked subject matter jurisdiction because there was no pending criminal action against L, and L appealed to this court. Subsequently, L was arrested via an arrest warrant with the same police case number as was on the search and seizure warrant. Because L was charged with a class A felony, the matter was transferred from the part B docket in Meriden to the part A docket in New Haven. On L's appeal, *held*: the appeal was dismissed as moot as the relief sought on appeal, a hearing on the merits of the motions, is available to L in the pending criminal action, which stemmed from the same investigation that prompted the search warrant at issue in the appeal; moreover, no practical relief would follow from a determination as to the trial court's jurisdiction to consider those claims in the absence of a pending criminal action; furthermore, although L claimed that the appeal involved the Meriden court that issued the search warrant and not the New Haven court where the criminal action is pending, the search warrant L sought to quash and the arrest warrant in the criminal action both have the same Meriden police case number and were issued in connection with the same investigation.

Argued May 18—officially released September 6, 2022

Procedural History

Motions to quash a search and seizure warrant, brought to the Superior Court in the judicial district of New Haven at Meriden, geographical area number seven, where the court, *Rosen, J.*, dismissed the motions, and the movant appealed to this court. *Appeal dismissed.*

Anthony Lazzari, self-represented, the appellant (movant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, chief state's attorney, *Jennifer F. Miller*, assistant state's attorney, and *James Dinnan*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. Anthony Lazzari appeals from the judgment of the trial court dismissing his emergency motions seeking, inter alia, to quash a search and seizure warrant. The court determined that, because there

was no pending criminal action against Lazzari, it lacked subject matter jurisdiction over the motions. On appeal, Lazzari claims that the court had jurisdiction over the motions despite the absence of a pending criminal action. Since Lazzari filed this appeal, however, events have rendered the appeal moot. Accordingly, we dismiss the appeal for lack of subject matter jurisdiction.

The record reveals the following facts and procedural history. On October 21, 2020, the Meriden Police Department obtained a search and seizure warrant directed to Google Legal Investigations (Google), seeking records for Lazzari's Google account between September 17 and September 23, 2020. In an October 27, 2020 email, Google notified Lazzari that it had received a search warrant for his account records and explained that, "[u]nless we promptly receive a copy of a filed motion to quash that is file-stamped by a court of competent jurisdiction, Google may provide responsive documents pursuant to applicable law . . . ." The message informed Lazzari that Google received the warrant from the Meriden Police Department and that the "case number" is 20-005055. Subsequently, Lazzari filed " 'emergency' " motions, dated November 2, 2020, (1) "to quash unreasonable and unlawful search and seizure warrant fraudulently issued on October 21, 2020," (2) "for full protective order" as to Lazzari, "his property, and any/all information related to and associated with him," and (3) "for a full evidentiary hearing on the merits." When he filed his motions, there was no pending criminal action against him.

The trial court, *Rosen*, *J.*, held a hearing on the motions on November 19, 2020. At the hearing, the state argued that the court lacked subject matter jurisdiction to consider the motions because there was no criminal action pending before it. The court agreed with the state and issued an oral ruling dismissing the motions. On November 27, 2020, Lazzari filed " 'emergency'"

motions "for reconsideration and [to] quash [Google] warrant" and "for clarification (re: improper dismissal of emergency pleading(s) and nonruling of oral request for stay)."

On December 9, 2020, the court dismissed both motions for lack of jurisdiction. On December 15, 2020, Lazzari filed in this court a motion for review of the court's order dismissing his motions for reconsideration and clarification. He subsequently filed the present appeal on December 29, 2020, and this court dismissed his preappeal motion for review on December 31, 2020.

On January 19, 2021, Lazzari filed a motion for articulation, asking the trial court to articulate the factual and legal bases for its decision, and a motion for rectification, seeking to correct minor typographical errors in the transcript.[1] On January 26, 2021, the state filed a motion to dismiss the appeal for lack of a final judgment, which this court granted on March 3, 2021. On March 12, 2021, Lazzari filed a motion for reconsideration en banc. The panel granted the motion for reconsideration, denied the state's motion to dismiss, and restored the case to the docket on April 21, 2021.[2]

On May 10, 2021, the trial court granted the motions for articulation and rectification. In its articulation, the court stated: "The Superior Court's authority in a criminal case is established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding. . . . Thus, there must be a presentment of the information, and a pending cause of action, in order to invoke the Superior Court's subject matter jurisdiction in criminal proceedings. . . .

[1] At two points in the transcript, the word "phishing" was used instead of "fishing" in the phrase "fishing expedition."

[2] Because the panel granted the motion for reconsideration, no action was necessary as to Lazzari's request for en banc reconsideration.

"[Lazzari] failed to establish, either at argument or in his motions, that the court in fact had subject matter jurisdiction to hear the motions, and he conceded that there was no pending criminal court action. In the absence of a presentment of the information and a pending criminal court action, the court lacked subject matter jurisdiction to hear the motions, and they were properly dismissed." (Citation omitted; internal quotation marks omitted.)

On November 16, 2021, after the appeal was ready for argument, Lazzari was arrested in Meriden pursuant to an arrest warrant issued in "Police Case Number" 20-005055, and the state charged him with, inter alia, three counts of trafficking in persons in violation of General Statutes (Rev. to 2019) § 53a-192a. See *State* v. *Lazzari*, Superior Court, judicial district of New Haven, Docket No. CR-21-0348534-T.[3] Because a violation of § 53a-192a is a class A felony, the matter was ordered transferred from the part B docket in the geographical area number seven in Meriden to the part A docket in the judicial district of New Haven. See Practice Book § 1-6. In light of the pending criminal matter involving the same investigation that prompted the search warrant at issue in this appeal, this court notified the parties to be prepared to address at oral argument whether this appeal is moot because the state has filed a criminal information and initiated a criminal proceeding against Lazzari.

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court

[3] We take judicial notice of the file in the pending criminal matter. See *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003) ("[t]here is no question that the [court] may take judicial notice of the file in another case" (internal quotation marks omitted)); see also *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) (court may judicially notice court files without affording hearing).

to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or ha[s] lost its significance because of a change in the condition of affairs between the parties. . . . [T]he 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." (Internal quotation marks omitted.) *State* v. *Begley*, 122 Conn. App. 546, 550–51, 2 A.3d 1 (2010).

During oral argument, Lazzari argued that the appeal is not moot. He claimed, "what I'm challenging is what came out of Meriden, not out of New Haven . . . ." He further argued that he should "not have to wait for another case that is pending in another court. They're two different courts, they're not the same court." For its part, the state argued that the appeal is moot and noted that both the search warrant and the arrest warrant are part of the same Meriden police case, as evidenced by the police case number recorded on each document. We agree with the state.

In the present case, the court determined that it lacked jurisdiction over Lazzari's motions challenging the search warrant because there was no pending criminal action against him. On appeal, Lazzari claims that the court had jurisdiction to consider the merits of his motions notwithstanding that there was no pending criminal action and requests that this court reverse the judgment and remand the matter for a "full evidentiary hearing which would be challenging, attacking and contesting the unreasonable and unlawful search and seizure warrant . . . ." Now, however, there is a pending criminal matter against Lazzari stemming from the same investigation that prompted the search warrant at issue in this appeal. Thus, whether the court had subject matter jurisdiction over Lazzari's motions in the

absence of a pending criminal action has "lost its significance because of a change in the condition of affairs between the parties." (Internal quotation marks omitted.) *State* v. *Begley*, supra, 122 Conn. App. 550–51.

Furthermore, the relief sought by Lazzari on appeal—a hearing on the merits of his motions—already is available to him in the pending criminal action. Although Lazzari claims that this appeal involves the Meriden court that issued the search warrant and not the New Haven court where the criminal action is pending,[4] as noted by the state, the search warrant Lazzari seeks to quash and the arrest warrant in the criminal action both have the same Meriden police case number and were issued in connection with the same investigation. Accordingly, Lazzari has the opportunity to present his claims regarding the validity of the search warrant in the pending criminal action and, therefore, no practical relief would follow from a determination as to the trial court's jurisdiction to consider those claims in the absence of a pending criminal action. Consequently, the appeal is moot.[5]

The appeal is dismissed.

In this opinion the other judges concurred.

[4] Meriden is in the New Haven judicial district. See General Statutes § 51-344 (8).

[5] We note that Lazzari emphasized at oral argument that the issue in this appeal is of public importance, which is one of the three requirements for the capable of repetition, yet evading review exception to the mootness doctrine. See *Taber* v. *Taber*, 210 Conn. App. 331, 336 n.3, 269 A.3d 963 (2022) ("[F]or an otherwise moot question to qualify for review under the capable of repetition, yet evading review exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met,

PETER REK ET AL. *v.* KIRK PETTIT ET AL. (AC 45210)

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

Syllabus

The plaintiffs, legal guardians of the minor child C, appealed from the orders of the trial court requiring C to suspend contact with his long-term personal counselor, L, and engage with a new therapist with the goal of working toward the resumption of visitation with the defendants, C's maternal grandparents. Thereafter, the defendants filed a motion with the trial court, seeking an order that, notwithstanding the plaintiffs' appeal, there was no automatic appellate stay in effect. Subsequently, the trial court issued an order that there was no automatic stay of the custody and visitation orders and that the plaintiffs were to comply with the trial court's orders. Thereafter, the trial court denied the plaintiffs' motion for a discretionary stay. Subsequently, the plaintiffs filed motions for review of the trial court's orders determining that there was no automatic appellate stay and denying their motion for a discretionary stay. *Held*:

1. This court granted the plaintiffs' motion for review of the trial court's order determining that there was no automatic appellate stay in effect but concluded that the plaintiffs could not prevail on their claim that the trial court incorrectly determined that there was no automatic appellate stay; the trial court's orders pertained to the manner and extent of visitation, as well as contact with the defendants, and visitation orders expressly were exempt from the automatic appellate stay under the relevant rule of practice (§ 61-11 (c)).
2. This court granted the plaintiffs' motion for review of the trial court's order denying their motion for a discretionary stay and concluded that the trial court did not abuse its broad discretion only insofar as the court ordered the parties to engage with a new therapist for the purpose of facilitating visitation, but it concluded that the trial court did abuse its discretion in suspending contact between C and L, as that court did not have before it any evidence regarding the impact of the suspension of therapy on C's best interest, L was not engaged at the behest of the trial court, the suspension of therapy was only a suggestion made by the defendants' counsel at closing arguments, the guardian ad litem indicated that suspension of therapy with L would not be in C's best

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the appeal must be dismissed as moot." (Internal quotation marks omitted.)). Nevertheless, Lazzari did not argue that the challenged action in the present case satisfied the first two requirements under this exception. Accordingly, he has not demonstrated that the exception applies to save this appeal from being moot.

interest and, therefore, the court did not adequately account for the potential harm to C that could follow from the disruption of his relationship with L; accordingly, relief was granted in part, in that the court's order that the therapy sessions between C and L were suspended until further order of the court was stayed pending the final resolution of this appeal, and the remainder of the relief requested was denied.

Considered May 11—officially released September 6, 2022

Procedural History

Action seeking to modify the terms of a visitation agreement, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, where the court, *Coleman, J.*, granted the plaintiffs' motion to modify custody and issued certain orders; thereafter, following an evidentiary hearing, the court, *Hon. Eric D. Coleman*, judge trial referee, reversed its previous orders and issued new orders, from which the plaintiffs appealed to this court; subsequently, the court, *Hon. Eric D. Coleman*, judge trial referee, granted the defendants' motion for order for a determination as to whether an automatic stay was in effect; thereafter, the court, *Hon. Eric D. Coleman*, judge trial referee, denied the plaintiffs' motion for a mistrial, and the plaintiffs filed an amended appeal; subsequently, the court, *Hon. Eric D. Coleman*, judge trial referee, denied the plaintiffs' motion for an order of discretionary stay; thereafter, the plaintiffs filed motions for review with this court. *Motion for review of order of no automatic appellate stay granted; relief denied. Motion for review of denial of discretionary stay granted; relief granted in part.*

Megan L. Wade and *James P. Sexton*, in support of the plaintiffs' motions for review.

Opinion

SUAREZ, J. The plaintiffs, Peter Rek and Carisa Rek, the legal guardians of a minor child named Caleb,[1] have

[1] The plaintiffs are very close friends of Caleb's biological mother.

appealed from the December 15, 2021 orders of the trial court requiring Caleb to suspend contact with his long-term personal counselor and engage with a new therapist with the goal of working toward the resumption of visitation with Caleb's maternal grandparents, the defendants, Kirk Pettit and Charlotte Pettit. On January 7, 2022, the defendants filed a motion with the trial court seeking an order that, notwithstanding the plaintiffs' appeal, there is no automatic stay of the court's December 15, 2021 orders. On March 8, 2022, the court issued a written order indicating that there is no automatic stay of custody and visitation orders and that the plaintiffs are to comply immediately with its December 15, 2021 orders. On March 17, 2022, the plaintiffs filed a motion for discretionary stay, which the court denied on March 22, 2022.

Before this court are two motions for review filed by the plaintiffs.[2] The first motion, filed on April 4, 2022, asks this court to review and reverse the court's March 8, 2022 order determining that there is no automatic appellate stay in effect. The second motion, filed on April 21, 2022, asks this court to review and reverse the court's March 22, 2022 order denying their request for a discretionary stay. On the first motion for review, we conclude that the underlying orders are visitation orders that are not automatically stayed pursuant to Practice Book § 61-11 (c). On the second motion for review, we conclude that the court did not abuse its broad discretion in denying the plaintiffs' request for a discretionary stay only insofar as the court ordered the

[2] The plaintiffs filed several other motions seeking relief from this court. On March 25, 2022, this court ordered a temporary stay of the trial court's orders pending the resolution of these motions for review. See Practice Book §§ 60-1 and 61-14. This court also directed the court to comply with Practice Book § 64-1 (b) and issue a decision setting forth the factual and legal basis of its March 22, 2022 order denying the plaintiffs' motion for a discretionary stay. The court issued its memorandum of decision on April 11, 2022.

parties to engage with a new therapist for the purposes of facilitating visitation; we reach a different conclusion with respect to the court's order suspending Caleb's contact with his long-term personal counselor. We therefore grant the plaintiffs' April 4, 2022 motion for review, but deny the relief requested therein, and grant the April 21, 2022 motion for review, and grant, in part, the relief requested therein.

The following undisputed facts and procedural history are pertinent to the resolution of these motions. Caleb was born in 2010. When Caleb's biological parents became unavailable to care for him, the plaintiffs and the defendants filed petitions for custody of Caleb with the Superior Court for Juvenile Matters in Waterbury. On August 8, 2016, the Superior Court for Juvenile Matters, *Dooley*, *J.*, appointed the plaintiffs as legal guardians of Caleb, and approved a visitation agreement between the plaintiffs and the defendants and entered it as an order of the court. The order further provided that enforcement or modification thereof would be in family court. On November 29, 2016, the plaintiffs filed the underlying action seeking to modify the terms of the visitation agreement. The defendants objected and filed a motion for contempt. This protracted litigation followed. Notwithstanding court orders to the contrary, visitation actually ceased in August, 2017, allegedly due to Caleb's anxiety in the presence of the defendants. Attorney Rosa C. Rebimbas was appointed as guardian ad litem (GAL) for Caleb on September 10, 2018.

The court, *Coleman*, *J.*, conducted an evidentiary hearing from September 3 through 6, 2019, on the plaintiffs' November 29, 2016 motion. Among the witnesses who testified at the 2019 trial were the GAL; Patricia Levesque, Caleb's personal counselor since 2016; Constance Mindell, who, the court found, had been involved to "assist the parties in working together for the best

interests of the child" since September, 2017; and Kristan McClean, who, the court found, has "been involved since January 14, 2019, to help the parties foster a better relationship" between Caleb and the defendants. On January 3, 2020, the court, in a memorandum of decision, granted the plaintiffs' motion to modify and issued orders requiring progressively increased contact (letters, phone calls, and "fun time" outings with Peter Rek, Kirk Pettit, and Caleb). It specifically required the parties to "continue to work together in a therapeutic setting with Kristan McClean or some other mutually agreed upon duly licensed and qualified therapist to arrive at a schedule of visitation . . . ." The court gave the parties a one year report back date. Neither party appealed from the January 3, 2020 orders.

On February 26, 2020, the defendants filed a motion for order claiming that the plaintiffs would not cooperate in finding a different "mutually agreed upon" therapist to work toward visitation, to which the plaintiffs objected. Court operations were curtailed shortly thereafter due to the COVID-19 pandemic.

On January 5, 2021, the parties appeared before Judge Coleman for their report back date. On January 26, 2021, the plaintiffs filed a motion for order, asking the court to preclude the defendants from rearguing issues that predated the January 3, 2020 decision. The defendants objected. The parties and their counsel appeared before the court on various dates in early 2021. On February 16, 2021, the plaintiffs filed a request for an evidentiary hearing because there was a disagreement as to whether the parties had complied with the court's January 3, 2020 orders. Thereafter, the court requested that each side provide the name of a family therapy professional acceptable to that side. On April 7, 2021, the defendants filed a notice of compliance, giving the name of Philip J. Mays. On April 8, 2021, the plaintiffs filed their notice of compliance, giving the names of

three professionals at Connecticut Behavioral Health. In that notice, they also requested "an evidentiary hearing on the issue of whether . . . engag[ing] with another therapist for the purpose of determining whether visitation between [the defendants and Caleb] is in the best interest of the minor child."

The court heard testimony on June 1, June 28, and August 16, 2021, on the plaintiffs' April 8, 2021 request for a hearing. At that hearing, McClean testified that, beginning in January, 2019, her role was to work with the parties to establish a safe and healthy visitation relationship. In alternating weeks, she met with Caleb and then the defendants, to work through Caleb's concerns with "past interactions" with the defendants in order to "work toward" a joint session. There was one joint session in the summer of 2019, which she described as "uncomfortable" for Caleb. McClean testified that she had not met with the defendants since September, 2019. She testified that she believed they were unwilling to work with her, although she had "made herself available." She continued to meet remotely with Caleb and the plaintiffs approximately once per month through September, 2020. The court also heard testimony from Kirk Pettit, Carisa Rek, Levesque, and the GAL, and then heard closing arguments.

On December 15, 2021, the court issued a memorandum of decision in which it reversed its January 3, 2020 orders and issued a series of new orders. The court, inter alia, (1) ordered the parties to discontinue working with McClean altogether, (2) "suspended until further order of the court" any contact between Caleb and Levesque, and (3) ordered the parties to engage the services of Mays, the defendants' chosen family therapist, to "conduct one therapeutic/reunification visit per month" with Caleb, and "as appropriate including with [the defendants] and any other parties deemed necessary." Those orders also required progressively

increased contact (letters, phone calls, and "fun time" outings with Peter Rek, Kirk Pettit, and Caleb) and monthly in-person visits between Caleb and the defendants, supervised by one or both of the plaintiffs, beginning as soon as March, 2022, "[i]f and when deemed appropriate" by Mays.

On January 3, 2022, the plaintiffs filed this appeal. On January 4, 2022, the plaintiffs' appellate counsel notified Mays, by way of email, that he had filed an appeal of the court's January 3, 2022 orders and, as a result of the automatic stay stemming from the appeal, he advised the plaintiffs not to meet with him. On January 10, 2022, the defendants filed a motion for order in the trial court, asking the court to terminate the appellate stay, if one existed. The plaintiffs objected on substantive and procedural grounds.[3] The plaintiffs also filed a motion for a mistrial, which the court denied. On January 28, 2022, the plaintiffs filed an amended appeal challenging the denial of their motion for a mistrial.

I

In their first motion for review, filed on April 4, 2022, the plaintiffs challenge the court's determination that an automatic appellate stay was not in effect and argue that the December 15, 2021 orders are not "orders of . . . visitation" that are exempt from the automatic appellate stay. We are not persuaded.

Our review of the plaintiffs' claim requires us to construe Practice Book § 61-11, particularly subsections (a) and (c). The interpretation and application of provisions of the rules of practice involves a question of law over which our review is plenary. See *Bouffard* v. *Lewis*, 203 Conn. App. 116, 120, 247 A.3d 667 (2021).

[3] After an appeal is filed, Practice Book § 61-11 (e) requires that a motion to terminate an appellate stay be filed with the appellate clerk.

Practice Book § 61-11 governs stays of execution. Section 61-11 (a) provides in relevant part: "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. . . ." Pursuant to § 61-11 (c), certain orders in family matters are exempt from the automatic stay provision: "Unless otherwise ordered, no automatic stay shall apply . . . to orders of . . . custody or visitation in family matters brought pursuant to chapter 25 . . . ."

The plaintiffs maintain that the December 15, 2021 orders change "Caleb's medical providers with the intent of potentially leading to future visitation. To be clear, not a single [December 15, 2021] order actually orders any visitation between Caleb and the [defendants] on a date certain. As a result, they are not visitation orders . . . ." In support of their position, the plaintiffs rely on the "plain meaning" of the term "visitation order." The plaintiffs argue that most of the orders do not "[establish] a visiting time between Caleb" and the defendants, but rather "detail progressive potential contact that is explicitly contingent on" whether Mays deems such contact to be appropriate. And because, according to the plaintiffs, an order requiring them to change therapists *is* automatically stayed, so too is any "progressive potential contact."[4] We are not persuaded.

[4] The plaintiffs also argue that the court's consideration of the issue of whether there was an appellate stay of the December 15, 2021 orders "violated the automatic stay that was created by the plaintiffs appealing the trial court's denial of their motion for mistrial." This argument merits little discussion. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 482–83, 706 A.2d 960 (1998) ("It is well established that a trial court maintains jurisdiction over an action subsequent to the filing of an appeal. . . . Moreover, a trial court's postappeal jurisdiction persists regardless of any degree of substantive connection between the postappeal motion and the issue on appeal." (Citations omitted; internal quotation marks omitted.)).

The court's authority to adjudicate the dispute between these parties arises under General Statutes § 46b-56, which allows the court to issue "[o]rders [regarding] custody, care, education, visitation and support of children." General Statutes § 46b-56 (i) clearly states that "[a]s part of a decision concerning custody or visitation, the court may order either parent or both of the parents and any child of such parent to participate in counseling . . . provided such participation is in the best interest of the child." Our Supreme Court, in *DiGiovanna* v. *St. George*, 300 Conn. 59, 75, 12 A.3d 900 (2011), described the "tools in [the trial court's] arsenal to effectuate visitation" as including "prescrib[ing] specific conditions under which visitation would take place to address legitimate concerns of either party."[5] The court can order "appropriate counseling sessions geared toward the cessation of the animosity between the parties or, at the least, minimizing the possibility that such animosity will have a negative impact upon the child." Id., 76. The court also may use its contempt powers to coerce a recalcitrant party's compliance. See id. "[T]he best interest of the child guides the court in determining how best to foster [the] relationship. Those considerations may indicate . . . counseling, as well as restrictions on the time, place, manner and extent of visitation." Id., 78.

In the present case, in its January 3, 2020 memorandum of decision, the court suspended the August 8,

[5] In *DiGiovanna* v. *St. George*, supra, 300 Conn. 73–79, our Supreme Court considered whether a trial court may deny a nonparent's application for visitation when the applicant has met the stringent burden of proof established in *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002). In *DiGiovanna*, our Supreme Court treated, as uncontested, that the applicant had proven by clear and convincing evidence that the requisite relationship existed between the applicant and the child pursuant to *Roth*, and that the child would suffer the requisite level of harm if the relationship was not permitted to continue. *DiGiovanna* v. *St. George*, supra, 61. In resolving that appeal, our Supreme Court primarily addressed the *implementation* of visitation under a best interest of the child standard. See id., 73–79. Implementation of visitation orders is also the issue in this matter.

2016 orders of visitation, finding that those orders were not in Caleb's best interest at that time. The court, however, expressly and clearly ordered, inter alia, the parties to "continue to work together in a therapeutic setting with . . . McLean *or some other* mutually agreed upon duly licensed and qualified therapist to arrive at a schedule of visitation between [the defendants] and Caleb." (Emphasis added.) The court went on to issue further orders to reinstate visitation between the defendants and Caleb, as deemed appropriate by the therapist. Neither party appealed from these orders.

In its December 15, 2021 memorandum of decision, the court explicitly found that its January 3, 2020 orders were not complied with and little effort had been made to achieve contact between Caleb and the defendants. The court issued new orders that pertain to the "manner and extent of visitation" and contemplate progressively increased contact, with Mays' approval, geared toward the possibility of resuming regular monthly visits between Caleb and the defendants. Visitation orders expressly are exempted from the automatic appellate stay by Practice Book § 61-11 (c). Because we conclude that the orders at issue are "orders of . . . visitation" within the meaning of § 61-11 (c), they are not automatically stayed. Accordingly, the relief requested in the first motion for review is denied.

II

In their second motion for review, filed on April 21, 2022, the plaintiffs challenge the court's decision denying their request for a discretionary stay pursuant to Practice Book §§ 61-11 (c) and 61-12 pending the resolution of this appeal. They maintain that: (1) "the trial court failed to weigh properly the factors set forth in Practice Book § 61-11 (c) in support of its denial of a discretionary stay; and (2) the findings upon which the

trial court based its decision are clearly erroneous, finding no support in the record . . . .'' We conclude that the court did not abuse its broad discretion in determining that staying those orders would not be in the child's best interest. We further conclude, however, that the court abused its discretion in suspending the ''psychotherapy sessions and any other contacts between [Caleb] and Patricia Levesque,'' his personal therapist since 2016, pending the resolution of this appeal.

This court reviews trial court orders concerning discretionary stays under an abuse of discretion standard. See *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 459, 493 A.2d 229 (1985). ''In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action. . . . 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.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 362, 190 A.3d 68 (2018).

Practice Book § 61-11 (c) provides that a trial court may terminate or impose a stay in family matters following a hearing, provided the court considers the following factors relevant to this case: ''(1) the needs and interests of the parties, their children and any other persons affected by such order; (2) the potential prejudice that may be caused to the parties, their children and any other persons affected, if a stay is entered, not entered or is terminated . . . (4) the need to preserve

the rights of the party taking the appeal to obtain effective relief if the appeal is successful . . . and (6) any other factors affecting the equity of the parties."[6]

The court denied the plaintiffs' motion for a discretionary stay on March 22, 2022, and issued a memorandum of decision on April 11, 2022. In that decision, the court found that "absolutely nothing had been done in furtherance of the progressive steps set forth" in the court's initial January 3, 2020 decision. It determined that further delay of an opportunity for "another therapist to attempt to facilitate a functional relationship between Caleb and the defendants merely allows the assessment of the current therapists to go unchallenged and to become a self-fulfilling prophecy." The court was highly critical of Levesque, who testified that she "never discussed" the visitation issue with Caleb, yet repeatedly testified in various proceedings that the "slightest contact" with the defendants "might be incredibly damaging to Caleb." The court characterized her testimony as "speculat[ive]" no fewer than three times. The court found that the other providers *and* Caleb had "been influenced by Levesque."

The plaintiffs maintain that the court based its decision on a series of "core factual findings [that] are clearly erroneous." Among these are that McClean "never" held a joint session with the defendants and Caleb; and that Levesque had "influenced" McClean. Other challenged findings include the court's characterization of the efforts by the various professionals to facilitate visitation as "pitifully feeble" and the suggestion that, if anything, Caleb's anxiety regarding the defendants has "gotten progressively worse."

The record before the court, however, supports a finding that Caleb has not visited with the defendants

[6] Practice Book § 61-11 (c) (3) and (5) are factors specific to financial issues in a marital dissolution action that are not relevant to the resolution of this matter.

since the summer of 2019—months before the court's January 3, 2020 orders, and not at all since the court issued those orders. The court in its April 11, 2022 memorandum of decision, found that none of the court's January 3, 2020 orders had resulted in "progressively increased contact," nor had the parties "work[ed] together in a therapeutic setting . . . to arrive at a schedule of visitation." On this record, and for the limited purpose of determining whether the court abused its discretion in declining to stay its December 15, 2021 orders that the parties engage with a new therapist, Mays, to facilitate visitation, we are not left with a definite and firm conviction that the challenged findings were clearly erroneous.

In determining whether to enter a discretionary appellate stay of its orders in a family matter, the court must consider the "needs and interests" of the parties and weigh the "potential prejudice" that may be caused if a stay is not entered. See Practice Book § 61-11 (c) (1) and (2). In weighing those factors here, the court determined that Caleb's needs and interests were "paramount" and "[t]hose needs and interests are protected by the oversight of Mr. Mays, whose involvement is an essential part of the [court's] December 15, 2021 [decision]." The court found that, if Mays "determines that visitation between [Caleb and the defendants] should proceed, that visitation will occur under his professional and responsible guidance and direction." The court further found that the plaintiffs will not be prejudiced by allowing Caleb to begin therapy with Mays because it is possible that Mays could agree with the plaintiffs and recommend against visitation.

Pursuant to Practice Book § 61-11 (c) (6), the trial court was free to consider "any other factors affecting the equity of the parties." Here, the court found: (1) the parties had entered into the negotiated visitation

agreement with the juvenile court in 2016, and the plaintiffs almost immediately moved to modify it; (2) the plaintiffs have "never . . . attempted to offer or produce any evidence" that the defendants "failed to protect [Caleb] from inappropriate adult situation and behavior," despite the representation in their 2016 motion to modify; (3) the plaintiffs unilaterally terminated visitation in 2017; and (4) the plaintiffs have not done "all they could" to alleviate Caleb's anxiety regarding visitation. The court apparently weighed these findings heavily in determining that immediately engaging with a new family therapist to facilitate visitation was in Caleb's best interest.

In arguing that the court abused its broad discretion in refusing to stay that order pending the resolution of their appeal, the plaintiffs emphasize contrary evidence that was before the court. McClean testified that the defendants were unwilling to follow through with therapeutic recommendations. The GAL recommended reengaging with McClean because, in her opinion, engaging yet another professional to facilitate visitation would *not* be in Caleb's best interest. The court had before it a three page document handwritten by Caleb and introduced through Levesque, in which Caleb stated that he was eleven and one-half years old and just wished that the defendants would "leave [him] alone" because they make him "uncomfortable" and "all the therapy is thanks to them . . . and I think I have [post-traumatic stress disorder]. . . ." Levesque testified that Caleb's response to visitation with the defendants was that of someone who experienced "trauma" and who had been diagnosed with "post-traumatic stress disorder." In their motion for review, the plaintiffs acknowledge that the court was free to discredit all of this evidence. They emphasize, however, that, in order for the court to have reached the conclusions that it did, there must be some affirmative evidence that engaging

with Mays is in Caleb's best interest, and they argue that no such evidence was presented because Mays was not called to testify.

We are troubled by the court's heavy reliance on the professional judgment of Mays in fashioning its orders when Mays was not presented as a witness at trial nor were his credentials presented as evidence. However, because contact between the defendants and Caleb has been minimal since August, 2017 (and apparently nonexistent since August, 2019, notwithstanding court orders to the contrary), the court determined that an "assessment concerning whether . . . [a visitation relationship] is feasible should be done *without any further delay*." (Emphasis added.) The defendants' position at trial was that McClean had "failed" to facilitate a visitation relationship between the defendants and Caleb and that, instead, Mays should be engaged to conduct at least one "therapeutic reunification" visit per month with them and Caleb. The court's various orders clearly indicate that it was dissatisfied with McClean's efforts at facilitating visitation. The court weighed the Practice Book § 61-11 (c) factors in a manner that furthered Caleb's interests in a relationship with the defendants, and declined to stay its December 15, 2021 orders requiring the parties to engage with Mays for the purpose of assessing whether visitation is feasible. On this record, we cannot say that the court abused its broad discretion in declining to stay those orders pending the resolution of the plaintiffs' appeal.

Nevertheless, we conclude that the court abused its broad discretion when it did not stay its December 15, 2021 order that Caleb suspend all contact with Levesque, his personal therapist since August, 2016, pending the final resolution of this appeal. The evidence before the court was that, unlike McClean, the GAL, and other professionals tasked with facilitating a visitation

relationship between Caleb and the defendants, Levesque was *not* engaged at the behest of the court. Moreover, it appears that the defendants' request for relief with respect to Levesque was raised, for the first time, during their counsel's closing argument when counsel asked the court to "remove Patty Levesque from this boy's life."[7] When counsel concluded argument, the GAL asked for permission to "speak up" in response to the defendants' late "modification of the proposed orders," which the court permitted. The GAL indicated that Levesque is Caleb's "personal counselor," not a "court-ordered" professional, and that Caleb "does have a bond [with Levesque and] . . . that any action by this court to [affect] that bond would be detrimental to the child

[7] Relevant portions of the closing argument by the defendants' counsel are as follows:

"It's really perplexing on how we have five years of intensive therapy with Patty Levesque and we've got no amelioration of his anxiety. His anxiety, as you pointed out, I don't know if you were saying his anxiety is regressing but there's regression not progression. Why? It really makes no sense. . . .

"Our proposed orders are to utilize Mr. Philip Mays . . . conduct one therapeutic reunification visit at minimum per month between Caleb and his grandparents. And that's without the presence of Peter and [Carisa] Rek. . . . [For reasons stated, Ms. McClean] is not the right person for this job. I do believe Mr. Mays is. . . .

"I think Ms. McClean had the opportunity to get a breakthrough going and she failed. It's too bad that so much time has passed and I think our postorders appreciate that. . . . [We] are very measured in our request. Once a month therapeutic visitation, reunification visitation, supervised by Mr. Mays. Is that so much to ask? Under the circumstances, Your Honor, it's the best interest for Caleb. . . . His best interest is to deal with this irrational perspective of his grandparents in a therapeutic setting with a competent professional.

"I don't know if Your Honor would take the steps that it would take to remove Patty Levesque from this boy's life. I know you have the authority to do that. I think she's testified, I think three times now and I've never been more certain that that should happen. So, I would, I think, modify my proposed orders just slightly and ask Your Honor to at least consider that. Is she the source? I don't think so. But is she helpful? I don't think so. Will you order it? I'm not so sure you will. But I could see, Your Honor, if you tie it together. If we remove her and we add one person one time per month I think it's actually going to benefit Caleb quite a bit."

and not in the child's best interest." There was no evidence presented to support a contrary opinion.

To be clear, we make no determination, at this juncture, that the court erred in its assessment of Levesque's credibility or the progress that Caleb had made in his treatment with her. However, the court did not have before it any evidence as to the impact the suspension of therapy between Caleb and Levesque would have on Caleb's best interest. The court only heard a suggestion by the defendants' counsel at closing arguments that the court should suspend the therapy. Moreover, we find it compelling that the GAL's response to the defendants' eleventh hour request to remove Levesque from Caleb's life was to seek permission to address the court to make known her professional assessment that such an order would not be in Caleb's best interest. We conclude that, in declining to stay this order, the court did not adequately account for the potential harm to Caleb that could follow from the disruption of his relationship with his long-term personal counselor. We agree with the plaintiffs insofar as they ask this court to stay that portion of the trial court's December 15, 2021 orders pending the final resolution of this appeal. We therefore grant the second motion for review and grant relief limited to this order.

The motion for review filed on April 4, 2022, is granted, but the relief requested therein is denied. The motion for review filed on April 21, 2022, is granted, and the relief requested therein is granted, in part, in that the court's December 15, 2021 order that "[t]he psycho-therapy sessions and any other contacts between the minor child and Patricia Levesque shall be suspended until further order of the court" is stayed pending the final resolution of this appeal; the remainder of the relief requested is denied.

In this opinion the other judges concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 215

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STEPHEN J. WILLIAMS *v.* TOWN OF MANSFIELD
(AC 44152)

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

Syllabus

The plaintiff appealed to the Superior Court from the parking violation assessment issued against him by the hearing officer for the defendant town of Mansfield. After the town had issued the plaintiff a $30 parking ticket, the plaintiff filed an appeal with the town. Following a hearing, the town's hearing officer issued the subject assessment against the plaintiff. The plaintiff then appealed to the Superior Court, pursuant to the applicable statute (§ 7-152b (g)), by filing a petition to reopen the assessment. The court dismissed the appeal on the ground that it lacked subject matter jurisdiction because the appeal was moot as a result of the town's having elected to void the underlying parking ticket. Thereafter, the court denied the plaintiff's motion for an order of mandamus to compel the clerk of the court to tax costs he had incurred by filing and litigating the appeal, concluding that the plaintiff was not the prevailing party, and, therefore, he was not entitled to the taxation of costs under the applicable statute (§ 52-257). On the plaintiff's appeal to this court, *held*:

1. The trial court improperly dismissed the plaintiff's appeal as moot because it could have granted the plaintiff practical relief by sustaining his appeal and ordering the town's hearing officer to vacate the assessment: although the town voided the parking ticket, the assessment against the plaintiff remained in effect, as the parking ticket, which is an allegation that the plaintiff committed a parking violation, was separate and distinct from the assessment, which is an adjudication of the plaintiff's liability for the alleged violation, and, therefore, the assessment had independent legal significance from the parking ticket; accordingly, the judgment

was reversed and the case was remanded with direction to sustain the appeal and to order the town's hearing officer to vacate the assessment.

2. The trial court improperly denied the plaintiff's motion for an order of mandamus to compel the taxation of costs: that court, having been notified that the town had voided the parking ticket underlying the appeal, should have sustained the appeal and ordered the town's hearing officer to vacate the assessment, and, given that outcome, there was no question that the plaintiff would have been the prevailing party in the appeal; accordingly, the court was directed to consider on remand whether the plaintiff was entitled to costs pursuant to § 52-257.

Argued May 23—officially released September 6, 2022

Procedural History

Petition to reopen a parking violation assessment issued by the defendant, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley, J.*, granted the defendant's motion to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court; subsequently, the court, *Sicilian, J.*, denied the plaintiff's motion for an order of mandamus to compel the taxation of costs, and the plaintiff filed an amended appeal. *Reversed*; *judgment directed*; *further proceedings*.

Stephen J. Williams, self-represented, the appellant (plaintiff).

Mary C. Deneen, with whom was *Kevin M. Deneen*, for the appellee (defendant).

Opinion

PRESCOTT, J. The self-represented plaintiff, Stephen J. Williams, appeals from the judgment of the Superior Court dismissing as moot his appeal filed pursuant to General Statutes § 7-152b (g) and Practice Book § 23-51 (a)[1] from an assessment imposed pursuant to § 7-152b (e) by the defendant, the town of Mansfield (town),

[1] General Statutes § 7-152b (g) provides: "A person against whom an assessment has been entered pursuant to this section is entitled to judicial review by way of appeal. An appeal shall be instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee in an amount equal to the entry fee

with respect to a $30 parking ticket, and denying his motion for an order of mandamus to compel the taxation of costs (motion to compel). On appeal, the plaintiff claims that the court improperly (1) concluded that it lacked subject matter jurisdiction to consider his appeal, which the court concluded was rendered moot after the town elected to void the underlying parking ticket, and (2) determined that he was not the prevailing party on appeal and, thus, not entitled to costs. We conclude that the plaintiff's appeal was not moot and, therefore, that the court improperly dismissed the appeal on the ground that it lacked subject matter jurisdiction. Rather, the court should have rendered judgment sustaining the appeal and ordered that the underlying assessment be vacated. We further conclude that the court improperly denied the plaintiff's motion to compel the taxation of costs solely on the ground that the plaintiff was not the prevailing party on appeal. Accordingly, we reverse the judgment and remand the case with direction to render judgment sustaining the appeal and ordering the town's hearing officer to vacate the assessment, and for further proceedings on the merits of the plaintiff's motion to compel the taxation of costs.[2]

for a small claims case pursuant to section 52-259, at the Superior Court facility designated by the Chief Court Administrator, which shall entitle such person to a hearing in accordance with the rules of the judges of the Superior Court."

Practice Book § 23-51 (a) provides: "Any aggrieved person who wishes to appeal a parking or citation assessment issued by a town, city, borough or other municipality shall file with the clerk of the court within the time limited by statute a petition to open assessment with a copy of the notice of assessment annexed thereto. A copy of the petition with the notice of assessment annexed shall be sent by the petitioner by certified mail to the town, city, borough or municipality involved."

[2] The plaintiff also claims that the court improperly "fail[ed] to afford the parties an opportunity for discovery and to conduct an evidentiary hearing prior to its determination of [the] disputed jurisdictional issues . . . ." Because we agree with the plaintiff's first claim and, accordingly, conclude that the court's judgment must be reversed, we need not address this claim.

The following undisputed facts and procedural history are relevant to our resolution of the plaintiff's appeal. On April 4, 2019, the town issued the plaintiff a parking ticket in the amount of $30. On April 15, 2019, the plaintiff filed an appeal with the town. On May 15, 2019, the town held a hearing and, on the same date, issued a notice denying the appeal. On June 18, 2019,[3] the plaintiff, pursuant to § 7-152b (g),[4] appealed the assessment of the parking ticket to the Superior Court. He filed with the court a petition to reopen the assessment in which he requested that the town's assessment against him be "rescinded." On July 3, 2019, he filed an amended petition in which he provided more details about the underlying assessment and appeal to the town.[5]

On December 11, 2019, the town filed a motion to dismiss the plaintiff's appeal. The town asserted that, because it "ha[d] voided the parking ticket and waived all associated fees and/or fines," the plaintiff's appeal was "moot." Accordingly, the town argued, the court

[3] The summons lists a return date of June 18, 2019. The petition to reopen the assessment was filed with the court on June 12, 2019.

[4] In both his petition and amended petition; see footnote 5 of this opinion; the plaintiff stated that he was appealing the assessment pursuant to General Statutes § 7-152c (g), which is the incorrect statute. Section 7-152c (g) provides the hearing procedure for *citations*, whereas § 7-152b (g) provides the hearing procedure for *parking violations*. We reasonably can construe this mistake as a scrivener's error.

[5] In the amended petition, the plaintiff represented that he had parked his vehicle on property owned by Storrs Associates, LLC, and that a town constable, who also was employed by Storrs Associates, LLC, issued the parking ticket. The plaintiff alleged that "[t]he parking limitation signs . . . violate[d] [General Statutes] § 14-311b [because the signs] fail[ed] to comply with the current Manual of Uniform Traffic Control Devices as implemented by the Office of the State Traffic Administration . . . ." Specifically, he alleged that "the signage [did not] have a green legend and border and failed to clearly display the limitation area with arrows or words." Additionally, he contended that the town's notice of the violation was defective. He further contended that the town's hearing officer improperly denied his appeal on the basis that it was not timely filed.

lacked subject matter jurisdiction to hear the appeal. On February 10, 2020, the court held a hearing on the motion and issued an oral ruling dismissing the plaintiff's appeal as moot.[6]

On February 10, 2020, the plaintiff, pursuant to Practice Book § 18-5, filed a bill of costs requesting the clerk of the court to tax costs he had incurred by filing and litigating the appeal. On February 11, 2020, the town filed an objection to the plaintiff's bill of costs, in which it stated that General Statutes § 52-257, which governs the awarding of costs, provides that costs may be awarded only to a " 'prevailing party.' " The town argued that, because the plaintiff's appeal was dismissed for lack of subject matter jurisdiction, the plaintiff was not the prevailing party and, accordingly, was not entitled to costs.

On March 2, 2020, the plaintiff filed a motion to reargue the judgment of dismissal. The court denied the plaintiff's motion on March 16, 2020. On July 6, 2020, the plaintiff filed the present appeal.[7]

On August 3, 2020, the plaintiff filed a motion asking the trial court "for an order of mandamus compelling the clerk to tax the costs in this case." On August 17, 2020, the court issued an order denying that motion, stating: "The plaintiff was not the prevailing party and therefore is not entitled to the taxation of costs." The plaintiff timely moved to reargue the August 17, 2020 order, which the court denied on September 10, 2020. The plaintiff amended the present appeal to include a challenge of this order.

[6] Pursuant to Practice Book § 64-1, the transcript of the oral decision was signed by the trial judge.

[7] We note that the appeal was untimely. See Practice Book § 63-1 (a) and (c). The town, however, did not file a motion to dismiss the appeal as untimely within ten days of the plaintiff's filing of the appeal, as required by Practice Book § 66-8, and, thus, we need not consider the timeliness issue.

On October 13, 2020, the plaintiff, pursuant to Practice Book § 64-1,[8] filed with this court and the trial court a notice, "notif[ying] the appellate clerk that no statement of decision has been filed in the trial court . . . as [to] the trial court's order finding that '[the] plaintiff was not a prevailing party and therefore is not entitled to the taxation of costs.' " On the same date, the trial court issued a one page memorandum of decision, which stated in relevant part: "To the extent that additional explication is required, the court notes that the taxation of costs in civil actions is governed by . . . § 52-257. That statute permits the taxation of costs only to a 'prevailing party.' The plaintiff was not a prevailing party. To the contrary, the plaintiff's petition was dismissed . . . on February 10, 2020. *The plaintiff was, therefore, the losing party.* As such, the plaintiff was not entitled to the taxation of costs. There was, therefore, no appropriate basis for the plaintiff's motion for an order of mandamus." (Emphasis added.)

I

The plaintiff claims that the court improperly granted the town's motion to dismiss his appeal on mootness grounds after the town voided his parking ticket. We agree.

We begin by setting forth the relevant standard of review and legal principles that govern our analysis. "A

[8] Practice Book § 64-1 provides in relevant part: "(a) The trial court shall state its decision either orally or in writing . . . in rendering judgments in trials to the court in civil . . . matters . . . . The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. . . .

"(b) If the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)."

motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Mangiafico* v. *Farmington*, 331 Conn. 404, 418, 204 A.3d 1138 (2019). "A determination regarding a trial court's subject matter jurisdiction is a question of law. . . . Accordingly, [o]ur review of the court's ultimate legal conclusion[s] and resulting [determination] of the motion to dismiss will be de novo." (Citation omitted; internal quotation marks omitted.) *Great Plains Lending, LLC* v. *Dept. of Banking*, 339 Conn. 112, 120, 259 A.3d 1128 (2021). "Whether an action is moot implicates a court's subject matter jurisdiction . . . . Our case law firmly establishes that [a] case is considered moot if [a] court cannot grant the [plaintiff] any practical relief through its disposition of the merits . . . ." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 373, 260 A.3d 1187 (2021).

Section 7-152b delegates to municipalities the authority to issue parking tickets, to conduct hearings to determine the liability of motor vehicle operators or owners who receive those tickets, and to assess fines, penalties, costs, and fees provided for by the municipalities' applicable ordinances. A parking ticket is an allegation that a vehicle owner has committed a parking violation. Pursuant to § 7-152b (c), a municipality may send notice to the vehicle owner informing him: "(1) Of the allegations against him and the amount of the fines, penalties, costs or fees due; (2) that he may contest his liability before a parking violations hearing officer by delivering in person, by electronic mail or by mail written notice within ten days of the date thereof; (3) that if he does not demand such a hearing, an assessment and judgment shall enter against him; and (4) that such judgment may issue without further notice."

If the vehicle owner contests his liability for the alleged violation, a hearing shall be held before the

municipality's hearing officer in accordance with § 7-152b (e). Section 7-152b (e) provides in relevant part: "The hearing officer shall announce his decision at the end of the hearing. . . . If [the hearing officer] determines that the person is liable for the violation, he shall . . . enter and assess the fines, penalties, costs or fees against such person as provided by the applicable ordinances of that [municipality]." Section 7-152b (f) provides in relevant part: "If such assessment is not paid on the date of its entry, the hearing officer shall send . . . a notice of the assessment to the person found liable and shall file, not less than thirty days or more than twelve months after such mailing, a certified copy of the notice of assessment with the clerk of a superior court facility designated by the Chief Court Administrator . . . . The certified copy of the notice of assessment shall constitute a record of assessment. . . . The clerk shall enter judgment . . . against such person in favor of the [municipality]. . . . [T]he hearing officer's assessment, when so entered as a judgment, shall have the effect of a civil money judgment and a levy of execution on such judgment may issue without further notice to such person." Pursuant to § 7-152b (g), the vehicle owner can appeal the hearing officer's assessment to the Superior Court within thirty days of the mailing of the notice of the assessment.[9]

In the present case, a town constable issued the plaintiff a parking ticket, which merely alleged that he violated one of the town's parking ordinances. After a

[9] In the present case, the record does not indicate that the town, in accordance with § 7-152b (f), filed with the Superior Court a certified copy of its May 15, 2019 notice of the assessment that it issued to the plaintiff. The plaintiff's petition to reopen the assessment was filed with the court on June 12, 2019. See footnote 3 of this opinion. As stated previously, § 7-152b (f) provides that a municipality shall send to the Superior Court a certified copy of the notice of an assessment "not less than thirty days" after the notice is mailed to the vehicle owner who received the assessment. Thus, the plaintiff appealed the assessment before the town was permitted to file a certified copy of the notice of the May 15, 2019 assessment.

hearing, the town's hearing officer issued an assessment against the plaintiff, which established his liability for the parking violation. The plaintiff argues that, although the town voided the fine associated with the parking ticket, the hearing officer's assessment nevertheless remains in place. Therefore, he argues, the case is not moot because he is seeking to have the hearing officer's decision vacated. The town maintains that, once it voided the parking ticket, there was no practical relief that the court could grant the plaintiff because no justiciable issue remained between the parties.

We agree with the plaintiff that the case is not moot. The assessment against him remains even after the town voided the parking ticket. The parking ticket, which is simply an allegation that he committed a parking violation, is separate and distinct from the assessment, which is an adjudication of his liability for the alleged violation. In other words, the assessment has independent legal significance from the parking ticket.

Thus, the court could have granted the plaintiff practical relief by sustaining his appeal and ordering the town's hearing officer to vacate the assessment in light of the fact that the town essentially decided that it would not defend the appeal.[10] Accordingly, we reverse the judgment of dismissal and remand the case with direction to render judgment sustaining the appeal and ordering the hearing officer to vacate the assessment.

II

The plaintiff next claims that the court, in denying his motion to compel the taxation of costs, improperly determined that he was not the prevailing party. In light of our resolution of the plaintiff's first claim, we agree with the plaintiff and conclude that, on remand, the

[10] In fact, at oral argument before this court, the town acknowledged that the trial court could have remanded the case to the town's hearing officer to vacate the assessment.

court should consider anew the plaintiff's motion to compel.

Ordinarily, we review a trial court's decision regarding whether to award fees and costs for abuse of discretion. See, e.g., *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 24–25, 905 A.2d 55 (2006); *Honan* v. *Dimyan*, 63 Conn. App. 702, 712, 778 A.2d 989, cert. denied, 258 Conn. 942, 786 A.2d 430 (2001). When, however, a court's decision is challenged on the basis of a question of law, our review is plenary. *Indoor Billboard Northwest, Inc.* v. *M2 Systems Corp.*, 202 Conn. App. 139, 197, 245 A.3d 426 (2021). In this case, the court did not make a discretionary determination about what fees and costs, if any, the plaintiff should be awarded. Rather, the court denied the plaintiff's motion to compel the taxation of costs on the basis of its legal conclusion that he was not the "prevailing party" under § 52-257. See *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 136, 176 A.3d 1146 (2018) (court tasked with determining, as matter of law, whether defendant successfully defended action under General Statutes § 42-150bb, which provides in relevant part that "an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action . . . based upon [a] contract or lease").

As we stated in part I of this opinion, the court in the present case, having been notified that the town had voided the parking ticket underlying the appeal, should have sustained the plaintiff's appeal and ordered the town's hearing officer to vacate the assessment. Given that outcome, which clearly would amount to a "win" for the plaintiff because it is the very relief he sought in bringing the appeal, there is no question that the plaintiff would be the prevailing party in the appeal. Thus, the court's decision to deny the motion to compel outright was improper, and the court should reconsider

on remand whether the plaintiff is entitled to costs pursuant to § 52-257.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal and ordering the town's hearing officer to vacate the underlying assessment, and to reconsider the plaintiff's motion to compel the taxation of costs.

In this opinion the other judges concurred.

MICHELLE J. POLLARD *v.* GEICO GENERAL INSURANCE COMPANY
(AC 44560)

Elgo, Suarez and DiPentima, Js.

Syllabus

The plaintiff sought to recover underinsured motorist benefits pursuant to an automobile insurance policy issued by the defendant insurer in connection with injuries she had sustained in a motor vehicle accident in 2012. The plaintiff first brought an action against the defendant in 2016 related to the accident, which the trial court disposed of by granting the defendant's motion for nonsuit due to the plaintiff's failure to comply with discovery orders. The plaintiff initiated the present action against the defendant in 2019 pursuant to the accidental failure of suit statute (§ 52-592 (a)). The defendant moved for summary judgment, alleging that the plaintiff could not bring the present action pursuant to § 52-592 (a) because the nonsuit in the prior action was for disciplinary reasons and further alleging that her claim for benefits was untimely pursuant to the terms of the policy, which precluded claims for underinsured motorist benefits from being brought more than three years after the date of an accident without invoking a tolling provision of the policy by providing the defendant with written notice of a claim for uninsured motorist benefits. The plaintiff claimed that a letter her counsel sent to the defendant in 2012 satisfied the tolling provision of the insurance policy. The trial court granted the motion and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on her claim that the trial court improperly granted summary judgment to the defendant: although the trial court granted the motion for summary judgment on the basis that, as a matter of law, § 52-592 (a) was not applicable, this court affirmed the trial court's granting of summary judgment on the alternative ground that no genuine issues of material fact existed as to whether the plaintiff

failed to bring suit within three years and failed to toll that limitation period in accordance with the insurance policy, as it was undisputed that the plaintiff commenced the action for underinsured motorist benefits outside of the three year limitation period, as neither the 2016 action nor the 2019 action was commenced within three years of the 2012 accident, and, the written notice the plaintiff provided to the defendant of the accident contained no reference to a potential claim for underinsured motorist benefits and, thus, as a matter of law, was insufficient to satisfy the policy's unambiguous tolling provision; moreover, the defendant was not required to make a showing that no genuine issue of material fact existed as to all elements of the tolling provision, as the plaintiff's failure to meet either requirement of the tolling provision rendered it inapplicable.

Argued May 9—officially released September 6, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the defendant's motion to strike; thereafter, the court, *Cobb, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John A. Sodipo, for the appellant (plaintiff).

Joseph M. Busher, Jr., for the appellee (defendant).

Opinion

DiPENTIMA, J. The plaintiff, Michelle J. Pollard, appeals from the summary judgment rendered by the trial court in favor of the defendant, Geico General Insurance Company, on the plaintiff's complaint seeking to recover underinsured motorist benefits. On appeal, the plaintiff claims that the court improperly determined that the accidental failure of suit statute, General Statutes § 52-592 (a), did not apply so as to revive her otherwise time barred action. The defendant counters that summary judgment was appropriately

rendered and asserts, as an alternative ground for affirmance of the court's judgment, that the plaintiff's action was barred because she failed under the terms of the parties' insurance policy to commence suit timely or to invoke the policy's tolling provision. We agree with the defendant's alternative argument and, accordingly, affirm the judgment of the trial court on that basis.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant. In November, 2016, the plaintiff brought a prior action to recover underinsured motorist benefits against the defendant in connection with an automobile collision (2016 action).[1] In the operative complaint in that action, the plaintiff alleged that, on or about September 17, 2012, she was rear-ended by a vehicle operated by Norma Rivera while operating her automobile in a drive-through lane of a fast food restaurant in Hartford and, as a result, she suffered injuries and incurred medical expenses. She alleged that Rivera's insurer paid her the full liability limits under Rivera's automobile insurance policy such that coverage under Rivera's policy was exhausted on or about June 9, 2016. She further alleged that she had not been sufficiently compensated by Rivera's policy and that, pursuant to the insurance policy between her and the defendant, the defendant was required to provide her with underinsured motorist benefits but had failed to do so. She claimed breach of contract, breach of the implied covenant of good faith and fair dealing, a violation of Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and breach of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq.

[1] We take judicial notice of the file in the 2016 action. See, e.g., *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) (no question exists concerning power of court to take judicial notice of files in Superior Court).

During the litigation of the 2016 action, a dispute arose regarding the plaintiff's compliance with the defendant's interrogatories and requests for production, which culminated in the court, *Shapiro*, *J.*, granting the defendant's motion for nonsuit on May 31, 2018. In granting the motion for nonsuit, the court stated: "Granted absent objection. Nonsuit may enter against the plaintiff due to failure to comply with the court's previous order, dated October 6, 2017, directing discovery compliance by November 3, 2017."

In April, 2019, the plaintiff initiated the present action against the defendant pursuant to the accidental failure of suit statute. In the operative complaint, the plaintiff repeated the allegations in the 2016 action, and again claimed breach of contract (count one), breach of the implied covenant of good faith and fair dealing (count two), a violation of CUTPA (count three) and a violation of CUIPA (count four). The defendant filed a motion to strike counts two, three and four of the complaint, which the court granted on February 13, 2020, leaving only count one, in which the plaintiff alleged that the defendant breached the contract between the parties by failing to provide her with underinsured motorist benefits in relation to the September, 2012 collision at the fast food restaurant.

The defendant filed a motion for summary judgment and memorandum of law in which it contended that no genuine issue of material fact existed that (1) the plaintiff could not bring the present action for underinsured motorist benefits pursuant to the accidental failure of suit statute because the nonsuit in the 2016 action was for disciplinary reasons and was not a matter of form[2]

[2] General Statutes § 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because . . . the action has been otherwise avoided or defeated . . . for any matter of form . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action . . . ."

and (2) the plaintiff failed to bring an action within three years of the date of the accident and failed to invoke the tolling provision of the insurance policy by providing the defendant with proper written notice of a claim for underinsured motorist benefits and, therefore, the present action is time barred. The plaintiff filed an objection and a memorandum of law in opposition to the defendant's motion. The court, *Cobb*, *J.*, granted the defendant's motion for summary judgment on the first ground after determining that no genuine issues of material fact existed and that, as a matter of law, the accidental failure of suit statute was not applicable. The court did not address the second ground raised in the defendant's motion. The plaintiff filed a motion to reargue/reconsider, which the court denied. Additional facts and procedural history will be set forth as necessary. This appeal followed.

On appeal, the plaintiff claims that the court erred in granting the defendant's motion for summary judgment because (1) the court's conclusion was based on an insufficient factual record, (2) the court erred in making credibility assessments on the basis of a "cold printed record" and (3) the court erred in deciding on a motion for summary judgment issues concerning motive, intent and subjective feelings and reactions. The plaintiff also claims that the court violated her right to due process in granting the defendant's motion for summary judgment and denying her motion to reargue/reconsider without a hearing.[3]

We turn our focus to the issue that was raised by the defendant in its motion for summary judgment that was not addressed by the trial court. On appeal, the defendant argues that no genuine issues of material fact

[3] This constitutional ground relates to the court's decision regarding the inapplicability of the accidental failure of suit statute. Thus, it is outside the scope of this opinion.

exist with respect to the plaintiff's failure, as a matter of law, to invoke the tolling provision of the insurance policy, which requires, inter alia, a timely written notice to the defendant of her claim for underinsured motorist benefits. This alternative ground, which was properly raised on appeal by the defendant and which the plaintiff had the opportunity to address in her reply brief, is dispositive of the appeal.[4] See *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 794, 749 A.2d 1144 (2000) ("Where the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive alternate ground for which there is support in the trial court record." (Citation omitted; internal quotation marks omitted.)); *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 219, 928 A.2d 586 (2007) (appellate court has discretion to rule on alternative grounds for summary judgment, even when trial court did not do so), aff'd, 289 Conn. 57, 956 A.2d 579 (2008).

We begin with the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as

[4] "Dismissal of a claim on alternative grounds is proper when those grounds present pure questions of law, the record is adequate for review, and the [opposing party] will suffer no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief." *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 308 n.8, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016). These requirements are satisfied. The plaintiff suffered no prejudice, the question presented is a matter of law and the record, which contains both the policy and the letter at issue, is adequate for review.

a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitles him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant [a party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012).

According to General Statutes § 38a-336 (g) (1), "[n]o insurance company doing business in this state may limit the time within which any suit may be brought against it . . . on the . . . underinsured motorist provisions of an automobile liability insurance policy to a period of less than three years from the date of accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (A) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (B) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals." The requirements in § 38a-336 (g) (1) for underinsured motorist claims were incorporated into the insurance policy between the parties. Section V, paragraph 6, of the insurance

policy, under the subheading "CLAIMS OR SUITS," addresses claims under section IV of the insurance policy, which concerns uninsured and underinsured motorist benefits, and provides: "All claims or suits under Section IV must be brought within three years of the date of accident. However, this does not apply to an underinsured motorist claim if the *insured*: (a) notifies us within three years of the date of accident, in writing, that he may have a claim for underinsured motorists benefits; and (b) commences suit under the terms of the policy no more than 180 days from the date of exhaustion of the limits of liability under all automobile bodily injury bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals." (Emphasis in original.)

It is undisputed that the plaintiff commenced an action for underinsured motorist benefits outside the three year limitation period. Specifically, neither the 2016 action nor the present action were commenced within three years after the September 17, 2012 accident. At issue is whether a genuine issue of material fact exists regarding whether a letter, dated October 1, 2012, that is addressed to the defendant from the plaintiff's counsel and is titled "LETTER OF REPRESENTATION," satisfies part (a) of the tolling provision of the policy, which concerns written notice to the defendant of a claim for underinsured motorist benefits. Although the plaintiff in its opposition mentioned phone calls between the parties, the only notification that was in writing, as required under the policy, is the October 1, 2012 letter. In the operative complaint in the present action, the plaintiff alleged that "[the defendant] was notified on or about September 17, 2012, about the collision to set up property damage and a personal injury file." In its memorandum of law in support of its motion for summary judgment, the defendant argued

that the October 1, 2012 letter did not satisfy the requirement of part (a) of the tolling provision of the insurance policy because it "makes no reference to a claim for underinsured motorist benefits." The defendant attached a copy of the October 1, 2012 letter to its motion. The plaintiff attached to her opposition the October 1, 2012 letter and an affidavit of Bildade Augustin, a litigation paralegal at Jacobs & Sodipo, LLC. Augustin stated that, "[b]ased on my training and the information given to me by [the plaintiff], I knew that there might be an uninsured or underinsured motorist claim against [the plaintiff's] policy. To this extent, I simultaneously sent a notice of claim, which we also refer to as a letter of representation, to both Nationwide (the tortfeasor's insurer of record in the police report) and also to [the defendant] . . . . I spoke with employees of both insurance companies by phone prior to sending the letters on or about October 1, 2012." In her memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiff argued that "written notice was sent to [the defendant] . . . on or about October 1, 2012, by Bildade Augustin. . . . The written notice sent to [the defendant] on October 1, 2012, satisfied the written notice requirement that [the defendant] requires in the contract. It states the date of the accident, the parties involved, and that the plaintiff suffered personal injuries. Whether or not a written notice was sent to [the defendant] in a timely manner as well as the sufficiency of said notice is an issue for the trier of fact."

On appeal, the defendant argues that, "[a]fter years of attempting to elicit the basis for timely written notice of an underinsured motorist claim . . . the plaintiff ultimately claimed that an October 1, 2012 letter qualifies as written notice of a claim for underinsured motorist benefits. . . . Even if the October [1], 2012 letter was sent to [the defendant], which is denied, the letter

does not comply with the policy requirement that [the defendant] be notified in writing that an underinsured motorist claim might be pursued." The plaintiff counters in her reply brief that the defendant cannot prevail on its alternative ground for affirmance because genuine issues of material fact exist, including whether the defendant received the October 1, 2012 letter.

Whether the defendant received the October 1, 2012 letter is not material to our analysis. Regardless of whether the October 1, 2012 letter was timely sent, or, as the defendant argues, sent at all, there is no genuine issue of material fact that the plaintiff failed to provide the defendant with written notice of her intention to pursue an underinsured motorist claim as required by part (a) of the tolling provision of the insurance policy. "Although facts may be in dispute, the disputed facts must be material." (Internal quotation marks omitted.) *Citibank (South Dakota), N.A.* v. *Manger*, 105 Conn. App. 764, 765–66, 939 A.2d 629 (2008). "A material fact is one that would alter the outcome of the case." *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 14, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999).

Construing the evidence in the light most favorable to the plaintiff, and assuming that the October 1, 2012 letter was sent to and received by the defendant in October, 2012, which is within three years of the date of the incident, the three year limitation period for filing an underinsured motorist benefits action is not tolled because, as a matter of law, the letter is insufficient to satisfy part (a) of the unambiguous tolling provision of the insurance policy. See *Dorchinsky* v. *Windsor Ins. Co.*, 90 Conn. App. 557, 561, 877 A.2d 821 (2005) (affirming trial court's granting of summary judgment on basis that written notice of claim for underinsured motorist benefits was insufficient to satisfy tolling provision of insurance policy).

The October 1, 2012 letter, which was sent from John A. Sodipo from Jacobs & Sodipo, LLC, to the defendant, states: "Please be advised that this office has been retained to represent the interests of [the plaintiff] in connection with injuries sustained in a motor vehicle accident which occurred on September 17, 2012 in Hartford, Connecticut. Kindly forward all future correspondence regarding this claim to our office. Our office is requesting a copy of [the plaintiff's] insurance policy. [The plaintiff] is currently seeking medical treatment for her injuries. I would appreciate you opening the appropriate bodily injury claim file. We are requesting that you contact our office upon receipt of this correspondence. Thank you for your cooperation." (Emphasis omitted.) Significantly, the letter contains no reference to a potential claim for underinsured motorist benefits.

Dorchinsky v. *Windsor Ins. Co.*, supra, 90 Conn. App. 557, involved a provision of an insurance policy that is similar to the policy provision at issue in the present case in that the language of the tolling provision in both polices are in accord with § 38a-336 (g) (1). See id., 561–63. In *Dorchinsky*, this court held that the trial court properly determined that no genuine issue of material fact existed that the tolling provision of the insurance policy required a specific reference to a potential claim for underinsured motorist benefits and that a notice referencing, in general, only the accident, property damage, medical bills and damages was not sufficient. Id., 561. This court rejected the plaintiff's claim that, in granting a motion for summary judgment, the trial court had construed the tolling provision of the policy "too strictly by reading it to require the specific words 'underinsured' or 'uninsured' in the notice." Id., 562. The trial court determined that the notice was "insufficient to comply with the requirements of the policy," and that "the notice requirement in the policy

contemplates specific reference to a potential claim for underinsured motorist benefits and that a notice which references nothing more than the accident and a claim for property damage, medical bills and damages in general is not sufficient." (Internal quotation marks omitted.) Id., 561. This court reasoned that, "[t]o toll the applicable limitation period under § 38a-336 (g) (1), the insured must provide written notice to the insurer of any claim which the insured may have for underinsured motorist benefits. . . . That language plainly and unambiguously requires the insured to inform its insurer not merely that it is pursuing a claim, but rather that it is pursuing a claim for underinsured motorist benefits. As this court [has noted], [t]he insurance company . . . needs to be notified . . . in writing that there's the possibility that a claim will be brought for underinsured motorist coverage. . . . We therefore conclude that the court properly interpreted the requirements of § 38a-336 (g)." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 563, quoting *Tracy* v. *Allstate Ins. Co.*, 76 Conn. App. 329, 335, 819 A.2d 859 (2003), aff'd, 268 Conn. 281, 842 A.2d 1123 (2004).

In the present case, no genuine issues of material fact exist regarding the plaintiff's failure to satisfy part (a) of the policy's tolling provision. Similar to the insufficient written notice in *Dorchinsky*, which advised the defendant only of the accident, retention of counsel, and the existence of physical injuries; *Dorchinsky* v. *Windsor Ins. Co.*, supra, 90 Conn. App. 561; the notification here did not contain a specific reference to a potential claim for underinsured motorist benefits. The October 1, 2012 letter stated only a potential claim, in general, and did not specifically state that the plaintiff may have a claim for *underinsured motorist benefits*. As such, the October 1, 2012 letter does not satisfy the plain and unambiguous language of the insurance

policy, which required that, in order to invoke the tolling provision, the plaintiff inform the defendant explicitly that she may have a claim for underinsured motorist benefit*s*.

The plaintiff contends in her reply brief that, according to *Romprey* v. S*afeco Ins. Co. of America*, 310 Conn. 304, 77 A.3d 726 (2013), the defendant cannot prevail on its alternative ground for affirmance because the defendant, by addressing only part (a) of the tolling provision regarding written notice in its motion for summary judgment, failed to make a showing that no genuine issue of material fact existed as to "all elements" of the tolling provision because it failed to address part (b) of that provision, which concerned the timely commencement of suit following exhaustion. The plaintiff misreads *Romprey*, which holds that a defendant moving for summary judgment pursuant to § 38a-336 (g) (1) has the initial burden of demonstrating the nonexistence of a genuine issue of material fact "with respect to *both* the three year limitation period *and* the statute's compulsory tolling provision." (Emphasis in original.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 323. The court concluded that, "[b]ecause the defendant failed to negate a genuine issue of material fact concerning whether the plaintiffs had met the statutory tolling provisions of § 38a-336 (g) (1), the plaintiffs had no obligation to submit documents establishing the existence of such an issue. . . . Consequently, the trial court should never have reached the question of the adequacy of the plaintiffs' evidence." (Citation omitted; internal quotation marks omitted.) Id., 326.

In the present case, the defendant satisfied its burden for summary judgment with respect to both the three year limitation period, which was undisputedly not met, and the statute's tolling provision, as established by *Romprey*. The tolling provision of the insurance policy requires *both* that the plaintiff (1) provide written notice

to the defendant within three years of the date of the accident that she may have a claim for underinsured motorist benefits *and* (2) commence an action within 180 days from the date of exhaustion. Because both requirements of the tolling provision must be satisfied, the failure to meet either requirement renders the tolling provision inapplicable.[5] See, e.g., *Dorchinsky* v. *Windsor Ins. Co.*, supra, 90 Conn. App. 561 (insufficient written notice of claim for underinsured motorist benefits rendered tolling provision of insurance policy unsatisfied). Accordingly, the defendant, in demonstrating that, as a matter of law, the October 1, 2012 letter failed to satisfy the requirements of a written notice of a claim for underinsured motorist benefits under part (a) of the policy's tolling provision, was entitled to summary judgment. For the foregoing reasons, we affirm the court's granting of the defendant's motion for summary judgment on the alternative ground that no genuine issues of material fact exist that the plaintiff failed to bring suit within three years and failed to toll that limitation period in accordance with the insurance policy.

The judgment is affirmed.

In this opinion the other judges concurred.

PETER J. SCOTT *v.* KYU SCOTT
(AC 44304)

Prescott, Elgo and Suarez, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying her motion for contempt. The defendant had alleged that the plaintiff wilfully refused to comply with several financial orders in the

[5] The plaintiff's compliance with the part (b) of the tolling provision is not challenged by the defendant.

parties' separation agreement, which was incorporated into the dissolution judgment, by failing to reimburse her for certain expenses she unilaterally incurred on behalf of the couple's minor children, including, inter alia, $5775 for dental surgery, $51,500 for the cost of a private college coach and $9000 for an automobile, as well as the significant cost of a twenty-two day enrichment program in Jackson, Wyoming. The trial court concluded that the plaintiff's actions did not rise to the level of contempt. It determined that the separation agreement was ambiguous as to the date on which certain of the parties' financial obligations were to commence and that the defendant sought reimbursement for items that either were not covered by the agreement or for which she had not obtained the plaintiff's consent, as required under the agreement. The court further concluded that certain of the defendant's expenditures were extravagant and unnecessary and that she had not acted in good faith under the agreement. On appeal, the defendant claimed, inter alia, that the trial court improperly rewrote the separation agreement, thereby denying her reimbursement from the plaintiff, and improperly awarded him attorney's fees pursuant to the statute (§ 46b-87) applicable to contempt proceedings. *Held*:

1. The trial court did not err in denying the defendant's motion for contempt, as the separation agreement was ambiguous regarding the date on which the plaintiff was to commence paying the children's tuition as well as certain other financial obligations; although the agreement contained a definitive commencement date for the plaintiff's payment to the defendant of unallocated alimony and child support, it did not provide a start date for the payment of the children's expenses, and, as there were two reasonable interpretations of the commencement dates, those portions of the agreement did not constitute clear and unambiguous orders of the court.

2. The defendant's claim that the trial court modified the separation agreement's child support order such that the plaintiff was not required to pay for certain of the children's expenses was unavailing, as the court's findings that the plaintiff was not required to reimburse the defendant for the cost of the automobile she bought for the children, as well the costs for the private college coach and the enrichment program, were not clearly erroneous: although the provision of the agreement pertaining to the car was ambiguous, the court determined, after considering all of the evidence, that the parties did not intend the agreement to cover the cost of an automobile but, rather, the expenses for a child to obtain a license to drive an automobile as well as related expenses such as fuel, maintenance, insurance or driving lessons; moreover, the court's finding that the defendant's conduct did not comport with an implicit duty of good faith was supported by the record, as the enrichment program was more akin to a vacation for the defendant and the children than an extracurricular activity for the children, and the expenditure for the private college coach was extravagant and unnecessary in light

of the fact that college counseling was part of the tuition package at the children's boarding school; furthermore, the plain and unambiguous meaning of the separation agreement did not obligate the plaintiff to reimburse the defendant for the hundreds of lower monetary value expenses she itemized that could not be considered extracurricular or related to organized activities within the meaning of the agreement.

3. The trial court did not abuse its discretion when it did not enter orders requiring the plaintiff to reimburse the defendant for children's expenses that she unilaterally incurred, the court having properly concluded that those expenses were either not covered under the agreement or were not made in good faith.

4. The trial court did not err in determining that the defendant was not entitled to full reimbursement from the plaintiff for the cost of the children's dental procedures: contrary to the defendant's assertion, the court's factual findings with respect to those procedures were not clearly erroneous but were supported by evidence that the plaintiff arranged for the procedure to be done by an in-network dentist and agreed to share the cost with the defendant, as was his prerogative under the separation agreement, but that the defendant insisted that the procedures be done by an out-of-network oral surgeon because it was an emergency; moreover, because the plaintiff did not agree to have the procedure performed by the out-of-network dentist and the defendant did not offer any credible evidence as to the nature of the procedure or the necessity that it be performed quickly and by a particular oral surgeon, she was required under the agreement to obtain the plaintiff's consent for the procedure; accordingly, the court properly concluded that the defendant was entitled under the separation agreement to reimbursement for 60 percent of the cost of the procedures performed by an in-network dentist or oral surgeon.

5. The trial court did not abuse its discretion in awarding the plaintiff attorney's fees, as § 46b-87 permits the award of such fees to the prevailing party in a contempt proceeding: the plaintiff's actions did not rise to the level of wilful contempt, whereas the defendant did not exercise good faith and good judgment in making arbitrary and unilateral expenditures that were based on a strict reading of the separation agreement; moreover, the court properly considered the defendant's behavior, as an award of attorney's fees under § 46b-87 is punitive, rather than compensatory, and, contrary to the defendant's contention, the court's ability to award the plaintiff attorney's fees was not impacted by its order that the plaintiff reimburse her for certain tuition costs, as a trial court has broad discretion to make a party whole, even in the absence of a finding of contempt, as well as the authority under its equitable powers to fashion an order designed to protect the integrity of the dissolution judgment.

Argued January 13—officially released September 6, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, denied the defendant's motion for contempt, entered certain financial orders, and awarded attorney's fees to the plaintiff, and the defendant appealed to this court. *Affirmed*.

Samuel V. Schoonmaker IV, for the appellant (defendant).

Gary I. Cohen, for the appellee (plaintiff).

Opinion

SUAREZ, J. This appeal stems from postdissolution proceedings in which the defendant, Kyu Scott, moved that the plaintiff, Peter J. Scott, be found in contempt by virtue of his breach of several provisions of the separation agreement (agreement) that was entered into by the parties and incorporated into the judgment dissolving their marriage. On appeal, the defendant claims that the court improperly (1) denied her motion for contempt, (2) rewrote the agreement and retroactively modified a child support order, (3) failed to find an arrearage and enter orders necessary to preserve the integrity of the agreement, (4) determined that the defendant was not entitled to reimbursement for the cost of an out-of-network oral surgeon, and (5) ordered the defendant to pay attorney's fees to the plaintiff. We affirm the judgment of the trial court.

The following facts, as found by the court or as undisputed in the record, and procedural history are relevant to this appeal. The marriage of the plaintiff and the

defendant was dissolved on March 4, 2015. Prior to the dissolution, the plaintiff and the defendant entered into the agreement, which was approved by the court and incorporated by reference into the dissolution decree. The agreement provides for the joint legal and physical custody of the parties' two children.

The agreement also included an award of unallocated alimony and child support. Specifically, article 3.1 requires the plaintiff, beginning on January 1, 2015, to pay to the defendant a percentage based "unallocated alimony and child support until the death of either party, the [defendant's] remarriage, prior to the minor children's high school graduation or the completion of four . . . years of high school, or her cohabitation as defined in . . . General Statutes § 46b-86 (b), or for a non-modifiable term of seven . . . years . . . ." "Commencing the first day of September following the minor children's high school graduation or the completion of four . . . years of high school," article 3.2 requires the plaintiff to pay unallocated alimony and child support at a lower percentage based rate. The agreement provides that the unallocated alimony and child support payments terminate at the end of year seven on December 31, 2022, if not sooner for one of the specified reasons.

Article V, which is titled "Pre-College Children's Expenses," provides for the payment of the children's expenses while they attend boarding school. Article 5.1[1] requires the plaintiff to pay 60 percent and the

[1] Article 5.1 of the agreement provides: "The [plaintiff] shall pay 60 [percent] and the [defendant] shall pay 40 [percent] of any reasonably incurred, unreimbursed or uninsured medical expense for the benefit of the children. In year five, and provided that the children are attending boarding or private school, the [plaintiff] shall pay 100 [percent] of said expenses. Each party shall obtain the agreement of the other when a child required non-emergency, non-routine medical treatment, but such approval may not unreasonably be withheld. The parties shall account to each other and make payments to each other in accordance with this obligation on a quarterly basis. Both parties may submit claims directly to the insurer, and reimbursement to the party who advanced payment shall be made within [ten] days after submission of proof of payment."

defendant to pay 40 percent of the unreimbursed or uninsured medical and dental expenses of the children. Article 5.2[2] requires the plaintiff to pay 60 percent and the defendant to pay 40 percent of the cost of boarding or private school. Article 5.3[3] requires the plaintiff to pay 60 percent and the defendant to pay 40 percent of the children's "[e]xtracurricular, [o]rganized [a]ctivities and [o]ther [e]xpenses . . . ." Articles 5.1, 5.2 and 5.3 each provide that the plaintiff must pay 100 percent of the children's expenses "[i]n year five" if the children are still attending boarding school. Article 5.4[4] requires the plaintiff to reimburse the defendant for article 5.3 expenses that she pays within one month of the defendant's request for payment.

Article 3.5[5] provides that if the alimony support obligation terminates, "then the parties shall determine the

[2] Article 5.2 of the agreement provides: "If the children, by agreement of the parties, attend boarding or private school, their tuition, room and board, years one through four, shall be paid [60 percent] by the [plaintiff] and [40 percent] by the [defendant]. In year five, tuition, room and board shall be paid [100 percent] by the [plaintiff].

[3] Article 5.3 of the agreement provides in relevant part: "Children's expenses during their school years shall be paid [60 percent] by the [plaintiff] and [40 percent] by the [defendant]. In year five, if the children are attending boarding school, all of their expenses shall be paid [100 percent] by the [plaintiff]. Such expenses to be shared by the parties shall include, but are not limited to, all school related educational, extracurricular and social activities; non-school related educational and extracurricular [activities]; organization/team/program fees, equipment, and team travel related expenses; all organized summer programs including transportation; enrichment programs such as music lessons, sports lessons, and the like; necessary tutors; pre-boarding school and pre-college expenses, including, but not limited to, testing and preparatory classes, tutors, college coaches, application fees, travel expenses for pre-application boarding school and college visits; driver's education and other expenses for a child to obtain and hold a license to drive an automobile (car insurance, cars and related fuel and maintenance) and the like."

[4] Article 5.4 of the agreement provides: "In the event the [defendant] has paid, on behalf of the children, any of the expenses set forth in paragraph 5.3 for which the [plaintiff] is responsible, the [plaintiff] shall reimburse the [defendant] for the amount she has paid one month after proof of payment."

[5] Article 3.5 of the agreement provides: "In the event that alimony payments terminate, for whatever reason, and the [plaintiff] is obligated to provide child support for the parties' children pursuant to [General Statutes] § 46b-

amount of child support to be paid by the [plaintiff] to the [defendant] retroactive to the date alimony ended." The defendant remarried on May 4, 2018. At that time, the alimony portion of the award terminated, and the plaintiff made no further alimony payments to the defendant. Thereafter, despite the fact that article 3.5 of the agreement requires the plaintiff and the defendant to "determine the amount of child support to be paid by the [plaintiff] to the [defendant] retroactive to the date alimony ended," neither the plaintiff nor the defendant took any steps to have the court determine an appropriate child support order pursuant to General Statutes §§ 46b-84[6] and 46b-86.[7]

On June 19, 2018, the defendant filed a motion for contempt, alleging that the plaintiff was not complying with several financial orders contained in the agreement. Specifically, the defendant claimed that the plaintiff "wilfully and deliberately failed and refused to comply with the court's order concerning his agreement to

84, then the parties shall determine the amount of child support to be paid by the [plaintiff] to the [defendant] retroactive to the date alimony ended. The [plaintiff] shall make child support payments until the children reach the age of [eighteen], unless the children have not graduated from high school, in which event, the [plaintiff] shall pay child support until the later of the children's graduation from high school or the children's [nineteenth] birthday."

[6] General Statutes § 46b-84 (a) provides in relevant part: "Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . ."

General Statutes § 46b-84 (b) further provides in relevant part: "If there is an unmarried child of the marriage who has attained the age of eighteen and is a full-time high school student, the parents shall maintain the child according to their respective abilities if the child is in need of maintenance until such child completes the twelfth grade or attains the age of nineteen, whichever occurs first. . . ."

[7] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ."

pay for the children's expenses, including unreimbursed medical and dental expenses, boarding or private school, college coach, car insurance, extracurricular, organized activities and other expenses." In her motion, the defendant asked the court to find the plaintiff in contempt, enter an order requiring the plaintiff to comply with the portions of the agreement regarding the children's expenses, and award her attorney's fees. In response, the plaintiff filed a motion for attorney's fees asking that he "be awarded . . . reasonable counsel fees and costs incurred in defending against the baseless claim of contempt, pursuant to . . . General Statutes [§] 46b-87."

The court conducted an evidentiary hearing on the motion on December 4 and 6, 2019. On February 4, 2020, the court issued a memorandum of decision on the defendant's motion for contempt. The court began by noting that the "first task of the court is to determine if the order on which the claim is based is clear and unambiguous. In this matter, during final argument, counsel for the [defendant] observed that the agreement itself is, 'hardly a road map of clarity.' The court agrees. The initial confusion stems from the meaning of 'those three little words,' to wit: 'In year five.' They or a variant of them appear in both articles III and V of the agreement.

"Under article 3.5 of the agreement, the parties were obligated to calculate the appropriate amount of child support retroactive to the date that the alimony ended, and they have not done so as of the date of the hearing. On the other hand, what they have done is come to an informal arrangement or, more accurately, a large misunderstanding regarding the scope of article 5.3, whereby each party makes general expenditures on behalf of the children, tallies them all up, and sends the sum total to the other party for a monetary adjustment in favor of one or the other. The parties agreed

by stipulation . . . in January, 2018, that their accounts were square as of the end of 2017.

"That informal arrangement notwithstanding, the biggest problem with the arrangement is that it is not a clear and unambiguous order of the court, and, hence, a failure to comply is not a breach and does not result in a finding of contempt.[8] Second, and perhaps more

[8] In its memorandum of decision, the court found "particularly troubling" the course of action taken by the parties after the defendant's remarriage, which caused, under the terms of the agreement, the termination of the defendant's alimony and led the plaintiff to "[make] no further alimony payments to the [defendant]." The court observed that neither the plaintiff nor the defendant took any steps to unbundle the existing unallocated award for the purpose of determining the appropriate amount of child support for the two children, who had a right to parental support under § 46b-84 (b). The court stated that, "[i]nstead of ignoring the issue, or worse, using self-help, the better procedure is for one of the parties to move either for a modification based upon substantially changed circumstances, or a motion for order to determine child support. In that way, the court would have an opportunity to determine whether, under all the circumstances, the children are in need of maintenance and, if so, to award an appropriate amount of child support and, more important, to protect the fundamental legal right of the minor children to receive it. Instead, their informal arrangement, and the [defendant's] attempt to enforce it and the ambiguous terms of their court-approved agreement, through contempt, have simply complicated the process."

Although, at the hearing on the motion for contempt, the parties did not request that the court determine the appropriate amount of child support after the defendant remarried, and the defendant does not raise a claim of this nature in this appeal, we emphasize that the trial court's criticism of the parties' course of action was entirely appropriate. As this court has observed, it is well established that "the independent nature of a child's right to support . . . [is a] right [that] cannot be vitiated or circumscribed by way of an agreement between the parents. . . . [Parents] cannot make a contract with each other regarding the maintenance or custody of their child which the court is compelled to enforce . . . ." (Citations omitted; internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 731–32, 197 A.3d 1000 (2018). "[A]s a matter of public policy . . . issues involving custody, visitation, and child support must be resolved only by a court." Id., 733. The trial court identified the parties' failure to seek judicial assistance when modification became necessary. See, e.g., *Riscica* v. *Riscica*, 101 Conn. App. 199, 201, 921 A.2d 633 (2007). Even though neither party sought judicial assistance when the alimony portion of the unallocated award terminated, the trial court in family matters is vested with wide

problematic, is the fact that the [defendant] has blurred the lines, in her claim, merging, for example, the children's snacks, allowance, haircuts, and clothing, to name just a few items that are clearly not 'extracurricular,' with some items that arguably fall into that category and are covered by the agreement, and, as a result, could be the subject of a motion for contempt. The tuition at Choate Rosemary Hall [boarding school] would be a good example. Last, the specific items that she has claimed, while they may be within the 'black letter' of the agreement, were made unilaterally, without the agreement of the [plaintiff], were either unnecessary or an unusually large expenditure (e.g., 'college coach') and, hence, were not made in good faith. Accordingly, the [defendant] should be fully responsible for the cost of the college coach, the car purchased for the children and the enrichment experience in Jackson, Wyoming. The [plaintiff's] liability for the dental surgery should be limited to 60 [percent] of the cost of the procedure performed by the in-network dentist or oral surgeon.[9]"

discretion and broad equitable powers. The court had the opportunity to take steps to rectify the problem it had identified, and perhaps it should have done so. "The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute . . . ." (Internal quotation marks omitted.) *Foisie* v. *Foisie*, 335 Conn. 525, 543, 239 A.3d 1198 (2020). "For that reason, equitable remedies are not bound by formula but are molded to the needs of justice." (Internal quotation marks omitted.) Id. Nevertheless, because this issue has not been raised in the trial court or in this appeal, we address it no further.

[9] In its memorandum of decision, the court stated: "It has long been the law, that, based upon their 'unique human relationship,' divorcing spouses owe a duty to each other of 'full and frank disclosure' of their financial circumstances, 'no less than' if they were in a 'fiduciary to beneficiary' relationship. . . . It is not a stretch to find that, in their postjudgment dealings, especially when it comes to their children, that the parties also have a duty of fair dealing in the execution of their agreements. Courts have encouraged agreements by and between parties as a means to avoid conflict and to resolve differences. While each is entitled to their opinion as to the meaning of a particular clause, in doing so, they should not take unfair advantage of contractual provisions that are wide open or less than clear.

(Citation omitted; emphasis omitted; footnote in original.)

The court found that the use of the words "[i]n year five" in article V of the agreement was ambiguous. The court determined that, "[l]ooking at the plain meaning of the words, there are two logical ways to interpret what was intended to be the commencement date for the operative financial obligations set forth in the agreement, that is: (a) from and including March 4, 2015, the date of the agreement itself, or (b) retroactively from and including January 1, 2015. It is clear from a reading of article 3.1 that the [plaintiff's] alimony obligation commenced on January 1, 2015. It is also clear that the parties did not intend that there be a gap in coverage for the children's unreimbursed medical expenses as set forth in article 5.1. Accordingly, the court finds that the agreement is ambiguous as to this issue. However, looking at the agreement as a whole, the court finds that a start date of January 1, 2015, would be more consistent with the intent of the parties and more likely to carry its terms and provisions of same into effect."

On the basis of these findings, the court later concluded that, "under all the circumstances, the relevant provisions of the agreement in question are ambiguous, and the [plaintiff's] actions do not rise to the level of contempt; and that, however, notwithstanding a finding of no contempt, as to the private school expenses, the intent of the parties was to use the calendar year and not the designated school year (i.e., freshman, sophomore, etc.) as a basis for determining the respective responsibilities of the parties based upon the following considerations: (a) at the time that the clause was drafted, both children were attending public school; (b) the decision

In other words, honoring the spirit of an agreement is just as important, and to ignore it is likely to lead to unnecessary conflict and the concomitant waste of assets. This case is a prime example." (Citation omitted.)

to have the children repeat [ninth] grade was mutual and arrived at after the agreement was drafted; and (c) the phrase in question is repeated in the clauses related to the children's activities and unreimbursed medical expenses; that the children's senior year at Choate Rosemary Hall is the '[fifth] year' [that] was contemplated by the parties; and that the [plaintiff's] obligation is 100 [percent] thereof."

As to the unreimbursed medical and dental expenses, the court made several findings of fact and conclusions, stating that "[t]he parties do not appear to have a dispute as to the application of their respective shares of these expenses but, rather, to specific expenditures. For instance, the [defendant] seeks 100 [percent] reimbursement from the [plaintiff] for a dental procedure for the children. The [plaintiff] had made long-standing arrangements for the procedure to be done by an in-network dentist, and, at the last minute, the [defendant] arbitrarily changed to an out-of-network oral surgeon, claiming that it was an emergency. The dental surgeon's bill was $5775. . . . The [defendant] did not offer any credible evidence or expert testimony as to the nature of the procedure and much less the necessity that it be performed quickly and by whom. Under all the circumstances, it would be unfair to make the [plaintiff] bear the entire cost over and above the normal charges that he had already made arrangements to have done." (Citation omitted.)

With respect to the private school tuition, the court made the following findings of fact and conclusions: "At the time of the dissolution, the children were both attending Eastern Middle School, a public school in Greenwich. A mutual decision was reached later, while the children were still students at Greenwich High School, to send them to Choate Rosemary Hall as boarding students, where they would repeat [ninth] grade. It is important to note that the parties could have, but

did not, [specify] that this provision applied to the traditional, specific academic years (i.e., freshman, sophomore, etc.), as they did do in article 3.1 relating to the termination of alimony. Rather, they used the generic description, 'years one through four.' The [plaintiff's] contention, however, is just that. In essence, notwithstanding the repetition of the freshman year, he claims he has no further obligation, and would only have one, should there be a specific [fifth] academic year. According to the testimony of the [defendant], Choate Rosemary Hall has no term beyond senior year. While there is some logic to the [plaintiff's] interpretation, the better, more logical explanation is that the children are currently in 'year five' and that his obligation under the terms of the agreement is 100 [percent] of the tuition, room and board at Choate Rosemary Hall."

The court also made several findings of fact and conclusions with respect to the disputed expenses paid by the defendant on behalf of the children, specifically, the college coach, the enrichment experience, and the automobile. The court found that, "[i]n years one through four, such expenditures are to be made during their school years, 60 [percent] by the [plaintiff] and 40 [percent] by the [defendant]. However, in year five, in the event that the children are attending boarding school, the [plaintiff] pays 100 [percent]. The [defendant] has offered to the court several exhibits outlining her out-of-pocket expenditure on behalf of the children; the list is very comprehensive, detailing even the smallest, inconsequential items [such] that the court questions her good faith and perspective. In particular, she has made arbitrary expenditures based upon a strict reading of the agreement. As a case in point, the [defendant] made a unilateral decision to use a firm called Preminente as a college coach for the twins, and, to that end, she has expended or committed to expend $51,500 . . . . While the agreement specifically uses

the term 'college coaches,' the testimonial evidence is clear that Choate Rosemary Hall had college counselors on staff as part of the tuition package. The court finds under all the circumstances that her expenditure and commitment to pay same to be extravagant and unnecessary. Likewise, the [defendant] unilaterally selected an expensive, [twenty-two] day 'enrichment program' at Jackson, Wyoming, through the Grand Teton National Park Foundation that was more akin to a family vacation. Similarly, the [defendant] unilaterally purchased a used car for a net of $9000 . . . for the children on the strength of a patently ambiguous clause, drafted ostensibly to cover 'expenses for a child to obtain and hold a license to drive an automobile.' A parenthetical listing, by way of example, includes 'car insurance, cars and related fuel and maintenance.' Clearly, one does not have to own or lease a car in order to obtain and maintain a driver's license, and a logical explanation would be that it was intended to cover the fuel and maintenance of a vehicle, as with other expenses related to driving a car such as 'car insurance' or driving lessons. There does not appear to be a mechanism in the agreement to resolve such disagreements but, rather, it relies upon the good faith and good judgment of each of the parties, something the [defendant] has clearly not exercised." (Citations omitted.) On the basis of these facts, the court ultimately concluded that "the arbitrary actions of the [defendant] regarding the college coach, the dental surgery, enrichment program at Jackson, Wyoming, and the purchase of the used car, fall outside the realm of good faith and fair dealing."

Finally, with respect to the plaintiff's claim for attorney's fees, the court "reviewed the affidavit of counsel fees . . . dated July 18, 2019, and [found] it to be fair and equitable under all the circumstances." (Citation omitted.) Because the court "[did] not find the [plaintiff's] actions to [rise] to the level of wilful contempt,

under all the [circumstances],'' the court concluded that ''it is equitable and appropriate for the court to award him reasonable attorney's fees in the amount of $14,930.''

On the basis of the foregoing analysis, the court denied the defendant's motion for contempt. Notwithstanding its denial of the defendant's motion for contempt, the court ordered that the ''plaintiff . . . pay in full any outstanding tuition and fees for the children's senior year at Choate Rosemary Hall and [that] he . . . reimburse the defendant . . . for any tuition and fees that she may have expended for their senior year.'' The court also ordered that the defendant pay the plaintiff's attorney's fees in the amount of $14,930 on the basis of its denial of the motion for contempt. This appeal followed.

I

We first address the defendant's claim that the court improperly denied the plaintiff's motion for contempt. Specifically, the defendant argues that the relevant portions of the agreement were sufficiently clear and unambiguous so as to support a finding of contempt. We disagree.

We begin by setting forth the legal principles relevant to this claim. ''Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . [C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is particularly harsh . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . . To constitute

contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . If we answer that question affirmatively, we then review the trial court's determination that the violation was wilful under the abuse of discretion standard." (Citations omitted; internal quotation marks omitted.) *Puff* v. *Puff*, 334 Conn. 341, 364–66, 222 A.3d 493 (2020).

General Statutes § 46b-66 (a) provides in relevant part that, "[i]f the court finds the [dissolution] agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court. . . ." In order to adjudicate the defendant's claim that the court erred in denying her motion for contempt, we begin by addressing the threshold question of whether the underlying court order, the dissolution agreement, was "sufficiently clear and unambiguous so as to support a judgment of contempt." (Internal quotation marks omitted.) *Pressley* v. *Johnson*, 173 Conn. App. 402, 408, 162 A.3d 751 (2017).

"It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover,

the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citation omitted; internal quotation marks omitted.) *Dejana* v. *Dejana*, 176 Conn. App. 104, 114–15, 168 A.3d 595, cert. denied, 327 Conn. 977, 174 A.3d 195 (2017).

We conclude, as did the trial court, that the agreement was not a clear and unambiguous order because the language of the agreement is susceptible to more than one reasonable interpretation. Specifically, the agreement is ambiguous as to the commencement date for the financial obligations imposed by the agreement.

In order to determine whether the agreement is clear and unambiguous, we examine the language of the agreement. Article III, which addresses alimony and child support, provides a definitive commencement date for the payment of the award of unallocated alimony and child support. It provides in relevant part: "Commencing on January 1, 2015, and on the first and fifteenth days of each month thereafter, the [plaintiff] shall pay to the [defendant], as unallocated alimony and child support until the death of either party, the [plaintiff's] remarriage, prior to the minor children's high school graduation or the completion of four . . . years of high school, or her cohabitation as defined in [General Statutes] § 46b-86 (b), or for a non-modifiable

term of seven . . . years, the following percentages of his 'gross annual earned income from employment' . . . ."

On the other hand, article V, which provides for the payment of "[c]hildren's [e]xpenses," does not include a start date for the commencement of the financial obligations contained within it but, rather, indicates the division of payment responsibilities between the plaintiff and the defendant by referencing "years one through four" and "year five . . . ." Article 5.1 provides in relevant part: "*In year five*, and provided that the children are attending boarding or private school, the [plaintiff] shall pay 100 [percent] of [unreimbursed medical and dental] expenses." (Emphasis added.) Article 5.2 provides: "If the children, by agreement of the parties, attend boarding or private school, their tuition, room and board, *years one through four*, shall be paid [60 percent] by the [plaintiff] and [40 percent] by the [defendant]. *In year five*, tuition, room and board shall be paid [100 percent] by the [plaintiff]." (Emphasis added.) Finally, article 5.3 provides in relevant part: "*In year five*, if the children are attending boarding school, all of their expenses shall be paid [100 percent] by the [plaintiff]." (Emphasis added.)

We agree with the court that there are two reasonable interpretations of the commencement date for the financial obligations set forth in the agreement. To begin, because article 3.1 clearly states that the plaintiff's alimony obligation commenced on January 1, 2015, one logical interpretation is that all of the financial obligations set forth in the agreement also commence on January 1, 2015. Another logical interpretation, however, is that the agreement's financial obligations commence on March 4, 2015, the date of the agreement. This interpretation applies principally to the portions of the agreement, including article V, that do not specify a commencement date for the financial obligations that

they impose. Because the commencement date for the relevant financial obligations contained within the agreement is susceptible to more than one reasonable interpretation, the agreement is ambiguous with respect to this issue.

Further, the meaning of the words "years one through four" and "year five" for the purposes of article V is ambiguous. Article V provides for the division of the children's expenses while they attend boarding school. Instead of referring to specific academic years, such as freshman, sophomore, junior, and senior, article V references "years one through four" and "year five . . . ." In particular, the ambiguity stems from article 5.2, which provides that, "[i]f the children, by agreement of the parties, attend boarding or private school, their tuition, room and board, *years one through four*, shall be paid [60 percent] by the [plaintiff] and [40 percent] by the [defendant]. *In year five*, tuition, room and board shall be paid [100 percent] by the [plaintiff]." The way in which this section is written, particularly how it refers to the payment of boarding school tuition and room and board for "years one through four," creates ambiguity because "years one through four" in this context reasonably could be interpreted to mean the number of years that the children have attended boarding school. Other portions of the agreement, however, measure the years based on the number of years that have passed since the commencement of the financial obligations imposed by the agreement. Because article V is unclear as to whether its reference to "years one through four" and "year five" refer to specific academic years or years that have passed since the commencement of the financial obligations contained in the agreement, article V of the agreement is ambiguous.

Because we determine that the relevant portions of the agreement were not clear and unambiguous orders of the court, we conclude that the court did not err

when it concluded that the plaintiff was not in contempt of the order.

II

We next address the defendant's claim that the court improperly rewrote the separation agreement and modified the child support order retroactively. Specifically, the defendant argues that the "court improperly modified the . . . agreement by determining that articles 5.3 and 5.4 did not require the plaintiff to pay for [the] children's expenses." We disagree and conclude that the court did not modify the agreement but, rather, properly interpreted the agreement and determined that it did not cover several of the disputed expenses that the defendant unilaterally incurred. These expenses include the used car, the college coach, and the enrichment experience, as well as the hundreds of low monetary value expenses on the defendant's itemized list that cannot be characterized as "extracurricular."

"A trial court in a dissolution action has broad equitable powers under our dissolution statutes. . . . Those powers do not, however, allow the court to rewrite a separation agreement that has been incorporated into the judgment of dissolution." (Citation omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 696, 941 A.2d 301 (2008). Instead, a court must treat a "separation agreement that has been incorporated into a dissolution decree and its resulting judgment . . . as a contract and [construe the agreement] in accordance with the general principles governing contracts." (Internal quotation marks omitted.) *Dejana* v. *Dejana*, supra, 176 Conn. App. 114.

"When construing a contract, [a court seeks] to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction . . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written

words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 180–81, 972 A.2d 228 (2009).

The defendant claims that the court improperly rewrote the separation agreement and modified the child support retroactively. We disagree. Instead, we conclude that, when interpreting the agreement, the court properly determined that several expenses incurred by the defendant were not expenses that were covered under the agreement either because they did not fall under the language of the agreement or because they were not made in good faith and, therefore, that the plaintiff is not required to reimburse the defendant for such expenses.

With respect to this issue, the court noted in its memorandum of decision that "the [defendant] has blurred the lines in her claim, merging, for example, the children's snacks, allowance, haircuts, and clothing, to name just a few items that are clearly not 'extracurricular,' with some items that arguably fall into that category and are covered by the agreement and, as a result, could be the subject of a motion for contempt. The tuition at Choate Rosemary Hall would be a good example. [Additionally], the specific items that she has claimed,

while they may be within the 'black letter' of the agreement, were made unilaterally, without the agreement of the [plaintiff], were either unnecessary or an unusually large expenditure (e.g., 'college coach') and, hence, were not made in good faith. Accordingly, the [defendant] should be fully responsible for the cost of the college coach, the car purchased for the children, and the enrichment experience in Jackson, Wyoming." We analyze each of the disputed expenses in turn.

We first conclude that the plaintiff was not required to reimburse the defendant for the cost of the used automobile because it was not an expense covered by the agreement. We begin by determining whether the agreement was clear and unambiguous as to whether, under article 5.3, the cost to purchase an automobile for the children is a reimbursable expense. As we stated previously in this opinion, whether an agreement is clear and unambiguous is a question of law over which our review is plenary. See, e.g., *Isham* v. *Isham*, supra, 292 Conn. 181. We conclude that the contract language at issue is ambiguous because it is reasonably susceptible to more than one interpretation. The portion of article 5.3 on which the defendant relies in requesting reimbursement for the cost of the used automobile provides that the agreement covers "expenses for a child to obtain and hold a license to drive an automobile . . . ." Considering the ordinary meaning of the language in the agreement, it appears that this provision intended to cover expenses such as automobile insurance, driving lessons, other fees associated with obtaining a driver's license, or even costs associated with the maintenance of an automobile. The expense to purchase an automobile does not fall within the ordinary meaning of this provision because one does not need to own an automobile in order to obtain and hold a license to drive an automobile. The ambiguity with

respect to this provision, however, stems from a parenthetical indicating that the expenses covered by article 5.3 include "car insurance, *cars* and related fuel and maintenance . . . ." (Emphasis added.) This portion of the agreement is ambiguous because the parenthetical suggests that an automobile is included in the covered expenses under article 5.3, but the language outside of the parenthetical, within its ordinary meaning, does not seem to encompass the purchase of an automobile.

Because "the language of [the agreement] is ambiguous, the determination of the parties' intent is a question of fact." (Internal quotation marks omitted.) *Isham* v. *Isham*, supra, 292 Conn. 181. The court determined that this clause was "drafted ostensibly to cover expenses for a child to obtain and hold a license to drive an automobile." (Internal quotation marks omitted.) The court reasoned that "one does not have to own or lease a car in order to obtain and maintain a driver's license, and a logical explanation would be that [the clause] was intended to cover the fuel and maintenance of a vehicle, as well as other expenses related to driving a car such as car insurance or driving lessons." (Internal quotation marks omitted.) We conclude that the court's finding as to the clause's meaning, after considering all of the evidence, including the testimony of the parties, was not clearly erroneous. We therefore conclude that the court properly determined that the automobile was not an expense covered under the agreement and, therefore, the plaintiff was not required to reimburse the defendant for the cost of the automobile.

We now turn to the defendant's claims for reimbursement related to the expenses that she incurred for the college coach and the enrichment experience. Although these expenses appear to fall within the literal meaning of article 5.3, our resolution of these claims also requires us to examine whether the court's finding that the defendant's conduct did not comport with an implicit duty

of good faith and fair dealing is supported by the record. "[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . . To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Citations omitted; internal quotation marks omitted.) *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 432–33, 849 A.2d 382 (2004).

We conclude that the court's finding that the defendant did not act in good faith under the agreement—with respect to the expense that she unilaterally incurred for the private college coach—was not clearly erroneous, and, therefore, the plaintiff is not required to reimburse the defendant for that expense. The court noted that parties to a separation agreement "should not take unfair advantage of contractual provisions that are wide open or less than clear," and they should "[honor] the spirit of [the] agreement . . . ." Although the agreement did include "college coaches" as a reimbursable expense under article 5.3, the court determined that the defendant's $51,500 expenditure for a private college coach was extravagant and unnecessary, particularly given the fact that Choate Rosemary Hall

provides college counseling as part of the tuition package. Because we have determined that there is support in the record for the court's finding that the defendant did not act in good faith when she incurred this expense, we conclude that the finding is not clearly erroneous. We therefore conclude that the plaintiff is not required to reimburse the defendant for this expense under the agreement.

We also conclude that the court properly found that the expense that the defendant incurred for the "enrichment experience" was not made in good faith, and, therefore, the plaintiff is not required to reimburse the defendant for that expense under the agreement. The court found that the enrichment program in Jackson, Wyoming, through the Grand Teton National Park Foundation was more akin to a vacation enjoyed by the defendant and her children than an extracurricular activity for the children. The court ultimately found that the defendant's unilateral decision to purchase the enrichment experience for the children, a significant expense, and to request the plaintiff's reimbursement for what appeared to be a vacation with the defendant, was not made in good faith under the agreement. We conclude that the court's finding with respect to the enrichment experience, on the basis of the evidence before it, was not clearly erroneous. Accordingly, the plaintiff is not required under the agreement to reimburse the defendant for this expense.

Finally, we conclude that, on the basis of the plain and unambiguous meaning of the agreement, the plaintiff was not required to reimburse the defendant for the litany of itemized expenses such as snacks, allowances, haircuts, and clothing because these expenses cannot be considered "extracurricular" or related to "[o]rganized [a]ctivities," and, therefore, they are not covered by article 5.3 of the agreement. Pursuant to the agreement, expenses covered under article 5.3 include "all

school related educational, extracurricular and social activities; non-school related educational and extracurricular [activities]; organization/team/program fees, equipment, and team travel related expenses; all organized summer programs including transportation; enrichment programs such as music lessons, sports lessons, and the like; necessary tutors; [and] pre-boarding school and pre-college expenses, including, but not limited to, testing and preparatory classes, tutors, colleges coaches, application fees, [and] travel expenses for pre-application boarding school and college visits . . . ." The defendant, in her itemized list for reimbursement, has outlined hundreds of expenses, merging some expenses that fall under article 5.3 with others that clearly do not. For example, the defendant included in the itemized list many expenses for things such as clothing, snacks, allowances, and haircuts, which clearly are not expenses that can be considered "[e]xtracurricular . . . ." Having already discussed in detail the higher monetary value items that are the subject of the defendant's claims for reimbursement under the agreement, we note that it would serve no useful purpose to individually address in this opinion the hundreds of other, lower monetary value expenses listed by the defendant that are also the subject of this claim. Nonetheless, we have considered each of these expenses and conclude for reasons similar to those already discussed herein, that the court properly found that the plaintiff was not obligated under the agreement to reimburse the defendant for these expenses.

We conclude that (1) the court's finding that the parties did not intend for the agreement to cover the cost to purchase an automobile for the children was not clearly erroneous, and, therefore, the court properly determined that the automobile was not an expense covered under the agreement; (2) the court's findings that the defendant did not act in accordance with the

implied duty of good faith when she incurred the expenses for the college coach and the enrichment experience were not clearly erroneous, and, therefore, the court properly determined that the plaintiff was not required to reimburse the defendant for these expenses under the agreement; and (3) on the basis of the plain meaning of the agreement, the large number of low monetary value expenses on the itemized list, including clothing, snacks, allowances, and haircuts, cannot be considered "[e]xtracurricular," and, therefore, they are not covered under the agreement. On the basis of these conclusions, we further conclude that the court did not rewrite the separation agreement or retroactively modify the child support. Instead, the court properly determined that these expenses were not covered under the agreement, and, therefore, the plaintiff was not required to reimburse the defendant for these expenses.

III

We next address the defendant's claim that the court abused its discretion by failing to find an arrearage with respect to the plaintiff's obligation to pay for expenses related to the parties' children under the agreement[10] and enter orders to preserve the integrity of the agreement. As we iterated in part II of this opinion, the court, upon interpreting the agreement, properly concluded that the agreement did not require the plaintiff to reimburse the defendant for several of the disputed expenses that she incurred, and, accordingly, the court did not err in failing to find an arrearage and enter orders with respect to those expenses.

It is well established that, "[i]n a contempt proceeding, even in the absence of a finding of contempt, a trial court has broad discretion to make whole a party

[10] For clarification, we note that the defendant did not ask the trial court to find an arrearage related to an order of child support, nor is that an issue raised in this appeal.

who has suffered as a result of another party's failure to comply with the court order." (Emphasis omitted; internal quotation marks omitted.) *Fuller* v. *Fuller*, 119 Conn. App. 105, 115, 987 A.2d 1040, cert. denied, 296 Conn. 904, 992 A.2d 329 (2010). "Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Pressley* v. *Johnson*, supra, 173 Conn. App. 408. "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Fuller* v. *Fuller*, supra, 115.

The court did not abuse its discretion when it did not enter orders requiring the plaintiff to reimburse the defendant under article 5.3 of the agreement for particular "[c]hildren's expenses" that the defendant unilaterally incurred. For the reasons set forth in part II of this opinion, the court properly concluded that the expenses that the defendant unilaterally incurred for the numerous itemized expenses, including snacks, allowances, haircuts, and clothing, as well as the used automobile, the college coach, and the enrichment experience, were either not covered under article V of the agreement or were not made in good faith. Therefore, the court did not abuse its discretion when it did not enter orders requiring the plaintiff to reimburse the defendant for such expenses.[11]

[11] We note that the court did order the plaintiff to reimburse the defendant for the children's tuition at Choate Rosemary Hall for their senior year. The court found that, although the agreement was "ambiguous and the [plaintiff's] actions do not rise to the level of contempt . . . the intent of the parties was to use the calendar year and not the designated school year (i.e., freshman, sophomore, etc.) as a basis for determining the respective responsibilities of the parties . . . ." The court ultimately found that, under

IV

The defendant next claims that the court erred in concluding that he was not entitled to reimbursement for the cost of the children's dental procedures performed by an out-of-network oral surgeon. Specifically, the defendant claims that, in denying reimbursement for the cost of the out-of-network dental procedures, the court relied on findings of fact that were clearly erroneous. We disagree.

The following additional facts are relevant to this claim. At the evidentiary hearing conducted by the court on December 4 and 6, 2019, both the plaintiff and the defendant testified with respect to the disputed expenses for the children's dental procedures. The defendant testified that the children "needed to get their wisdom teeth pulled. I asked [the plaintiff] to make an appointment. He didn't. I finally did because they had an infection. They had an appointment in . . . April, and a week before my appointment, [the plaintiff] told the kids that he had an appointment for them the next day with an in-network oral surgeon. . . . I ultimately took them to the [out-of-network] dentist, the oral surgeon who [one of the children] had previously had his teeth pulled by, and [the plaintiff] refused to make the payment for an out-of-network oral surgeon." The defendant further testified that the expense for the oral surgeon was incurred in April, 2018. She also testified that she charged the plaintiff 60 percent of the total cost of the procedures but that he paid her only $900,

the agreement, "the children's senior year at Choate Rosemary Hall is the '[fifth] year' . . . contemplated by the parties and that the [plaintiff's] obligation is [100 percent] thereof." The fact that the court, in the absence of a finding of contempt, ordered the plaintiff to reimburse the defendant for the children's boarding school tuition after interpreting the agreement to require him to do so demonstrates that the court was aware of its ability to enter orders to preserve the integrity of the agreement.

and that "[h]e insisted that we use an in-network, [non-board] certified oral surgeon." When asked on cross-examination about whether the plaintiff sent her a list of in-network dentists to be used for the dental procedure, the defendant replied, "[y]es, the night before the appointment." Further, when asked whether the agreement stated that "each party shall obtain the agreement of the other when a child requires nonemergency, nonroutine medical treatment but such approval shall not unreasonably be withheld," the defendant indicated that the agreement did so provide. Finally, the defendant indicated during cross-examination that the plaintiff did not agree with her unilateral choice of an out-of-network dentist and that the plaintiff told her that he would be willing to share the cost to have an in-network dentist to perform the procedure.

The plaintiff testified that the first time he learned that the children needed oral surgery was in mid-April, 2018. The plaintiff testified that, after learning that the children needed oral surgery: "I obtained copies of their dental X-rays. I researched available dentists. . . . I spoke to a dentist on the phone in Stamford, a Dr. William Kim. I went and, in person, met with . . . Kim, [and] showed him the X-rays . . . ." The plaintiff further testified that Kim is an in-network, board certified dentist. After obtaining information from Kim during the initial meeting, the plaintiff testified that he scheduled an appointment for the children to have the necessary procedure performed. The plaintiff testified that, after he made the appointment, he "notified [the defendant] of the date of the appointment and of the doctor's name and bio." This notification occurred in the "[m]iddle of April." The plaintiff further testified that the defendant instead took the children to an out-of-network oral surgeon of her choosing in early June. When asked if he knew why the defendant did not meet or confer with the in-network, board certified dentist that

the plaintiff had referred to her, the plaintiff testified that the defendant "researched the background of the wrong Dr. Kim." The plaintiff testified that he reimbursed the defendant $900 for the dental procedures because he "believed it was the reasonable payment for the services of an in-network doctor."

With respect to the dental expenses, the court found that "[t]he parties do not appear to have a dispute as to the application of their respective shares of these expenses but, rather, to specific expenditures. For instance, the [defendant] seeks 100 [percent] reimbursement from the [plaintiff] for a dental procedure for the children. The [plaintiff] had made long-standing arrangements for the procedure to be done by an in-network dentist, and, at the last minute, the [defendant] arbitrarily changed to an out-of-network oral surgeon, claiming that it was an emergency. The dental surgeon's bill was $5775. . . . The [defendant] did not offer any credible evidence or expert testimony as to the nature of the procedure and much less the necessity that it be performed quickly and by whom. Under all the circumstances, it would be unfair to make the [plaintiff] bear the entire cost over and above the normal charges that he had already made arrangements to have done." (Citation omitted.) The court ultimately determined that "[t]he [plaintiff's] liability for the dental surgery should be limited to 60 [percent] of the cost of the procedure performed by the in-network dentist or oral surgeon."

The defendant claims that the court erred in concluding that she was not entitled to full reimbursement for the cost of the dental procedures performed by the out-of-network oral surgeon because the court made and relied on findings of fact that were clearly erroneous with respect to the dental procedure. In her brief, the defendant asserts that, "[b]ased on the evidence, the trial court found, [t]he [plaintiff] had made long-standing arrangements for the [dental] procedure to be done

by an in-network dentist, and, at the last minute, the [defendant] arbitrarily changed to an out-of-network oral surgeon, claiming that it was an emergency. . . . The trial court proceeded to find that it would be unfair for the [plaintiff] to pay the entire cost of [the] oral surgery, above the amount he would have paid for the in-network dentist. . . . The trial court accordingly denied the relief sought, which was reimbursement of $2450 under article 5.1. . . . *The trial court's denial of the reimbursement request was based on clearly erroneous findings of fact.*" (Citations omitted; emphasis added; internal quotation marks omitted.)

Our review of this claim requires us first to determine whether the facts as found by the court are clearly erroneous and then to interpret the language of the agreement. As we stated previously in this opinion, a separation agreement that has been incorporated into a dissolution decree and its resulting judgment are treated as a contract and construed in accordance with the general principles governing contracts. See, e.g., *Dejana* v. *Dejana*, supra, 176 Conn. App. 114. "The standard of review for the issue of contract interpretation is well established. When . . . there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . Accordingly, our review is plenary. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where 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." (Citation omitted; internal quotation marks omitted.) *Giedrimiene* v. *Emmanuel*, 135 Conn. App. 27, 34, 40

A.3d 815, cert. denied, 305 Conn. 912, 45 A.3d 97 (2012). "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.) *Martin* v. *Martin*, 101 Conn. App. 106, 110, 920 A.2d 340 (2007).

We conclude that the findings of fact made by the court with respect to this claim were not clearly erroneous. The plaintiff testified that he scheduled an appointment for the children to have their teeth extracted by an in-network dentist. The plaintiff testified that he then notified the defendant of the date of the appointment. The plaintiff further testified that the defendant instead took the children to an out-of-network oral surgeon whom she had chosen for an appointment that occurred after the date on which the plaintiff had scheduled the appointment for the children's procedures with the in-network dentist. On the basis of the plaintiff's testimony, there was evidence in the record to support the court's finding that the plaintiff made arrangements for the procedure to be done by an in-network dentist and that, instead, the defendant insisted that the procedures be performed by an out-of-network oral surgeon, claiming that it was an emergency. Further, it is clear from the record that the defendant did not offer any credible evidence or expert testimony as to the nature of the procedure or the necessity that it be performed quickly and by a particular oral surgeon. On the basis of our review of the entire record, we are not persuaded that a mistake has been committed. The findings of the court with respect to the dental procedures, therefore, are not clearly erroneous.

Having concluded that the facts, as found by the court, were not clearly erroneous, we next interpret the language of the agreement to determine whether

the court erred in concluding that the defendant was not entitled to reimbursement for the cost of the children's dental procedures. Article 5.1 of the agreement specifically addresses the payment of the children's unreimbursed medical and dental expenses. It provides: "The [plaintiff] shall pay [60 percent] and the [defendant] shall pay [40 percent] of any reasonably incurred, unreimbursed or uninsured medical expense for the benefit of the children. In year five, and provided that the children are attending boarding or private school, the [plaintiff] shall pay [100 percent] of said expenses. Each party shall obtain the agreement of the other when a child requires non-emergency, non-routine medical treatment, but such approval may not unreasonably be withheld. The parties shall account to each other and make payments to each other in accordance with this obligation on a quarterly basis. Both parties may submit claims directly to the insurer, and reimbursement to the party who advanced payment shall be made within [ten] days after submission of proof of payment." We conclude that the court did not err when it determined that the plaintiff's liability for the dental surgery should be limited to 60 percent of the cost of the procedure performed by the in-network dentist or oral surgeon.

Under the definitive language of the agreement, "[e]ach party shall obtain the agreement of the other when a child requires non-emergency, non-routine medical treatment, but such approval may not unreasonably be withheld." Because the defendant did not present any evidence establishing that the procedure was emergent in nature, article 5.1 required that she obtain the plaintiff's agreement for the procedure. The plaintiff did not agree to have the children's procedure performed by the out-of-network dentist but, rather, indicated that he would share the cost of the procedure performed by an in-network dentist, as was his prerogative under the agreement. We therefore conclude that the court

did not err when it determined that the defendant was not entitled to reimbursement for the cost of procedures performed by the out-of-network oral surgeon. The court properly concluded that the defendant was entitled to reimbursement for 60 percent of the cost of the procedures performed by an in-network dentist or oral surgeon.

V

Finally, the defendant claims that the court abused its discretion by ordering her to pay attorney's fees to the plaintiff under § 46b-87. Specifically, the defendant claims that the court erred in awarding the plaintiff attorney's fees because it also ordered the plaintiff to reimburse the defendant for the children's boarding school tuition under the agreement. We disagree and conclude that the court did not abuse its discretion when it ordered the defendant to pay attorney's fees to the plaintiff because the court found in favor of the plaintiff on the motion for contempt.

Section 46b-87 allows the court in its discretion to award attorney's fees to the prevailing party in a contempt proceeding. See *Gil* v. *Gil*, 110 Conn. App. 798, 806–807, 956 A.2d 593 (2008). Section 46b-87 provides in relevant part: "When any person is found in contempt of an order of the Superior Court entered under section 46b-60 to 46b-62, inclusive, 46b-81 to 46b-83, inclusive, or 46b-86, the court may award to the [party who brought the motion for contempt] a reasonable attorney's fee . . . such sums to be paid by the person found in contempt . . . ." Likewise, "if any such person is found not to be in contempt of such order, the court may award a reasonable attorney's fee to such person." General Statutes § 46b-87.

"Moreover, because the award of attorney's fees pursuant to § 46b-87 is punitive, rather than compensatory, the court properly may consider [a party's] behavior as

an additional factor in determining both the necessity of awarding attorney's fees and the proper amount of any award." *Esposito* v. *Esposito*, 71 Conn. App. 744, 750, 804 A.2d 846 (2002).

On appeal, "[w]e review a trial court's [ruling] as to attorney's fees . . . for an abuse of discretion. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, 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." (Citations omitted; internal quotation marks omitted.) *Gil* v. *Gil*, supra, 110 Conn. App. 802–803.

We conclude that the court did not abuse its discretion when it awarded the plaintiff attorney's fees in the sum of $14,930. Because the court "found [the plaintiff] not to be in contempt of [the] order," it could, in its discretion, "award a reasonable attorney's fee to [the plaintiff]." General Statutes § 46b-87. The court properly exercised its discretion when it concluded that, "as the court does not find the [plaintiff's] actions to arise to the level of wilful contempt, under all the circumstances, it is equitable and appropriate for the court to award him reasonable attorney's fees in the amount of $14,930."

Moreover, the court made several factual findings with respect to the defendant's behavior, which are relevant to the issue of attorney's fees. The court noted that "the [defendant] has offered to the court several exhibits outlining her out-of-pocket expenditures on behalf of the children, the list is very comprehensive, detailing even the smallest, inconsequential items [such] that the court questions her good faith and perspective. In particular, she has made arbitrary expenditures based upon a strict reading of the agreement."

(Emphasis omitted.) The court also noted that operation of the agreement "relies upon the good faith and good judgment of each of the parties, *something the* [*defendant*] *has clearly not exercised*." (Emphasis added.) It is clear that the court considered the behavior of the defendant, namely, her lack of good faith in making expenditures under the agreement, when it awarded attorney's fees to the plaintiff. This was a proper consideration for the court because attorney's fees under § 46b-87 are punitive rather than compensatory, and the court may consider the defendant's behavior in determining the necessity of awarding attorney's fees. See *Esposito* v. *Esposito*, supra, 71 Conn. App. 750.

The fact that the court ordered the plaintiff to reimburse the defendant under the agreement does not impact the court's ability to award attorney's fees to the plaintiff as the prevailing party on the issue of contempt. It is well established that "[c]ourts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment. . . . This is so because [i]n a contempt proceeding, *even in the absence of a finding of contempt*, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with the court order." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Pressley* v. *Johnson*, supra, 173 Conn. App. 408.

In the present case, as we explained previously in this opinion, the court did not find the defendant in contempt of the order because it determined that the agreement was not clear and unambiguous. Upon so finding, the court had the authority, in the exercise of its equitable powers, to fashion an order designed to

protect the integrity of the dissolution judgment. To that end, the court ordered that the plaintiff pay any outstanding tuition for the children's senior year of boarding school and reimburse the defendant for any tuition that she had already paid for that year. Notwithstanding this order, because the plaintiff was the prevailing party *on the issue of contempt*, the court had the discretion, under § 46b-87, to award attorney's fees to the plaintiff. Because we have determined that the court reasonably could have reached the conclusion that it did, we conclude that the court did not abuse its discretion in awarding attorney's fees to the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

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Underinsured motorist benefits; breach of contract; motion for summary judgment; whether plaintiff's written notice to defendant insurer of automobile accident satisfied tolling provision of underinsured motorist insurance policy.
Scott *v.* Scott 24
Dissolution of marriage; postdissolution motion for contempt; award of attorney's fees pursuant to statute (§ 46b-87); whether trial court erred in denying motion for contempt on ground that date in parties' separation agreement for commencement of financial obligations was ambiguous; claim that trial court modified separation agreement's child support order such that plaintiff was not required to pay for certain of children's expenses; claim that trial court abused its discretion by not requiring plaintiff to reimburse defendant for certain expenses defendant unilaterally incurred on behalf of parties' minor children; whether trial court erred in determining that defendant was not entitled to full reimbursement from plaintiff for cost of children's dental procedures; whether trial court abused its discretion in awarding plaintiff attorney's fees under § 46b-87, which permits award of fees to prevailing party in contempt proceeding.
Williams *v.* Mansfield 1
Petition to reopen parking violation assessment; subject matter jurisdiction; mootness; whether trial court improperly dismissed plaintiff's appeal of assessment issued by defendant town's hearing officer as moot; whether trial court improperly denied motion for order of mandamus to compel taxation of costs on ground that plaintiff was not prevailing party.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

THE BANK OF NEW YORK MELLON *v.* ACHYUT M. TOPE et al.,
SC 20592
Judicial District of New Haven

Foreclosure; Whether Defendant's Challenge to Plaintiff's Standing Was Improper Collateral Attack on Earlier Foreclosure Judgment; Whether Appellate Court's Judgment Can Be Affirmed on Alternative Ground That Trial Court Properly Denied Defendant's Motion to Open for Lack of Standing. The plaintiff bank brought this action to foreclose a mortgage on certain real property located on Sherman Avenue in New Haven and owned by the defendant, Achyut M. Tope. The trial court rendered a judgment of foreclosure by sale in November, 2014. The defendant subsequently filed multiple motions to open the judgment and extend the sale date, which were granted by the trial court. The trial court again entered a judgment of foreclosure by sale in November, 2016. The defendant then filed several unsuccessful motions to dismiss, in which he argued that the trial court lacked subject matter jurisdiction over the action because the plaintiff did not have standing to commence it. The defendant again challenged the plaintiff's standing and the subject matter jurisdiction of the trial court in a motion to open and stay the judgment. The trial court denied the motion, and the defendant appealed from the ruling. The Appellate Court (202 Conn. App. 540) affirmed, agreeing with the plaintiff that the appeal was an improper collateral attack on the foreclosure judgment. The Appellate Court noted that the defendant never directly challenged either foreclosure judgment. The Appellate Court found that, because the defendant did not demonstrate, or even argue, that the trial court's lack of subject matter jurisdiction is entirely obvious, he failed to rebut the presumption of the validity of the foreclosure judgment. The Appellate Court noted that the defendant did not challenge the plaintiff's standing or the trial court's jurisdiction until more than two years after filing his appearance and that three different trial court judges rejected his challenge after examining the record, considering his arguments and reviewing the documents that he submitted. The Appellate Court also found that it could not reasonably be argued that the defendant was deprived of a fair opportunity to litigate the issue of standing, as he was afforded multiple opportunities to present his arguments in full to the trial court, and that the defendant failed to furnish any strong policy reason to allow the other-

wise disfavored collateral attack on the foreclosure judgment. It accordingly "decline[d] to consider this collateral attack to the subject matter of the trial court." The defendant filed a petition for certification to appeal, which the Supreme Court granted as to whether his challenge to the plaintiff's standing to prosecute this action and, thus, the trial court's subject matter jurisdiction to adjudicate the matter, was an improper collateral attack on one or more of the foreclosure judgments rendered by the trial court in favor of the plaintiff. If the answer to the first certified question is "no," the Supreme Court will also decide whether the judgment of the Appellate Court should be affirmed on the alternative ground that the trial court properly denied the defendant's motion to open and stay the judgment.

MARIE FAIN *v.* BETHANY BENAK et al., SC 20629
Judicial District of New London

Negligence; Unavoidable Accident; Whether Unavoidable Accident Doctrine Applied to Preclude Finding of Negligence Where Defendant Allegedly Had Lost Control of Her Vehicle due to Unexpected Tire Blowout. The plaintiff and the defendant Bethany Benak were driving in opposite directions on the same road when Benak's vehicle crossed into the plaintiff's lane, the southbound lane, and struck the plaintiff's vehicle. Just prior to the collision, Benak heard a popping sound, and her vehicle pulled to the left, toward the southbound lane. It was later discovered that there was a tear in Benak's front left tire, which appeared to have blown out. At the time the tire burst, Benak did not know the speed at which she was traveling, whether she had applied her vehicle's brakes, or how far she was from the plaintiff's vehicle. The plaintiff subsequently commenced the present action against the defendant Department of Administrative Services (defendant), alleging that Benak was negligent and claiming that the defendant, as Benak's employer and the owner of the vehicle that Benak had been operating, was liable for the plaintiff's damages pursuant to General Statutes § 52-556. In her operative complaint, the plaintiff alleged that Benak was negligent in a number of ways, almost all of which relate to Benak's actions after her tire blew out, including failing to remain in her lane, failing to brake, and general inattentiveness while driving. After a bench trial, the defendant submitted a posttrial brief arguing, inter alia, that the tire blowout was unforeseeable and that, therefore, a finding of negligence was precluded by the "unavoidable accident" doctrine as recognized by our Supreme Court in *Shea* v. *Tousignant*, 172 Conn. 54 (1976), which held that liability

cannot be imposed on the operator of a vehicle who has a sudden medical emergency resulting in the loss of control of the vehicle. In its memorandum of decision, the trial court determined that the plaintiff proved that Benak had "negligently operated her vehicle and caused the collision with the plaintiff's vehicle in one or more of the ways set forth in the operative complaint." The court therefore declined to apply the unavoidable accident doctrine to the facts of the case. The court further noted that there was "no claim that Benak [had] experienced a sudden medical emergency which prevented her [from] maintain[ing] control of the vehicle," and it declined to extend "by analogy . . . the doctrine to a mechanical issue with the vehicle." Accordingly, the court rendered judgment in favor of the plaintiff. The defendant appealed, claiming that the unavoidable accident doctrine precluded a finding of negligence in the absence of proof that Benak had known of the impending blowout or had negligently caused it to occur. The Appellate Court (205 Conn. App. 734) affirmed the trial court's judgment. In rejecting the defendant's claim, the Appellate Court observed that "[t]he concept of unavoidable accident does not excuse a defendant from liability," but, "[r]ather, it contextualizes the question of whether an actor has been negligent." The Appellate Court therefore concluded that, "because the [trial] court found that Benak was negligent, the accident cannot be considered unavoidable or inevitable as a matter of law." The defendant was granted certification to appeal, and the Supreme Court will decide if the Appellate Court correctly determined that the trial court had properly held that the unavoidable accident doctrine did not apply to the facts of this case.

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

NOTICES

Notice of Certification as Authorized House Counsel

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

Certified as of May 11, 2022:

Susan L. Amble	True Green Capital Management

Certified as of June 21, 2022:

Judy A. Melillo	HomeServe USA Corp.

Certified as of July 25, 2022:

Nisha Kushal Bhandary	Franchise World Headquarters, LLC
Wenli Cai	Lone Pine Capital, LLC
Thomas R. Leistner	XPO Logistics
Franklin Rosario	Travelers, Inc.

Certified as of August 1, 2022:

Catherine E. Akenhead	Charter Communications

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Reprimand of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimand ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimand

May 20, 2022: John A. Pinheiro – 307915

July 1, 2022: Robert L. Fiedler - 307165

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 287 Main Street, Second Floor, Suite Two, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel