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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NOT ANOTHER POWER PLANT *v.* CONNECTICUT SITING COUNCIL ET AL.
(SC 20464)

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

Syllabus

Pursuant to statute (§ 16-50k (a)), "no person shall . . . commence the construction or supplying of a facility . . . that may, as determined by the [Connecticut Siting] [C]ouncil, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need . . . issued with respect to such facility or modification by the council."

Pursuant further to statute (§ 16-50p (a) (3) (B)), "[t]he council shall file, with its order, an opinion stating in full its reasons for the decision. The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine . . . [t]he nature of the probable environmental impact of the facility alone and cumulatively with other facilities, including a specification of every significant adverse effect . . . ."

The plaintiff, a nonprofit association formed to promote environmental conservation in the town of Killingly, appealed to the trial court from the decision of the defendant council, which approved the application of the defendant energy company, N Co., for a certificate of environmental compatibility and public need in connection with an electric generating facility that N Co. sought to construct in the town. The plaintiff had intervened in the administrative proceeding pursuant to statute (§ 22a-19 (a) (1)), claiming that approval of the facility would result in the unreasonable pollution and impairment of the public trust in the environment. According to N Co.'s application, the facility would be supplied with natural gas by E Co., which owns a distribution pipeline that extends from a mainline to the site of the proposed facility. For the facility to function, however, E Co. would need to replace approximately two miles of its existing distribution pipeline with an upgraded pipeline that would cross or abut wetlands, a river, and certain preserved or undeveloped lands. The plaintiff moved to dismiss or to stay N Co.'s application, claiming that the council was required to consider the environmental impact of the upgraded pipeline when weighing the public benefit of the facility against the harm that it would cause to the environment under § 16-50p (c) (1) of the Public Utility Environmental Standards Act (act) and that N Co. had neither obtained a commitment as to the design of the upgraded pipeline from E Co. nor fully assessed the environmental impact the upgraded pipeline would have. The council denied the plaintiff's motion and, after hearings, approved N Co.'s appli-

cation for a certificate, without ever considering the potential environmental effects of the upgraded pipeline. The council found that the facility was necessary for the reliability of the electric power supply of the state and, therefore, would be a public benefit, and that the adverse impacts of the facility were not disproportionate, either alone or cumulatively, when compared to the public benefit. On appeal to the trial court, the plaintiff claimed that the council had improperly segmented the project into two components, namely, N Co.'s electric generating facility and E Co.'s upgraded pipeline, to avoid a comprehensive review of the project's overall environmental impact. After rejecting N Co.'s special defense that the plaintiff lacked standing to appeal, the trial court concluded that, although the facility was intertwined with the upgraded pipeline insofar as the facility, as planned, could not operate without it, the council reasonably decided to consider them separately because, under the act, electric generating facilities and fuel transmission lines are separate facilities to be considered under different provisions and submitted by two unrelated parties. The court also observed that E Co. would need to apply for a certificate of environmental compatibility and public need under § 16-50k (a) to construct the upgraded pipeline and stated that it would consider the pipeline's environmental impact at that time. Further, the trial court concluded that the plaintiff had neither pointed to any environmental concerns with the facility itself nor claimed that combining the environmental impact of the facility with that of the upgraded pipeline would result in an increased environmental impact. Accordingly, the trial court rejected the plaintiff's improper segmentation claim, concluded that the plaintiff failed to establish that the council had improperly approved N Co.'s application, and rendered judgment dismissing the plaintiff's administrative appeal. On the plaintiff's appeal, *held*:

1. The trial court correctly concluded that the plaintiff had standing to appeal under § 22a-19 (a) (1) from the council's decision, the plaintiff having asserted a colorable claim of potential impairment of or destruction to the environment by alleging in its complaint that the council's improper segmentation of the project into two separate components, in order to avoid a comprehensive review of the project's overall impact, would result in a substantial likelihood of such impairment or destruction.

2. The plaintiff could not prevail on its claim that the trial court incorrectly determined that the council's failure to consider the environmental impact of E Co.'s future, upgraded pipeline when weighing the public benefit of the electric generating facility against the harm that it would cause to the environment was not arbitrary and capricious:

   a. Contrary to the council's claim, the plaintiff did not waive its claim regarding the council's refusal to consider the environmental impact of the upgraded pipeline by failing to challenge the council's finding that the facility would provide a public benefit in the trial court; the very

reason that the plaintiff argued that the council was required to consider the impact of the upgraded pipeline was that, if it had done so, it might have concluded that the adverse environmental impact of the facility and the upgraded pipeline together outweighed the public benefit, and the plaintiff's counsel expressly raised that argument in the trial court. b. The council was not prohibited under the act from considering the environmental impact of E Co.'s future, upgraded pipeline when considering N Co.'s application for a certificate for the electric generating facility; the language of § 16-50p (a) (3) (B) specifies the environmental factors that the council must consider and address in its written decision, a review of the statutory scheme revealed that the act does not specify matters that the council may not consider when balancing the public benefit of the proposed facility against the harm it would cause to the environment, and this court could perceive no reason why the legislature would have wanted to prohibit the council from considering any information that would be relevant to this balancing process; accordingly, when determining whether a facility under review will have a public benefit, the council is authorized to consider the facts that that facility is interdependent with another facility that does not yet exist and that there is a significant likelihood that the nonexistent facility ultimately may not be approved because its harmful effects, considered together with the harmful effects of the facility under review, could outweigh the public benefit of the facilities considered as a whole; moreover, although the council cannot, as a practical matter consider the actual environmental impact of a future project, the nature and scope of which has yet to be determined, the general notion that the council should weigh the overall benefits that interdependent projects will provide to the public against their overall impact on the environment was supported by both common sense and federal case law disfavoring the use of improper segmentation. c. The council's decision not to consider the potential environmental impact of the upgraded pipeline during the proceedings on N Co.'s application for a certificate for the facility was not arbitrary and capricious: although this court disagreed with the trial court's determination that the plaintiff did not claim that combining the environmental impact of the electric generating facility with that of the upgraded pipeline would result in an increased environmental impact, the plaintiff having very clearly claimed that the sum of their effects would be greater than the effect of either project considered alone and that the cumulative effect should be weighed against the public benefit, the trial court correctly determined that the council did not improperly segment the project on the grounds that the environmental impact of the upgraded pipeline would necessarily be considered by the council in a future proceeding and that the risk and cost of failing to obtain approval of the upgraded pipeline would be borne solely by N Co., which would have to post a decommissioning bond and to develop a decommissioning plan for

restoring the facility site if the council did not ultimately approve the upgraded pipeline.

3. The plaintiff could not prevail on its unpreserved claim that the trial court based its conclusion that the council and N Co. did not improperly segment the project on the incorrect assumption that, under § 16-50k (a), E Co. would be required to apply for a certificate of environmental compatibility and public need in connection with the upgraded pipeline; to the extent that the plaintiff claimed that the trial court failed to recognize that E Co. could evade the council's review by seeking review of the pipeline by another state or federal agency, the plaintiff made no such claim in the trial court, where the plaintiff's counsel expressly stated that she had every reason to believe that the council would thoroughly evaluate the environmental impacts of the pipeline and that her only concern was that the council would not be evaluating the cumulative impact of the facility and the upgraded pipeline, and, accordingly, any such claim was waived; moreover, any error with respect to the trial court's failure to recognize that, under § 16-50k (a), E Co. could file a petition for a declaratory ruling from the council that the upgraded pipeline would not have a substantial adverse environmental effect, rather than applying for a certificate of environmental compatibility and public need, was harmless, as the statutory and regulatory provisions governing petitions for a declaratory ruling from the council were not facially inadequate to ensure that the council would fully and fairly consider the issue, and any claim that the council would not do so in the present case was not ripe for review.

(*One justice concurring separately*; *two justices concurring in part and dissenting in part in one opinion*)

Argued September 10, 2020—officially released September 28, 2021*

Procedural History

Appeal from the decision of the named defendant approving the application by the defendant NTE Connecticut, LLC, for the construction of an electric generating facility, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Affirmed.*

Mary Mintel Miller, for the appellant (plaintiff).

Robert L. Marconi, assistant attorney general, with whom, on the brief, were *William Tong*, attorney gen-

* September 28, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

eral, and *Clare E. Kindall*, solicitor general, for the appellee (named defendant).

Linda L. Morkan, with whom were *Kenneth C. Baldwin*, *James P. Ray* and, on the brief, *Emilee Mooney Scott*, for the appellee (defendant NTE Connecticut, LLC).

Opinion

ROBINSON, C. J. The principal issue in this appeal is whether the named defendant, the Connecticut Siting Council (council), properly refused to consider the environmental impact of installing a gas pipeline to a proposed electric generating facility when weighing the public benefit of the facility against its probable environmental impact pursuant to the Public Utility Environmental Standards Act (act), General Statutes § 16-50g et seq. The defendant NTE Connecticut, LLC (NTE), submitted an application to the council seeking a certificate of environmental compatibility and public need for the construction of an electric generating facility (facility) in the town of Killingly (town) pursuant to the act. Thereafter, the plaintiff, Not Another Power Plant, a nonprofit association formed to promote environmental conservation in the town, intervened in the proceeding pursuant to General Statutes § 22a-19 (a) (1).[1] After conducting hearings, the council issued a decision approving NTE's application. The plaintiff then appealed from the council's decision to the trial court, claiming

[1] General Statutes § 22a-19 (a) (1) provides: "In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

that, when weighing the public benefit of the facility against the harm that it would cause to the environment, the council improperly had failed to consider the environmental impact of a gas pipeline that would have to be installed in the future to provide fuel to the facility. The trial court concluded that the council was not required to consider the impact of the gas pipeline and rendered judgment dismissing the plaintiff's administrative appeal. On appeal to this court,[2] the plaintiff claims that the council's refusal to consider the environmental impact of the future gas pipeline was arbitrary and capricious. In response, the defendants disagree and also challenge the plaintiff's standing to bring this administrative appeal. Although we conclude that the plaintiff had standing, we also conclude that the trial court properly dismissed the plaintiff's administrative appeal. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which were found by the council and the trial court or are undisputed, and procedural history. On August 17, 2016, NTE filed with the council an application for a certificate of environmental compatibility and public need (certificate) pursuant to General Statutes § 16-50k (a).[3] NTE explained in the application that "[n]atural gas will be provided [to the facility] through a firm natural gas fuel supply contract . . . ." The natural gas would be supplied through an upgraded gas pipeline to be constructed and owned by Eversource Energy Service

[2] The plaintiff appealed to the Appellate Court, and we granted NTE's motion to transfer the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[3] General Statutes § 16-50k (a) provides in relevant part: "Except as provided in subsection (b) of section 16-50z, no person shall . . . commence the construction or supplying of a facility . . . that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a 'certificate', issued with respect to such facility or modification by the council. . . ."

Company (Eversource). Eversource currently owns and operates an approximately fifty year old distribution gas pipeline that extends from a mainline located approximately two miles from the proposed facility site. Eversource would replace the distribution pipeline with a new pipeline with a diameter of at least fourteen inches. NTE further explained that it was seeking authorization to use ultra-low sulfur distillate as a fuel for the facility for up to 720 hours per year, although actual use was "expected to occur on the order of several hours once every two to three years and only under the circumstance where natural gas supply is not available."[4]

The plaintiff successfully sought permission to intervene in the proceeding pursuant to § 22a-19 (a) (1), claiming that approval of the facility would result in the unreasonable pollution and impairment of the public trust in the environment.[5] Thereafter, the plaintiff filed a motion for a stay and/or to dismiss the application, in which it claimed that the council was required to consider the environmental impact of the future gas pipeline when weighing the public benefit of the facility against the harm that it would cause to the environment, as required by General Statutes § 16-50p.[6] The plaintiff

[4] The council initially denied NTE's application without prejudice on grounds unrelated to the plaintiff's claims. Thereafter, NTE filed a motion to open and modify the council's decision. The council granted the motion and recommenced the proceedings on NTE's application for a certificate. Consistent with the approach of the parties, we treat the proceedings on NTE's application before and after the council granted NTE's motion to open as a single, continuous proceeding.

[5] The Connecticut Fund for the Environment also intervened in the proceedings on NTE's application for a certificate pursuant to § 22a-19 (a) (1), but it is not a participant in this appeal.

[6] General Statutes § 16-50p provides in relevant part: "(a) (1) In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.

"(2) The council's decision shall be rendered in accordance with the following:

"(A) Not later than twelve months after the filing of an application for a facility described in subdivision (1) or (2) of subsection (a) of section 16-50i

pointed out in the motion that the new pipeline would cross or abut (1) large wetland areas, (2) open space and protected land held by the Wyndham Land Trust, (3) the Bafflin Sanctuary, which is owned by the Connecticut Audubon Society, and the Air Line State Park Trail, (4) a large, undeveloped parcel owned by the Pomfret Rod and Gun Club, and (5) the Quinebaug River. The plaintiff also pointed out that NTE had not obtained a firm commitment as to the design and con-

or subdivision (4) of said subsection (a) if the application was incorporated in an application concerning a facility described in subdivision (1) of said subsection (a); and

"(B) Not later than one hundred eighty days after the filing of an application for a facility described in subdivisions (3) to (6), inclusive, of subsection (a) of section 16-50i, provided the council may extend such period by not more than one hundred eighty days with the consent of the applicant.

"(3) The council shall file, with its order, an opinion stating in full its reasons for the decision. The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine:

"(A) Except as provided in subsection (b) or (c) of this section, a public need for the facility and the basis of the need;

"(B) The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, (i) electromagnetic fields that, whether alone or cumulatively with other effects, impact on, and conflict with the policies of the state concerning the natural environment, (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values, (v) agriculture, (vi) forests and parks, (vii) air and water purity, and (viii) fish, aquaculture and wildlife;

"(C) Why the adverse effects or conflicts referred to in subparagraph (B) of this subdivision are not sufficient reason to deny the application . . . .

* * *

"(c) (1) The council shall not grant a certificate for a facility described in subdivision (3) of subsection (a) of section 16-50i [i.e., any electric generating or storage facility], either as proposed or as modified by the council, unless it finds and determines a public benefit for the facility and considers neighborhood concerns with respect to the factors set forth in subdivision (3) of subsection (a) of this section, including public safety.

* * *

"(3) For purposes of this section, a public benefit exists when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity and a public need exists when a facility is necessary for the reliability of the electric power supply of the state. . . ."

struction of the new pipeline and had not fully assessed the environmental impact that it would have. Accordingly, the plaintiff contended that the council should dismiss NTE's application or stay proceedings on it until the council could consider Eversource's application with respect to the pipeline. The council denied the motion on the ground that "the application was deemed complete by the [c]ouncil on September 15, 2016, and the feasibility of the utility interconnections will be explored during the course of these proceedings."

During the hearings on NTE's application, counsel for the plaintiff asked counsel for NTE, Mark Mirabito, whether it was "fair to say that with respect to th[e] gas pipeline . . . there's no evidence in th[e] record before [the council] for [it] to determine what impacts . . . installation of this gas pipeline will have . . . on the wetlands, open space, state park and land trust lands and the Quinebaug River . . . ." Another attorney for NTE, Kenneth C. Baldwin, objected to the question on the ground that "the [c]ouncil has already determined that it will review those impacts at a future time in an application filed by the appropriate party, in this case, Yankee Gas."[7] The council's chairman, Robert Silvestri, stated, "that is correct." Counsel for the plaintiff then asked for clarification as to whether the council would be considering the environmental impact of the new pipeline. Counsel for the council, Melanie A. Bachman, stated that, "throughout the proceeding, [the council has] had discussions that the pipeline would be the subject of a petition from Yankee Gas if this application is approved. . . . However, [the council is] not even sure if [it is] going to approve the application, or [the council] may modify it. [It] may move it. [The council] may be taking components and [putting] them in differ-

[7] Eversource was formerly known as Yankee Gas Services Company, and the names "Eversource" and "Yankee Gas" were used interchangeably during the proceedings on NTE's application for a certificate.

ent areas. . . . So, it's all somewhat premature to discuss the actual route of the gas lateral . . . . So, although . . . you're not prohibited from asking questions about environmental impact . . . the understanding that we have . . . is that . . . those petitions would be filed by the entities over which they have contracts. But right now, it's a little premature not knowing whether [the council] may decide to modify the facility or approve it at all."

The council found that the proposed facility was "necessary for the reliability of the electric power supply of the state" and, therefore, that it would be a public benefit. The council further concluded, without considering the potential environmental effects of the future gas pipeline, that the facility would not be "in conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic, and recreational values, agriculture, forests and parks, air and water purity, and fish, aquaculture and wildlife, together with all other environmental concerns . . . ." Finally, the council concluded that the adverse impacts of the proposed facility "are not disproportionate either alone or cumulatively with other effects when compared to [the] public benefit, are not in conflict with [the] policies of the [s]tate concerning such effects, and are not sufficient reason to deny the application." Accordingly, it directed that a certificate be issued to NTE.

The plaintiff brought this administrative appeal from the council's decision to the trial court pursuant to General Statutes § 4-183. The plaintiff contended that the council had improperly segmented "the project"—namely, the electric generating facility together with the gas pipeline that would be required to provide fuel to the facility—into separate projects to avoid a comprehensive review of its overall environmental impact. NTE denied the plaintiff's substantive claims and raised the

special defense that the plaintiff lacked standing to bring the administrative appeal. Specifically, NTE contended that, because the council's decision was related only to the electric generating facility, and because the plaintiff made no claim that the construction and operation of *that facility*, standing alone, would cause harm to the environment, the plaintiff lacked statutory standing under § 22a-19 (a) (1). The council also denied the plaintiff's substantive claims.

The trial court rejected NTE's claim that the plaintiff lacked standing, concluding that, because the plaintiff contended that the council should have considered the electric generating facility and gas pipeline as one project, and because it alleged that the gas pipeline was reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the natural resources of the state, its claims were sufficient to establish statutory standing under § 22a-19 (a) (1). Addressing the merits of the plaintiff's claim that the council had improperly segmented the project, the trial court concluded that "[t]he power plant and the theoretical future pipeline are different 'facilities' as defined in the statute, [they] are to be considered under different statutory provisions, and [they] are to be submitted to the council by two unrelated parties. Accordingly, the council . . . reasonably decided to consider them separately."

The trial court acknowledged that the electric generating facility was "intertwined with some form of an upgraded Eversource natural gas pipeline because the facility cannot function as planned and as approved without some form of an upgraded pipeline." The court also concluded, however, that the plaintiff had "not pointed to any [environmental] concerns with the facility itself, [or] any concerns that arise from the combination of the facility with the upgraded pipeline . . . ." The court further observed that the "upgraded pipeline

will need a certificate from the council, so there is no doubt that the council will consider the impacts from any pipeline upgrade, and the council has explicitly stated that [it] will consider the upgraded pipeline when it is presented to it by Eversource." Finally, the trial court noted that, if the council did not approve the upgraded pipeline, NTE would have to post a decommissioning bond and to develop a decommissioning plan for restoring the site of the facility, and the risk and cost of the failure to obtain approval of the gas pipeline would be borne solely by NTE. Accordingly, the court rejected the plaintiff's contention that "improper segmentation" had occurred. Having concluded that the plaintiff failed to establish that the council had improperly approved NTE's application for a certificate, the court rendered judgment dismissing the plaintiff's administrative appeal. This appeal followed.

On appeal, the plaintiff claims that the trial court incorrectly determined that the council was not required to consider the environmental impact of the future gas pipeline when weighing the public benefit of the electric generating facility against the harm that it would cause to the environment. The plaintiff points out that, without the gas pipeline, the facility will effectively be inoperable and, therefore, will have no public benefit. It is therefore clear, the plaintiff contends, that the council must have considered the public benefit of the facility and the pipeline together. To this end, the plaintiff additionally contends that the trial court incorrectly concluded that the environmental impact of the gas pipeline necessarily will be taken into account at some future point because Eversource will be required to apply to the council for a separate certificate before it can install the pipeline. The plaintiff points out that Eversource could request a declaratory ruling from the council that the pipeline would not have a substantial adverse environmental effect, in which case no certificate would be

required. See General Statutes § 16-50k (a). Accordingly, the plaintiff claims that the council also should have considered the environmental impact of the facility and the pipeline together when weighing the public benefit against the harm to the environment and that its refusal to do so was arbitrary and capricious.

In response, the council contends that the plaintiff waived any claim that the council improperly found that the electric generating facility would provide a public benefit by failing to claim in the trial court that the council had improperly balanced the public benefit of the electric generating facility against the harm to the environment. The council also claims that, even if this claim was not waived, it is meritless and that the trial court correctly determined that the council had not improperly segmented the project. With respect to the plaintiff's claim that the trial court incorrectly determined that Eversource will be required to apply for a certificate for the gas pipeline, the council contends that, even if that is the case, the environmental impact of the pipeline would necessarily be considered in any proceeding on a request for a declaratory ruling, and, therefore, any error was harmless. Finally, as an alternative ground for affirming the judgment of the trial court, the council raises the claim that the plaintiff lacked standing to appeal from the council's decision because it failed to allege that the decision would result in the impairment or destruction of the environment.

For its part, NTE claims that the council correctly determined that the act does not authorize the council to consider the environmental impact of future facilities, such as the gas pipeline, that have not yet been proposed or approved. Somewhat inconsistently, NTE also contends that the decision whether to consider the environmental impact of the gas pipeline was discretionary and that the council did not abuse its discretion when it declined to consider it. With respect to the

plaintiff's second claim, NTE contends that the plaintiff did not properly preserve for review the issue of whether NTE will be required to apply for a certificate because it never raised the claim before the council or in the trial court. It further contends that the trial court did not assume that NTE would have to apply for a certificate, but assumed only that the environmental impact of the gas pipeline would have to be considered in some forum. Finally, NTE joins the council in claiming, as an alternative ground for affirmance, that the plaintiff lacked standing to appeal to the Superior Court.

I

Because it implicates the trial court's subject matter jurisdiction, we first address the defendants' claim that the plaintiff lacked standing to appeal from the council's decision because it made no colorable claim that the decision would result in the impairment or destruction of the environment. We disagree.

We begin with the standard of review. "[I]n ruling on a motion to dismiss, the trial court must take 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." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 432–33, 829 A.2d 801 (2003). "Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Internal quotation marks omitted.) *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 226, 105 A.3d 210 (2014).

"This court repeatedly has held that a person who intervenes in an administrative proceeding pursuant to § 22a-19, and who is aggrieved by the agency's decision, is entitled to appeal from that decision pursuant to the statutory provisions governing appeals from the

decisions of that particular agency." *Finley* v. *Inland Wetlands Commission*, 289 Conn. 12, 25–26, 959 A.2d 569 (2008). "An intervenor pursuant to § 22a-19 has standing to bring an appeal from an agency's decision only to protect the natural resources of the state from pollution or destruction." (Internal quotation marks omitted.) Id., 34. "Although a plaintiff seeking to assert a claim under § [22a-19] need not prove [its] case in order to survive a motion to dismiss, [it] nevertheless must articulate a colorable claim of unreasonable pollution, impairment or destruction of the environment." (Internal quotation marks omitted.) *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 289–90, 933 A.2d 256 (2007). "A complaint does not sufficiently allege standing . . . by merely reciting the provisions of § [22a-19], but must set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken." (Internal quotation marks omitted.) *Finley* v. *Inland Wetlands Commission*, supra, 35.

In the present case, the plaintiff alleged in its complaint that the council had impermissibly segmented the project into two separate projects, namely, the electric generating facility and the gas pipeline, "in order to avoid a comprehensive review of [the] facility . . . ." The plaintiff further alleged that "[s]egmentation is to be avoided in order to ensure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions." Read in the light most favorable to the pleader, these allegations necessarily imply that the reason that segmentation is problematic is that it is more likely that an agency conducting an environmental impact review will approve each separate segment of a project than if the agency considered the project as a whole. In turn, this necessarily implies that segmentation could result

in an overall adverse impact on the environment that the agency might well have found to be unreasonable if it had considered the overall impact. Put differently, the improper segmentation of the project by the council would result in a substantial likelihood of the unreasonable impairment or destruction of the environment. We conclude, therefore, that the trial court correctly determined that the plaintiff had standing to bring this appeal.

II

We next address the plaintiff's claim that the trial court incorrectly determined that the council's refusal to consider the environmental impact of the future gas pipeline when weighing the public benefit of the electric generating facility against the harm that it would cause to the environment was not arbitrary and capricious. We disagree.

A

As a preliminary matter, we address the council's contention that the plaintiff waived this claim by failing to raise it in the trial court. Specifically, the council contends that the plaintiff never challenged the council's finding that the facility would provide a public benefit in the trial court but claimed only that the council should have considered the environmental impact of the future gas pipeline. The *very reason* that the plaintiff contended that the council was required to consider the impact of the pipeline, however, was that, if it had done so, it might have concluded that the adverse environmental impact of the facility and the pipeline, considered as a whole, outweighed the public benefit. Indeed, the plaintiff expressly made this argument to the trial court when counsel for the plaintiff stated that, although she had "every reason to believe that [the council] will do a thorough job evaluating what the environmental impacts are of the pipeline [during

future proceedings before the council] . . . what the . . . council actually does is a balancing test." Counsel for the plaintiff further argued that this balancing test was "the essence of what [the defendants are] trying to avoid by segmenting the project . . . ." Specifically, she argued that, because the council assumed that the pipeline would provide a great public benefit by rendering the electric generating facility operable but did not consider the pipeline's potentially severe environmental impact, "the balancing might [well] be off . . . ." In other words, if the council had declined to presume that the pipeline would provide a public benefit by rendering the electric generating facility operable, it could well have found that the public benefit provided by the electric generating facility was speculative. We conclude, therefore, that the plaintiff did not waive this claim.

B

We turn therefore to the merits of the plaintiff's claim that the council had the statutory authority to consider the environmental impact of the future gas pipeline when considering NTE's application for a certificate for the electric generating facility and that its refusal to do so was arbitrary and capricious. We begin our analysis with the standard of review. "Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 676, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001). "The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . arbitrary or capricious or character-

ized by abuse of discretion or clearly unwarranted exercise of discretion." General Statutes § 4-183 (j) (6).

Moreover, "courts should accord deference to an agency's formally articulated interpretation of a statute when that interpretation is both time-tested and reasonable." *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 166, 931 A.2d 890 (2007). Because the council's position that the act prohibits it from considering facilities, such as the gas pipeline, that are not currently existing when determining "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities" pursuant to § 16-50p (a) (3) (B) is not time-tested, our review is de novo. See, e.g., *Woodrow Wilson of Middletown, LLC* v. *Connecticut Housing Finance Authority*, 294 Conn. 639, 644, 986 A.2d 271 (2010).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation

and [common-law] principles governing the same general subject matter . . . .'' (Citation omitted; internal quotation marks omitted.) Id., 644–45.

Accordingly, we turn to the language of the applicable statutes. Section 16-50p (a) (3) provides in relevant part: ''The council shall file, with its order, an opinion stating in full its reasons for the decision. The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine . . . (B) *The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities*, including a specification of every significant adverse effect . . . that, whether alone or cumulatively with other effects, impact[s] on, and conflict[s] with the policies of the state concerning the natural environment . . . (C) Why the adverse effects or conflicts referred to in subparagraph (B) of this subdivision are not sufficient reason to deny the application . . . .'' (Emphasis added.) Section 16-50p (c) (1) provides: ''The council shall not grant a certificate for a facility described in subdivision (3) of subsection (a) of section 16-50i, either as proposed or as modified by the council, unless it finds and determines a public benefit for the facility and considers neighborhood concerns with respect to the factors set forth in subdivision (3) of subsection (a) of this section, including public safety.'' Section 16-50p (c) (3) provides: ''For purposes of this section, a public benefit exists when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity and a public need exists when a facility is necessary for the reliability of the electric power supply of the state.'' ''Facility'' is defined by the act to include ''a fuel transmission facility''; General Statutes § 16-50i (a) (2); and ''any electric generating . . . facility . . . .'' General Statutes § 16-50i (a) (3).

As we have indicated, NTE claims that these provision do not authorize the council to consider the potential environmental impact of a future project—in this case, the pipeline—when balancing the public benefit of a proposed facility against its adverse impact on the environment. Specifically, it contends that, because § 16-50p (a) (3) (B) expressly refers to "the probable environmental impact of *the facility alone* and cumulatively with other *existing facilities*"; (emphasis added); and because § 16-50i (a) defines electric generating facilities and fuel transmission lines as separate facilities, notwithstanding the fact that a particular fuel may be required to render a particular facility operable, the statutes clearly and unambiguously allowed the council to consider *only* the environmental impact of the facility together with the impact other *existing* facilities, and not the impact of a nonexistent fuel transmission line.

We conclude that these statutes did not prohibit the council from considering the potential impact of the gas pipeline in the proceedings on NTE's application for a certificate for the electricity generating facility. Section 16-50p (a) (3) (B) imposes an obligation on the council to "file . . . an opinion *stating in full* its reasons for the decision" that it has issued, in which it must "*find and determine* . . . [t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities . . . ." (Emphasis added.) Thus, the statute specifies the environmental factors that the council *must* consider and that it *must* expressly address in its written decision. The obvious intent of these provisions is to ensure that the council makes fully informed decisions and that it diligently carries out, and is clearly seen to carry out, its statutory duty "to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values" to the extent reasonably possible, consistent with the state's need for "adequate and reli-

able public utility services at the lowest reasonable cost to consumers . . . .'' General Statutes § 16-50g. These provisions also ensure that there is an adequate record for judicial review of the council's decisions. Contrary to NTE's claim, the statute does not specify matters that the council *may not* consider when balancing the public benefit of the proposed facility against the harm that it will cause to the environment. Indeed, we can perceive no reason why the legislature would have wanted to prohibit the council from considering *any* information that would be relevant to this balancing process.

We recognize that, as a purely practical matter, the council cannot consider the *actual* environmental impact of a future project, the nature and scope of which is indeterminate and that has not yet even been proposed. That does not mean, however, that the council is required to ignore the fact that a proposed facility will depend on the future existence of another facility that may well have a significant adverse effect on the environment.[8] Cf. *Delaware Riverkeeper Network* v. *Federal Energy Regulatory Commission*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (''an agency need not foresee the unforeseeable, but . . . [r]easonable forecasting and speculation [are] . . . implicit in [the National Environmental Policy Act (NEPA)], and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry'' (internal quotation marks omitted)). Indeed, we see nothing in

[8] In this regard, we emphasize that we conclude only that, when determining whether the facility under review will have a public benefit, the council is authorized to consider the facts that (1) the facility is interdependent with another facility that does not yet exist, and (2) there is a significant likelihood that the nonexistent facility ultimately may not be approved because the harmful effects of that facility, considered together with the harmful effects of the facility under review, could outweigh the public benefit of the facilities considered as a whole.

the act that would preclude the council from concluding under such circumstances that, for example, the public benefit of the proposed facility is entirely speculative because there is a significant likelihood that the second, future facility will not be approved, and then either (1) staying the proceedings on the application for a certificate pending approval of the second facility,[9] (2) conditioning the approval of the facility under review on approval of the second facility; see General Statutes § 16-50p (a) (1) and (b) (2) (authorizing council to impose conditions on approval); or (3) denying the application for a certificate without prejudice to resubmitting it when the second facility has been approved.[10]

This conclusion finds support in federal case law addressing the problem of "segmentation." In *Stewart Park & Reserve Coalition, Inc.* v. *Slater*, 352 F.3d 545, 559–60 (2d Cir. 2003), the plaintiff claimed that the defendants had improperly attempted to circumvent NEPA by engaging in segmentation, that is, by breaking the proposed construction project into smaller projects and failing to consider the overall impact of the entire project. The United States Court of Appeals for the Second Circuit recognized that "[s]egmentation is to be

[9] The council's attorney stated at oral argument before this court that the council has no authority to defer making a decision on an application for a certificate until proceedings on an interdependent project are completed. The council did not dispose of the plaintiff's motion for a stay and/or to dismiss NTE's application pending review of the gas pipeline on the ground that it had no authority to issue a stay, however, but denied the motion on its merits.

[10] We recognize that, if an application for a facility is not approved because the council has some doubt that the related second facility will be approved, that same problem may arise in the proceedings on the application for a certificate for the second facility, that is, the public benefit of the second facility might be speculative because the first facility has not been approved. Thus, it would appear that joint proceedings on interdependent facilities would be the preferred procedure. Because it is not before us in this appeal, we leave consideration of this procedural matter to the discretion of the council in the first instance.

avoided in order to [e]nsure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions." (Internal quotation marks omitted.) Id., 559. "A project is properly segmented if it (1) connects logical termini and is of sufficient length to address environmental matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements." Id. "A project has been improperly segmented, on the other hand, if the segmented project has no independent utility, no life of its own, or is simply illogical when viewed in isolation." Id. Similarly, the court in *Delaware Riverkeeper Network* v. *Federal Energy Regulatory Commission*, supra, 753 F.3d 1304, recognized that "[a]n agency impermissibly segments NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration. The [United States] Supreme Court has held that, under NEPA, proposals for . . . actions that will have cumulative or synergistic environmental impact [on] a region . . . pending concurrently before an agency . . . must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action."[11] (Internal quotation marks

[11] NTE contends that the plaintiff "offers this court no basis on which it could unilaterally adopt [the federal case law disfavoring segmentation] based on the language and construct of [the act]." NTE further contends that the act bars the application "of this extratextual doctrine." We recognize that, unlike the act, federal law *requires* an agency conducting an environmental review pursuant to NEPA to consider "both 'connected actions' and 'similar actions.' [40 C.F.R. § 1508.25 (a) (1) and (3) (2014)]. Actions are 'connected' if they trigger other actions, cannot proceed without previous or simultaneous actions, or are 'interdependent parts of a larger action and depend on the larger action for their justification.' [Id., § 1508.25 (a) (1)]. And actions are 'similar' if, 'when viewed with other reasonably foreseeable or proposed agency actions, [they] have similarities that provide a basis for

omitted.) Id., 1313, quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976).

We recognize that, as the defendants in the present case contend and as we have already suggested, the specific rule of *Stewart Park & Reserve Coalition, Inc.* v. *Slater*, supra, 352 F.3d 559, namely, that agencies must consider the actual environmental impact of interdependent projects, cannot apply when the facility under review will be interdependent with a nonexistent facility, the scope and nature of which is then unknown. We also recognize that these federal cases did not involve a situation in which the proposals for the interdependent projects will be submitted by different parties. Nevertheless, the general notion that the council should weigh the overall benefits that interdependent projects will provide to the public against their overall impact on the environment is simply a matter of common sense. As the plaintiff in the present case points out, if the environmental impact of a future facility that will be interdependent with the facility under review is entirely unknown, whether the public benefit of the facility under review outweighs its environmental impact must also be unknown. It is possible that the facility will have *no* public benefit because it is possible that the future facility will not be approved. Moreover, as we have also suggested, there are procedural mechanisms by which the council can overcome the difficul-

evaluating their environmental consequences together, such as common timing or geography.' [Id., § 1508.25 (a) (3)]." *Delaware Riverkeeper Network* v. *Federal Energy Regulatory Commission*, supra, 753 F.3d 1309. We have already concluded, however, that there is no language in the act that *prohibits* the council from considering any relevant information when balancing the public benefit of a proposed project against the harm that it will cause to the environment. Although the existence of connected or similar facilities may not always be relevant to the council's statutorily mandated balancing process under the act, the fact that the facility under review will require the future installation of an interdependent facility may well be relevant because, if the future facility is *not* approved, the facility under review will provide *no* public benefit.

ties posed by the facts that the nature and scope of a future project is currently unknown and a different party will be seeking approval for the project.

In support of their argument that the act does not authorize the council to consider an interdependent facility that does not yet exist when balancing the public benefit that will be provided by a proposed facility against the harm that it will cause to the environment, the defendants cite two Superior Court cases, *New Haven* v. *Connecticut Siting Council*, Docket No. CV-02-0513195-S, 2002 WL 847970 (Conn. Super. April 9, 2002) (*New Haven I*), and *New Haven* v. *Connecticut Siting Council*, Superior Court, judicial district of New Britain, Docket No. CV-02-0513195-S (August 21, 2002) (33 Conn. L. Rptr. 187) (*New Haven II*). In *New Haven I*, the plaintiffs, the city of New Haven and the attorney general, sought a stay pending the trial court's ruling on their administrative appeal from the council's approval of the installation of an electric transmission cable under Long Island Sound. See *New Haven* v. *Connecticut Siting Council*, supra, 2002 WL 847970, *1. The plaintiffs contended that state environmental law, as well as NEPA, required the council to consider the cumulative impact of the cable and other cables when balancing its public benefit against the harm that it would cause to the environment. See id. The Superior Court noted that, under General Statutes (Rev. to 2001) § 16-50p (c) (2) (B), the council was required to consider " 'every single adverse and beneficial effect that, whether alone or cumulatively with other effects, conflict[s] with the policies of the state concerning the natural environment . . . .' " Id. The court concluded that the statute required the council to consider only the effects of the facility under review and not the effects of other, future facilities. Id., *2. The court further concluded that, even if the case law construing NEPA applied to the act, that case law "requires that an

entity filing an environmental impact statement address related proposals only when the project in question has no 'independent utility.' " Id.

In *New Haven II*, the Superior Court's decision on the merits of the plaintiffs' appeal, the court addressed these claims again, and it again concluded that the controlling statutory provisions did not require the council to consider the environmental effects of other facilities that were planning to seek certificates. See *New Haven* v. *Connecticut Siting Council*, supra, 33 Conn. L. Rptr. 194. The court stated that "[i]t is entirely logical for an agency to consider only the environmental impact of the proposal before it, and then take that impact into account when evaluating subsequent proposals." Id. With respect to the plaintiffs' reliance on federal case law applying NEPA, the court concluded that General Statutes (Rev. to 2001) § 16-50g, which provided that one of the purposes of the act is to " 'provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria,' " does not make every regulation of the federal Council on Environmental Quality and the United States Environmental Protection Agency regarding federal environmental quality standards and criteria applicable to the council. Id., 196.

We conclude that these cases do not support the defendants' position. The court in *New Haven I* held only that, even assuming that federal case law applying NEPA applies to the act, it would not require the council to consider the environmental impact of future facilities when those facilities *are not interdependent* with the facility under review; see *New Haven* v. *Connecticut Siting Council*, supra, 2002 WL 847970, *2; a conclusion with which we entirely agree. We also agree with the court's conclusion in *New Haven II* that, if future facili-

ties are not interdependent with the facility under review, it would make sense for the council to consider the cumulative effects of the facilities when the future facilities submit applications for certificates. See *New Haven* v. *Connecticut Siting Council*, supra, 33 Conn. L. Rptr. 194. Finally, we agree with the Superior Court's statement that § 16-50g does not incorporate every regulation and procedural requirement of federal environmental law into the act. See id., 196. As we have already indicated, however, the federal case law addressing the segmentation of interdependent projects finds a basis not only in federal regulations but also in commonsense notions that are equally applicable to the interpretation and application of the state act. Accordingly, we conclude that the act did not prohibit the council from considering an interdependent facility that does not yet exist when balancing the public benefit that will be provided by a proposed facility against the harm that it will cause to the environment.

C

We now turn to the record in the present case to determine whether the trial court correctly determined that the council's refusal to consider the potential environmental impact of the gas pipeline during the proceedings on NTE's application for a certificate was not arbitrary and capricious. The trial court concluded that the electric generating facility and the gas pipeline were interdependent because the facility would not be able to operate as intended without the pipeline, and the defendants do not seriously challenge that conclusion on appeal. The trial court also concluded, however, that the council had not improperly segmented the project into two separate projects because (1) the plaintiff had not claimed that the combination of the electric generating facility with the gas pipeline would give rise to environmental concerns, (2) the council would consider the environmental impact of the gas pipeline in a future

proceeding, and (3) if the electric generating facility was unable to operate as intended, NTE would have posted a decommissioning bond and developed a decommissioning plan to restore the site of the facility, and the risk and cost of the failure to obtain approval for the gas pipeline would be borne solely by NTE, not by ratepayers.

We do not entirely agree with this analysis. Specifically, we do not agree with the trial court's conclusion that the plaintiff did not claim that combining the environmental impact of the electric generating facility with the impact of the gas pipeline would result in an increased environmental impact. Although the plaintiff made no claim that the combination would be synergistic, that is, that the facility and the pipeline together would produce an effect *greater* than the sum of their separate effects, it very clearly claimed that the sum of their effects would be greater than the effect of either project considered alone and that the cumulative effect should be weighed against the public benefit.

Nevertheless, we conclude that the trial court correctly determined that the council did not improperly segment the project because the environmental impact of the gas pipeline must be considered by the council in a future proceeding and because NTE alone would bear the cost and risk if the pipeline is not approved. As we discuss more fully in part III of this opinion, before it can grant a certificate to Eversource to install the gas pipeline, the council must find either that the pipeline will have no significant adverse environmental effect or that its impact, considered together with the impact of other existing facilities, is outweighed by the public benefit that it will provide. If the gas pipeline will have no significant impact, it follows that the cumulative impact of the facilities will not be significantly greater than the impact of the electric generating facility alone. If the pipeline will have a significant adverse

environmental effect, because the impact of the electric generating facility has already been determined, and because that impact would clearly be relevant, nothing would preclude the council from balancing the cumulative impacts of the two facilities against the public benefit that they would provide.[12] See General Statutes § 16-50p (a) (3) (B) (council must consider "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities").[13] If the council determines in that subsequent proceeding that the cumulative environmental impact outweighs the public benefit, the burden of decommissioning any portion of the electric generating facility that has already been built and restoring the site to its previous condition would be borne entirely by NTE. We conclude, therefore, that the trial court correctly determined that the council's refusal to consider the potential environmental impact of the gas pipeline during the proceedings on NTE's application for a certificate was not arbitrary and capricious.[14]

[12] As the trial court stated, we "must assume that the council and the Department of Energy and Environmental Protection [department] will properly perform their statutory functions when considering any future upgraded pipeline and will not be improperly pressured, as alleged by [the plaintiff], because of the council's prior issuance of the certificate for the [electric generating] facility." Any claim that the council and the department will be improperly influenced by the fact that NTE's application for a certificate was granted, in the subsequent proceedings on the gas pipeline, whatever form they may take, is not ripe for adjudication in this appeal.

[13] Although the parties do not address the issue, it seems clear that the term "existing facilities" was intended to include a facility for which a certificate has been issued, regardless of whether the facility has been fully constructed, if the existence of the facility would be relevant to the council's balancing procedure. Again, we can perceive no reason why the legislature would have wanted the council to ignore relevant information in making its determination.

[14] The concurring and dissenting opinion concludes that, because "the council reached a decision in this matter while laboring under the legally mistaken understanding that it could not exercise its discretion to deny or defer consideration of the pending application on the basis of the cumulative environmental impact of the electric generating facility and the future gas pipeline on which the operation of that facility will depend," a remand is

III

Finally, we address the plaintiff's claim that the trial court's conclusion that the defendants did not improperly segment the project was based on the incorrect assumption that Eversource would be required to apply for a certificate for the gas pipeline. NTE contends that this claim was waived because the plaintiff raised no claim in the trial court that Eversource could evade review by the council of the gas pipeline. We agree with NTE that the plaintiff failed to preserve for review any claim that Eversource could evade review by the council by seeking another agency's review. With respect to the plaintiff's claim that the trial court failed to recognize that Eversource could seek a declaratory ruling from the council that the gas pipeline would have no

necessary so that the council can properly exercise its discretion. We recognize that, ordinarily, an agency's failure to exercise its discretion because of a mistaken understanding of the law constitutes an abuse of discretion. Even if we were to assume, however, that the council believed that it was statutorily prohibited from considering the facts that the pipeline is an interdependent facility and that it has not yet been approved when weighing the public benefit of the electric generating facility against its environmental impact, we conclude that, under the specific circumstances of the present case, a remand is not necessary. As the matter now stands, the environmental impact of the electric generating facility must be considered during the certificate proceedings for the pipeline, unless Eversource files and the council grants a petition for a declaratory ruling that the pipeline will have no substantial adverse environmental effect. See part III of this opinion. If the pipeline ultimately is not approved and the electric generating plant cannot operate, NTE has posted a decommissioning bond to restore the site. If, as the concurring and dissenting opinion urges, the matter were remanded to the council for further proceedings, the council could stay the proceedings pending action on the pipeline, approve the certification conditioned on approval of the pipeline or deny the certificate without prejudice to reapplying if the pipeline is approved. In any case, the result would be the functional equivalent of the situation as it now stands: the cumulative environmental impact of the electric generating facility and the pipeline would be considered during the proceedings on the pipeline unless it were determined that the pipeline will have no substantial adverse environmental effect and, if the pipeline were not approved, NTE would be unable to complete the electric generating plant and the site would be restored.

substantial environmental impact instead of applying for a certificate, we conclude that any error was harmless.

We first address NTE's claim that the plaintiff waived this issue. The following additional procedural history is relevant to our resolution of this claim. The trial court and counsel for the plaintiff had the following exchange:

"The Court: [I]t seems, at least, from what your complaint says, that [the council is] going to consider whatever issues are associated with the pipeline when the application comes to [it]. So it doesn't seem like there's going to be anything missed. Explain to me why that's not right."

"[The Plaintiff's Counsel]: . . . I have every reason to believe that [the council] will do a thorough job evaluating what the environmental impacts are of the pipeline, but what the . . . council actually does is a balancing test. So [it does not] just look at environmental impacts. . . . [It's] not the Department of Environmental Protection. [The council is] not just concerned about that. [It's] also concerned about the benefit . . . to state residents, and [it has] to kind of do a balancing here. So . . . one of the problems with doing it in this order is [that the council is] going to say . . . there are going to be very significant environmental impacts . . . . [B]ut on the other side, if [the council] allow[s] this to go in, you have a very big benefit that there's going to be this operating national gas plant, and that's going to be great for the ratepayers . . . .

* * *

"And so . . . that is . . . the essence of what [the defendants are] trying to avoid by segmenting the project . . . . [J]ust because we're not appealing environmental impacts does not mean there weren't environmental impacts from the power plant. . . . So there were those impacts plus the impacts from the

pipeline that you're going to balance on the other side with the benefit to the state. And so, now, instead of having the whole picture . . . you're just looking at the pipeline where it looks like the upside might be really high . . . ."

Thus, the plaintiff made no claim to the trial court that Eversource could evade review by the council of the gas pipeline. To the contrary, counsel for the plaintiff stated that she had "every reason to believe that [the council] will do a thorough job evaluating what the environmental impacts are of the pipeline . . . ." She was concerned only that the council would not be evaluating the *cumulative* environmental impacts of the electric generating facility and the pipeline. We conclude, therefore, that, to the extent that the plaintiff claims on appeal that the trial court failed to recognize that Eversource could evade review by the council by seeking review of the pipeline by another state agency, such as the Department of Energy and Environmental Protection (department), or the Federal Energy Regulatory Commission (commission), any such claim was not preserved for review. See, e.g., *Crawford v. Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009) (this court "will not review a claim unless it was distinctly raised at trial"); see also *State* v. *Cruz*, 269 Conn. 97, 105, 848 A.2d 445 (2004) ("a party who induces an error cannot be heard to later complain about that error").

We further note that, even if the issue had been preserved for review, the plaintiff has not explained how Eversource could evade review by the council by submitting a petition for a declaratory ruling to the department when § 16-50k expressly provides that the issue of whether the proposed facility will cause a substantial adverse environmental effect must be "determined by the *council* . . . ." (Emphasis added.) General Statutes § 16-50k (a). In addition, although the plaintiff points

out that the department submitted a document to the council during the proceedings on NTE's application for a certificate in which it inquired whether the council or the commission will have jurisdiction over the gas pipeline, and although the council would not have jurisdiction over the facility if the commission had jurisdiction over it; see General Statutes § 16-50k (d) ("[t]his chapter shall not apply to any matter over which any agency . . . of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction"); the plaintiff points to no evidence that would support a conclusion that the commission might have jurisdiction because the pipeline might cross state lines. To the contrary, although the parameters of the pipeline were not fully determined at the time of the proceedings on NTE's application, the council expressly found that the new pipeline would be installed adjacent to the existing pipeline, which does not cross state lines. The plaintiff also has made no claim that proceedings before the commission would be inadequate to protect the environmental interests that the act was intended to protect.

With respect to the plaintiff's claim that the trial court failed to recognize that, as the defendants concede, Eversource could seek a declaratory ruling from the council instead of seeking a certificate, we conclude that any error was harmless. Under § 16-50k (a), an entity that intends to construct a facility subject to the act is required to obtain a certificate only if the facility "may, as determined by the council, have a substantial adverse environmental effect in the state . . . ." An entity that believes that a facility will not have a substantial adverse environmental effect may file a petition for a declaratory ruling to that effect with the council pursuant to General Statutes § 4-176 (a)[15] and § 16-50j-39

[15] General Statutes § 4-176 (a) provides: "Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability

(a) of the Regulations of Connecticut State Agencies.[16] Pursuant to § 16-50j-40 (b) of the regulations,[17] the council is not required to conduct a hearing on the petition but may do so if it deems a hearing necessary or helpful. Pursuant to § 16-50j-40 (c)[18] of the regulations, the council may issue a decision within sixty days after receiving the petition or it may decide not to issue a decision, stating the reasons for its action.

The plaintiff in the present case contends that the trial court's assumption that Eversource would be

to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency."

[16] Section 16-50j-39 (a) of the Regulations of Connecticut State Agencies provides: "Any interested person may at any time request a declaratory ruling of the Council with respect to the applicability to such person of any statute, or the validity or applicability of any regulation, final decision, or order enforced, administered, or promulgated by the Council. Such request shall be addressed to the Council and sent to the principal office of the Council by mail or delivered in person during normal business hours. The request shall state clearly and concisely the substance and nature of the request; it shall identify the statute, regulation, final decision, or order concerning which the inquiry is made and shall identify the particular aspect to which the inquiry is directed. The request for a declaratory ruling shall be accompanied by a statement of any data, facts, and arguments that support the position of the person making the inquiry. Where applicable, Sections 16-50j-13 to 16-50j-17, inclusive, of the Regulations of Connecticut State Agencies govern requests for participation in the proceeding."

[17] Section 16-50j-40 (b) of the Regulations of Connecticut State Agencies provides: "If the Council deems a hearing necessary or helpful in determining any issue concerning the request for a declaratory ruling, the Council shall schedule such hearing and give such notice thereof as shall be appropriate. The contested case provisions of Sections 16-50j-13 to 16-50j-34, inclusive, of the Regulations of Connecticut State Agencies shall govern the practice and procedure of the Council in any hearing concerning a declaratory ruling."

[18] Section 16-50j-40 (c) of the Regulations of Connecticut State Agencies provides: "Within 60 days after receipt of a petition for a declaratory ruling, the Council in writing shall: (1) issue a ruling declaring the validity of a regulation or the applicability of the provision of the Connecticut General Statutes, the regulation, or the final decision in question to the specified proceedings; (2) order the matter set for specified proceedings; (3) agree to issue a declaratory ruling by a specified date; (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under Section 4-168 of the Connecticut General Statutes, on the subject; or (5) decide not to issue a declaratory ruling, stating the reasons for its action."

required to submit an application for a certificate was harmful because applications for certificates and petitions for declaratory rulings "require vastly different levels of preparation and scrutiny." Specifically, it contends that, unlike an application for a certificate, a petition for a declaratory ruling does not trigger a requirement for a hearing, does not require the council to render a decision and does not expressly require the petitioner to submit specific detailed information about the proposed project. Cf. General Statutes § 16-50*l* (a) (1).[19]

[19] General Statutes § 16-50*l* (a) provides in relevant part: "To initiate a certification proceeding, an applicant for a certificate shall file with the council an application, in such form as the council may prescribe . . . . An application shall contain such information as the applicant may consider relevant and the council or any department or agency of the state exercising environmental controls may by regulation require, including the following information:

"(1) In the case of facilities described in subdivisions (1), (2) and (4) of subsection (a) of section 16-50i: (A) A description, including estimated costs, of the proposed transmission line, substation or switchyard, covering, where applicable underground cable sizes and specifications, overhead tower design and appearance and heights, if any, conductor sizes, and initial and ultimate voltages and capacities; (B) a statement and full explanation of why the proposed transmission line, substation or switchyard is necessary and how the facility conforms to a long-range plan for expansion of the electric power grid serving the state and interconnected utility systems, that will serve the public need for adequate, reliable and economic service; (C) a map of suitable scale of the proposed routing or site, showing details of the rights-of-way or site in the vicinity of settled areas, parks, recreational areas and scenic areas, residential areas, private or public schools, child care centers, as described in section 19a-77, group child care homes, as described in section 19a-77, family child care homes, as described in section 19a-77, licensed youth camps, and public playgrounds and showing existing transmission lines within one mile of the proposed route or site; (D) a justification for adoption of the route or site selected, including comparison with alternative routes or sites which are environmentally, technically and economically practical; (E) a description of the effect of the proposed transmission line, substation or switchyard on the environment, ecology, and scenic, historic and recreational values; (F) a justification for overhead portions, if any, including life-cycle cost studies comparing overhead alternatives with underground alternatives, and effects described in subparagraph (E) of this subdivision of undergrounding; (G) a schedule of dates showing the proposed program of right-of-way or property acquisition, construction,

We are not persuaded. We cannot conclude that the statutory and regulatory provisions governing petitions for a declaratory ruling from the council that a proposed facility will have no substantial adverse environmental effect for purposes of § 16-50k (a) are facially inadequate to ensure that the council will fully and fairly consider the issue, and any claim that the council will not do so in the present case is not yet ripe for review.[20] See footnote 12 of this opinion. If Eversource seeks a declaratory ruling and, after full and fair consideration of the issue, the council determines that the facility would have no substantial environmental effect, that would obviate the need for the procedural requirements applicable to an application for a certificate because the very purpose of those requirements is to allow the council to balance substantial harm to the environment against the public benefit provided by a facility. Accordingly, we conclude that any error by the trial court was harmless because there is no reasonable likelihood that the trial court would have reached a different conclusion if it had recognized that Eversource could file a petition for a declaratory ruling instead of an applica-

completion and operation; (H) an identification of each federal, state, regional, district and municipal agency with which proposed route or site reviews have been undertaken, including a copy of each written agency position on such route or site; and (I) an assessment of the impact of any electromagnetic fields to be produced by the proposed transmission line . . . ."

[20] To the extent that the plaintiff contends that the fairness of the council's ruling on a petition for a declaratory ruling might never be subject to review because it is possible that the plaintiff might not participate in the proceedings on any such petition, we conclude that the fact that the plaintiff might choose not to intervene in the proceedings does not render them inadequate. If the plaintiff is not permitted to intervene in any such proceedings, or if it intervenes and believes that the proceedings are unfair, it would be entitled to appeal. See *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 676, 714, 99 A.3d 1038 (2014) (plaintiff intervened in proceedings on petition for declaratory ruling pursuant to § 22a-19 (a) (1) and had standing to claim on appeal that council's procedures deprived it of common-law right to fundamental fairness).

tion for a certificate. See *Manning* v. *Michael*, 188 Conn. 607, 611, 452 A.2d 1157 (1982) ("[t]he burden of proving harmful error rests on the party asserting it . . . and the ultimate question is whether the erroneous action would likely affect the result" (citation omitted)).

The judgment is affirmed.

In this opinion McDONALD, MULLINS and KAHN, Js., concurred.

McDONALD, J., concurring. Although I concur in the result that the majority reaches and join in the court's judgment, I am not persuaded by the majority's analysis of the Public Utility Environmental Standards Act, General Statutes § 16-50g et seq., or its conclusion that the act did not preclude the named defendant, the Connecticut Siting Council, "from considering an interdependent facility that *does not yet exist* when balancing the public benefit that will be provided by a proposed facility against the harm that it will cause to the environment." (Emphasis added.) Part II B of the majority opinion. In my view, that conclusion is inconsistent with the command of General Statutes § 16-50p (a) (3), which provides in relevant part: "The council shall file, with its order, an opinion stating in full its reasons for the decision. The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine:

* * *

"(B) The nature of the probable environmental impact of the facility *alone* and cumulatively with other *existing facilities* . . . ." (Emphasis added.)

When the controlling statute explicitly provides that the council can consider only the facility that is the subject of the application before it alone and cumulatively with "other existing facilities," it is improper, in

my view, to go beyond that language and allow the council to consider nonexistent facilities that may or may not be the subject of future applications that would be submitted, if at all, by completely separate applicants. To do otherwise excises "existing" from the statute. Applications filed with the council are unusually technical and remarkably detailed, and the majority does not explain how the council should evaluate the probable environmental impacts of facilities for which it does not have that detailed information.

The legislature included the word "existing" in the statute for a reason, and the majority opinion undermines the legislature's choice by extending the authority of the council to permit consideration of nonexistent, hypothetical facilities when evaluating a proposed facility. To the extent that the plaintiff, Not Another Power Plant, has expressed concerns with segmentation of applications for interrelated facility projects, the resolution of those concerns are policy decisions for the legislature to make, not this court.

ECKER, J., with whom D'AURIA, J., joins, concurring in part and dissenting in part. I agree with parts I, II A, and II B of the majority opinion, in which the majority concludes that the plaintiff, Not Another Power Plant, has standing to bring this appeal and did not waive its claim that the trial court incorrectly determined that the refusal of the named defendant, the Connecticut Siting Council (council), to consider the environmental impact of the future gas pipeline was legally erroneous, and that the council proceeded under the legally erroneous belief that the relevant provisions of the Public Utility Environmental Standards Act (act), General Statutes § 16-50g et seq., precluded it from considering the environmental impact of the future gas pipeline when balancing the public benefit of the proposed electric generating facility against the harm that it will cause to the environment. Unlike the majority, however, I

believe that this latter holding requires us to reverse the judgment of the trial court and to remand the present case to that court with direction to remand it to the council to reconsider its approval of the application filed by the defendant NTE Connecticut, LLC (NTE), in light of its discretion to consider the potential environmental impact of the future gas pipeline. For that reason, I respectfully dissent in part.

The majority correctly observes that General Statutes § 4-183 (j) (6) requires a court to affirm an agency decision unless it finds " 'that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.' "[1] Part II B of the majority opinion. My agreement with the majority opinion, as I stated, also includes the conclusion that the council erroneously construed the act to prohibit it from considering the potential environmental impact of the gas pipeline in the underlying proceedings. That is, the council reached a decision in this matter while laboring under the legally mistaken understanding that it could not exercise its discretion to deny or defer consideration of the pending application on the basis of the cumulative environmental impact of the electric generating facility and the future gas pipeline on which the operation of that facility will depend. To the contrary, as the majority concludes, "the act did not prohibit the council from considering an interdependent facility that does not yet exist [namely, the pipeline] when balancing the public benefit that will be provided by a proposed facility against the harm that it will cause to the environment." Id.

[1] As the majority states, de novo review is appropriate here because the agency's interpretation of the relevant statutory provisions is not "time-tested . . . ." (Internal quotation marks omitted.) Part II B of the majority opinion.

My agreement with the majority ends there because, in my view, the council's "failure to exercise its discretion constituted an abuse of discretion." *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986); see also *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 609, 181 A.3d 550 (2018) (remand for hearing was appropriate "because the trial court improperly failed to exercise its discretion" (internal quotation marks omitted)); *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 256, 137 A.3d 748 (2016) ("the court's failure to recognize its authority to act constituted an abuse of discretion"). When an administrative agency does not recognize or exercise its discretion due to a misinterpretation of a rule or statute, it abuses that discretion. In other words, an agency, "vested with discretion, abuses that discretion when it behaves as if it has no other choice than the one it has taken, or when it makes a decision for which there is not adequate support." *Bennington Housing Authority* v. *Bush*, 182 Vt. 133, 139, 933 A.2d 207 (2007); see also *Fisher* v. *Commissioner for Internal Revenue*, 45 F.3d 396, 397 (10th Cir. 1995) (tax commissioner "failed to demonstrate that she had exercised her discretion and thereby abused that discretion"); *United States ex rel. Adel* v. *Shaughnessy*, 183 F.2d 371, 372 (2d Cir. 1950) ("[t]he courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion" (footnote omitted)); *Litterer* v. *Judge*, 644 N.W.2d 357, 362 (Iowa 2002) ("an agency that has authority to act but fails to exercise that authority based [on] a false belief that there is no such authority abuses its discretion"); *Clark Fork Coalition* v. *Dept. of Environmental Quality*, 347 Mont. 197, 209, 197 P.3d 482 (2008) ("when an agency, because of a misinterpretation of its rule, does not exercise its discretion it abuses its discretion"); 3 H. Koch & R. Murphy, Administrative Law and Practice (3d Ed. 2021)

§ 9:27 [4] ("[f]ailure to exercise discretion might be an abuse of discretion"); 73A C.J.S. 322, Public Administrative Law and Procedure § 416 (2004) ("[a]n agency that has authority to act but fails to exercise that authority based upon a false belief that there is no such authority abuses its discretion").

The majority concludes that, notwithstanding the council's failure to exercise its discretion, the council did not arbitrarily and capriciously refuse to consider the potential environmental impact of the gas pipeline because that impact will be considered in a future proceeding at which "the council must find either that the pipeline will have no significant adverse environmental impact or that its impact, considered together with the impact of other existing facilities, is outweighed by the public benefit that it will provide." Part II C of the majority opinion. It is true that the council could have arrived at the very same result in the proper exercise of its discretion. But that is not the standard by which error is measured in this context. Although the council *could have* arrived at the same conclusion had it been aware of its discretionary authority, and nonetheless decided to defer consideration of the pipeline's environmental impact until a future proceeding on an application seeking a certificate for that pipeline, it *also* could have decided to consider the impact of the two interrelated projects in a single proceeding. That is the point. The council had the discretion to choose either course, but it was not aware of its discretion and erroneously believed that it had no choice.

We do not know what the council would have chosen to do if it had exercised its discretion, and we must remand the matter to the council so that it may decide whether to consider the environmental impact of the

future gas pipeline when weighing the public benefit of the proposed electric generating facility against its probable environmental impact under § 16-50g.[2] See *Miami Nation of Indians of Indiana, Inc.* v. *United States Dept. of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001) (administrative agency's "[f]ailure to exercise discretion, however uncanalized that discretion, is an abuse of discretion," and "the remedy is to remand for the exercise of that discretion"), cert. denied sub nom.

[2] The majority acknowledges that, "ordinarily, an agency's failure to exercise its discretion because of a mistaken understanding of the law constitutes an abuse of discretion." Footnote 14 of the majority opinion. It concludes nevertheless that a remand is not required under the specific circumstances of the present case because "the result [of a remand] would be the functional equivalent of the situation as it now stands: the cumulative environmental impact of the electric generating facility and the pipeline would be considered during the proceedings on the pipeline unless it were determined that the pipeline will have no substantial adverse environmental effect and, if the pipeline were not approved, NTE would be unable to complete the electric generating plant and the site would be restored." Id. Perhaps, but perhaps not. As the majority observes, the council would have various options on remand, and its selection among those options (or its choice of some other option that we have not identified) may, as a practical or legal matter, significantly change "the situation as it now stands" in one way or another. Id. Timing and sequencing can matter a great deal in matters of regulatory approval. If that were not true, then the parties in the present case presumably would not have a dispute over the outcome of this appeal because it would make no difference to them whether the council's review of the cumulative environmental impact comes now or in a future proceeding. The bottom line is that the council, and not this court, possesses the information, the expertise, and the legal obligation to exercise its best judgment based on its own careful assessment of all of the pertinent considerations permitted by law—including, if it so chooses, the factor that the council mistakenly believed was off limits in the prior proceeding, namely, the environmental impact of the future gas pipeline. This court is ill-equipped to hypothesize what the council will do on remand or to speculate whether the consequences that flow from the agency's future determination, after remand, will be the "substantial equivalent" of the situation "as it now stands" pursuant to a legally erroneous prior decision. Id.; cf. *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 379, 194 A.3d 759 (2018) ("Under the [Uniform Administrative Procedure Act], it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is

Miami Nation of Indians of Indiana, Inc. v. *Norton*, 534 U.S. 1129, 122 S. Ct. 1067, 151 L. Ed. 2d 970 (2002); *United States ex rel. Adel* v. *Shaughnessy*, supra, 183 F.2d 372 n.3 ("[i]n such a case, the court can do no more than to require that the discretion be exercised, one way or the other"); *Davenport* v. *Newcomb*, 820 N.W.2d 882, 892 (Iowa App. 2012) ("[w]hen there is error based on an agency's failure to exercise discretion, the remedy is to reverse and remand to the agency for consideration"). Accordingly, I would reverse the judgment of the trial court with direction to remand the case to the council for further proceedings consistent with this opinion.

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only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Internal quotation marks omitted.))

ORDERS

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JULIO GUTIERREZ *v.* DANIEL MOSOR

The plaintiff's petition for certification to appeal from the Appellate Court, 206 Conn. App. 818 (AC 43881), is denied.

Deborah V. Jekot and *Jack G. Steigelfest*, in support of the petition.

Decided December 21, 2021

JOSHUA CRUZ *v.* COMMISSIONER OF CORRECTION

The petitioner Joshua Cruz' petition for certification to appeal from the Appellate Court, 206 Conn. App. 17 (AC 43961), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Erika L. Brookman, senior assistant state's attorney, in opposition.

Decided December 21, 2021

HIGH WATCH RECOVERY CENTER, INC. *v.* DEPARTMENT OF PUBLIC HEALTH ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 207 Conn. App. 397 (AC 43546), is granted, limited to the following issues:

"1. Did the Appellate Court properly follow this court's decisions in *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 927 A.2d 793 (2007), and *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, 226 Conn. 792, 629 A.2d 367 (1993), in concluding that a certificate of

need hearing conducted by the Department of Public Health pursuant to General Statutes § 19a-639a (f) (2) was not a 'contested case,' as defined by the Uniform Administrative Procedure Act, General Statutes § 4-166 (4)?

"2. If the answer to the first certified question is 'yes,' did the Appellate Court correctly conclude that the plaintiff's letter requesting that it be granted intervenor status in a certificate of need hearing that had been scheduled and noticed pursuant to General Statutes § 19a-639a (f) was not a legally sufficient request for a public hearing pursuant to subsection (e) of that statute?"

MULLINS, J., did not participate in the consideration of or decision on this petition.

Proloy K. Das, *Paul E. Knag* and *Emily McDonough Souza*, in support of the petition.

Kerry Anne Colson, assistant attorney general, and *Jeffrey J. Mirman*, in opposition.

Decided December 21, 2021

DANNY MOBLEY *v.* COMMISSIONER OF CORRECTION

The petitioner Danny Mobley's petition for certification to appeal from the Appellate Court, 207 Conn. App. 901 (AC 43734), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, and *Kevin M. Black, Jr.*, special deputy assistant state's attorney, in opposition.

Decided December 21, 2021

STRAZZA BUILDING AND CONSTRUCTION, INC. *v.* JENNIFER G. HARRIS, TRUSTEE, ET AL.

The petition of the named defendant and the defendant Jennifer G. Harris for certification to appeal from the Appellate Court, 207 Conn. App. 649 (AC 43958), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that there existed a genuine issue of material fact as to whether the plaintiff general contractor was in privity with its subcontractor for the purposes of res judicata, despite the fact that, in a separate proceeding against the subcontractor, the trial court found that no money was due to the general contractor, and pursuant to General Statutes § 49-33 (f), the subcontractor was statutorily subrogated to the rights of the general contractor?

"2. Did the Appellate Court correctly determine that the presumption of privity set forth in *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 208 A.3d 1223 (2019), was inapplicable to the present case and that no 'flow up' obligation extended from a subcontractor to a general contractor?"

Bruce L. Elstein, in support of the petition.

Anthony J. LaBella, in opposition.

Decided December 21, 2021

STATE OF CONNECTICUT *v.* TONY ESPINAL

The defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 369 (AC 41554), is denied.

Pamela S. Nagy, supervisory assistant public defender, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided December 21, 2021

SCOTT SWAIN *v.* COMMISSIONER OF CORRECTION

The petitioner Scott Swain's petition for certification to appeal from the Appellate Court, 208 Conn. App. 902 (AC 42277), is denied.

Scott Swain, self-represented, in support of the petition.

Sarah Hanna, senior assistant state's attorney, in opposition.

Decided December 21, 2021

SCOTT MENARD *v.* STATE OF CONNECTICUT

DARREN CONNOLLY *v.* STATE OF CONNECTICUT

The petition of the plaintiffs Scott Menard and Darren Connolly for certification to appeal from the Appellate Court, 208 Conn. App. 303 (AC 42342), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that the plaintiffs' post-traumatic stress disorder with physi-

cal manifestations is not a compensable bodily injury under General Statutes § 38a-336 (a) (1) (A)?

"2. Did the Appellate Court correctly determine that the common-law rule precluding double recovery required that the underinsured motorist damages awarded to the plaintiff Darren Connolly be reduced by the amount that a third party paid to Connolly in settlement of a Dram Shop Act claim?"

Daniel J. Krisch and *Jeffrey L. Ment*, in support of the petition.

Lorinda S. Coon, in opposition.

Decided December 21, 2021

STATE OF CONNECTICUT *v.* JASMIN I. LUNA

The defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 45 (AC 43097), is denied.

Laila M. G. Haswell, senior assistant public defender, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided December 21, 2021

ELLIS ROBINSON ET AL. *v.* WILLIAM TINDILL ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 208 Conn. App. 255 (AC 43995), is denied.

ROBINSON, C. J., and ECKER, J., did not participate in the consideration of or decision on this petition.

Michael A. Zizka, in support of the petition.

Decided December 21, 2021

AMMAR A. IDLIBI *v.* DEPARTMENT OF CHILDREN AND FAMILIES

The plaintiff's petition for certification to appeal from the Appellate Court (AC 45008) is denied.

KELLER, J., did not participate in the consideration of or decision on this petition.

Ammar A. Idlibi, self-represented, in support of the petition.

Colleen B. Valentine, assistant attorney general, in opposition.

Decided December 21, 2021

WIOLETTA KRAHEL *v.* MARIUSZ CZOCH

The plaintiff's petition for certification to appeal from the Appellate Court (AC 45017) is denied.

Yakov Pyetranker, in support of the petition.

Jeffrey D. Ginzberg, in opposition.

Decided December 21, 2021

CITY OF NEW HAVEN *v.* 20 GERRISH AVENUE, LLC, ET AL.

The petition of Jerome T. Dunbar for certification to appeal from the Appellate Court (AC 44683) is denied.

Jerome T. Dunbar, self-represented, in support of the petition.

Decided December 21, 2021

STATE OF CONNECTICUT *v.*
JERMAINE LEE COWAN

The defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 710 (AC 42450), is denied.

Jermaine Lee Cowan, self-represented, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided January 4, 2022

CITY OF HARTFORD POLICE DEPARTMENT *v.*
COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 755 (AC 43420), is granted, limited to the following issue:

"Did the Appellate Court properly reverse the trial court's judgment upholding the decision of the human rights referee on the basis that the evidence was insufficient to support a determination of intentional discrimination?"

Michael E. Roberts and *Megan K. Grant*, in support of the petition.

Daniel J. Krisch, in opposition.

Decided January 4, 2022

CITY OF HARTFORD POLICE DEPARTMENT *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.

The defendant Khoa Phan's petition for certification to appeal from the Appellate Court, 208 Conn. App. 755 (AC 43420), is granted, limited to the following issue:

"Did the Appellate Court properly reverse the trial court's judgment upholding the decision of the human rights referee on the basis that the evidence was insufficient to support a determination of intentional discrimination?"

James V. Sabatini, in support of the petition.

Daniel J. Krisch, in opposition.

Decided January 4, 2022

LUIS A. SANTANA, JR. *v.* COMMISSIONER OF CORRECTION

The petitioner Luis A. Santana, Jr.'s petition for certification to appeal from the Appellate Court, 208 Conn. App. 460 (AC 43687), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

Thadius L. Bochain, deputy assistant state's attorney, in opposition.

Decided January 4, 2022

JAMAAL COLTHERST *v.* COMMISSIONER OF CORRECTION

The petitioner Jamaal Coltherst's petition for certification to appeal from the Appellate Court, 208 Conn. App. 470 (AC 43864), is denied.

Michael W. Brown, assigned counsel, in support of the petition.

Laurie N. Feldman, deputy assistant state's attorney, in opposition.

Decided January 4, 2022

JULIO TORRES *v.* COMMISSIONER OF CORRECTION

The petitioner Julio Torres' petition for certification to appeal from the Appellate Court, 208 Conn. App. 803 (AC 43902), is denied.

Deren Manasevit, assigned counsel, in support of the petition.

Jonathan M. Sousa, deputy assistant state's attorney, in opposition.

Decided January 4, 2022

BENJAMIN F. ET AL. *v.* DEPARTMENT OF DEVELOPMENTAL SERVICES ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 208 Conn. App. 423 (AC 44025), is denied.

Benjamin M. Wattenmaker and *John M. Wolfson*, in support of the petition.

Emily V. Melendez, assistant attorney general, in opposition.

Decided January 4, 2022

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CONNECTICUT APPELLATE REPORTS

Vol. 210

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

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OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* LAMAR MCCARTHY
(AC 43785)

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

Syllabus

Convicted of three counts of kidnapping in the second degree and one count each of conspiracy to commit robbery in the second degree and larceny in the second degree, the defendant appealed to this court. The defendant drove R, an individual who sought to purchase heroin from him and who owed him money, to a bank. Unbeknownst to the defendant, who had remained in his vehicle during the incident, R robbed the bank. Although the defendant was unaware of R's wrongdoing, as he drove away from the scene, he noticed a police cruiser following him and began to drive very erratically and at high speeds. After his motor vehicle became disabled, the defendant stopped in front of a gas station. The defendant and R exited the vehicle, ran toward a Jeep that was parked at a gas pump, and demanded that W, the driver of the Jeep, get out of the vehicle. When W responded that his family was inside, the defendant ran to the passenger side of the vehicle, climbed over M, W's wife, and got into the driver's seat. R attempted to enter the backseat of the Jeep but was unsuccessful, as M and W's grandchildren were strapped into booster seats in the backseat. The defendant promptly exited the gas station at a high rate of speed with M and her grandchildren still inside the vehicle. The defendant took M's cell phone from her and entered the highway, continuing to drive erratically and at a high rate of speed. Approximately ten minutes after gaining control of the Jeep, the defendant pulled over to the side of the highway to let M and her grandchildren exit the vehicle. The defendant then immediately drove away, without returning M's cell phone, and M had to flag down a passerby for assistance. The defendant was not charged with any crimes relating to the

robbery of the bank, rather, the charges against him stemmed solely from his taking of the Jeep. *Held*:

1. The defendant could not prevail on his claim that he was entitled to a new trial on the kidnapping charges because the trial court improperly failed to provide an incidental restraint instruction to the jury in accordance with *State* v. *Salamon* (287 Conn. 509), the state having persuaded this court beyond a reasonable doubt that the error was harmless: the trial court's failure to instruct the jury on an essential element of the offense was a constitutional error, requiring the state to prove that the failure was harmless beyond a reasonable doubt; moreover, when evaluated in accordance with the relevant factors set forth in *Salamon*, there was no reasonable possibility that a properly instructed jury would have reached a different result concerning whether the defendant's restraint of M and her grandchildren was incidental to or necessary for him to complete the larceny, as, even though the defendant took possession of the Jeep at approximately the same time that he first restrained the victims and he restrained them only for approximately ten minutes, the defendant could have completed the larceny and released the victims earlier, he transported the victims to multiple locations while they were confined to the Jeep, the fact that the defendant was more likely to be apprehended by the police at the gas station if he permitted the victims to immediately exit the Jeep did not compel a conclusion that the victims' restraint was incidental to or necessary for the commission of the larceny, the defendant's restraint of the victims in a fast-moving vehicle while withholding M's cell phone from her, prevented the victims from summoning assistance or alerting the police to his location, the defendant's risk of detection was reduced and he was able to flee the gas station unhindered because he did not stop to free the victims at or near the scene of the larceny, and the restraint increased the victims' risk of harm independent of that posed by the larceny because the defendant confined them to a moving car that he was operating in an erratic manner and at high speeds and then left them on the side of the highway, he refused to return M's cell phone before he drove away, and he inspired fear in his victims.
2. Contrary to the defendant's claim, there was sufficient evidence from which the jury reasonably could have found the defendant guilty beyond a reasonable doubt of each of the three counts of kidnapping in the second degree: because, with respect to the defendant's first claim, this court concluded that there was no reasonable possibility that a properly instructed jury would find that the defendant's restraint was incidental to or necessary for his completion of the larceny, it necessarily followed that a reasonable view of the evidence supported the jury's finding that the defendant intended to prevent the victims' liberation beyond that which was incidental to or necessary to complete the larceny and, consequently, supported the jury's verdict; moreover, the evidence admitted at trial, including testimony regarding the defendant's erratic

driving at high speeds and M's concern for her safety and for that of her grandchildren, and the reasonable inferences that the jury was permitted to draw therefrom, were more than sufficient to establish that the defendant used or threatened to use force or intimidation to restrain the victims from exiting the vehicle before he began driving and while the vehicle was in motion.

3. The defendant could not prevail on his claim that the trial court abused its discretion and violated his constitutional right to due process when it denied his requests to have his leg shackles removed during trial: although the defendant expressed concern at trial that one of the jurors may have seen his leg shackles, the trial court had instructed a judicial marshal to sit in various chairs in the jury box to confirm that the defendant's leg shackles were not visible to the jury and the record revealed no evidence to suggest that the jurors actually saw or otherwise knew of the defendant's leg shackles; accordingly, the defendant failed to satisfy his burden of demonstrating that the jurors actually saw or otherwise was aware of his restraints and, therefore, failed to establish that the trial court's denial of his requests to remove his restraints deprived him of his right to a fair trial.

Argued September 15, 2021—officially released January 18, 2022

Procedural History

Substitute information charging the defendant with three counts of the crime of kidnapping in the second degree and with one count each of the crimes of robbery in the second degree, conspiracy to commit robbery in the second degree, and larceny in the second degree, brought to the Superior Court in the judicial district of New Britain, geographical area number seventeen, and tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty of three counts of kidnapping in the second degree and one count each of conspiracy to commit robbery in the second degree and larceny in the second degree, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, 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 *Christian Watson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Lamar McCarthy, appeals from the judgment of conviction, rendered following a jury trial, of one count of conspiracy to commit robbery in the second degree in violation of General Statutes §§ 53a-48 and 53a-135 (a) (1) (A), one count of larceny in the second degree in violation of General Statutes § 53a-123 (a) (1), and three counts of kidnapping in the second degree in violation of General Statutes § 53a-94. The defendant claims that (1) the trial court improperly failed to instruct the jury in accordance with *State* v. *Salamon*, 287 Conn. 509, 550, 949 A.2d 1092 (2008); (2) there was insufficient evidence to prove beyond a reasonable doubt that he intended to prevent the liberation of the victims beyond that which was incidental and necessary to commit the larceny and that he used or threatened to use physical force or intimidation to restrain the victims; and (3) the court violated his constitutional right to due process by denying his requests to remove his leg shackles. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On June 18, 2017, the defendant received a phone call from Norman Renaldi, who sought to purchase heroin from the defendant and asked him for a ride from Newington to Hartford. Renaldi previously had purchased heroin from the defendant on several occasions. The defendant picked up Renaldi in a red Honda minivan and told Renaldi that he owed the defendant money. Renaldi instructed the defendant to drive to the Stop & Shop at 505 North Main Street in Southington, inside of which was a People's United Bank branch (bank). During the drive and unbeknownst to

the defendant, Renaldi wrote a note on the back of a coupon, which stated, "EMPTY BOTH CASH DRAWERS QUICKLY + QUI[E]TLY AND NO-ONE GETS HURT!!"

After the defendant and Renaldi arrived at Stop & Shop, the defendant remained in the minivan while Renaldi went inside. Renaldi approached the bank and handed the note to one of the bank tellers. He kept one of his hands in the pocket of his sweatshirt, suggesting to the teller that he had a weapon. The teller retrieved and handed to Renaldi a large quantity of cash, which Renaldi placed, along with the note, into a slit that he had cut into the lining of his sweatshirt. Renaldi then exited the Stop & Shop, got back into the minivan, and told the defendant that they could leave. He did not tell the defendant that he had robbed the bank. Meanwhile, one of the bank tellers activated an alarm, which alerted the police that a robbery had occurred at the bank.

At approximately 1:15 p.m., on duty police officers received a dispatch that a white male had entered the bank, demanded cash, implied that he possessed a weapon, and then fled the scene in a red minivan. When the dispatch was received, the defendant was driving the minivan northbound on Route 10 in Southington. Southington Police Officer Jeremey Busa, who was on patrol, observed a red minivan that matched the description from the dispatch driving on Route 10. When the minivan stopped at a red traffic light, Busa pulled behind it in his police cruiser. The defendant noticed Busa's cruiser and became nervous. The defendant attempted to maneuver the minivan around a vehicle that was stopped in front of it at the stoplight but proceeded to hit the vehicle. The defendant then executed a U-turn and accelerated southbound down Route 10, at which point Busa activated the lights and siren of his cruiser. The defendant drove at a high rate of speed, striking the curb on the side of the road, weaving

in and out of traffic, crossing into incoming traffic, failing to stop at red lights, and driving across the driveways and lawns that abutted Route 10. Southington Police Officer Neal Ayotte, who was also on patrol, responded to the bank robbery dispatch, activated his body camera, and joined in the pursuit of the minivan in his police cruiser. As he approached the minivan on Route 10, Ayotte observed the driver operating the minivan erratically, and, at some point, Ayotte had to pull his cruiser into the front yard of a nearby residence to avoid being hit by the minivan.

Eventually, the tires on the passenger side of the minivan became flat, began to squeal, and emanated sparks and smoke. The defendant told Renaldi that the minivan belonged to his wife and that they needed to obtain another vehicle. Accordingly, the defendant stopped in front of a Shell gas station located at 212 Main Street in Southington (gas station) and parked the minivan so that it straddled the curb and the sidewalk in front of the gas station. Several police officers, including Busa and Ayotte, simultaneously arrived at the gas station. The defendant and Renaldi exited the minivan and ran toward a white Jeep Cherokee that was parked at a gas pump in front of the gas station.

The driver of the Jeep, W, had just finished pumping gas and had begun to get back into his Jeep when the defendant and Renaldi approached him. W's wife, M, was sitting in the front passenger seat of the vehicle, and their grandchildren, L and O, were sitting in booster seats in the backseat. Renaldi grabbed W and instructed him to get out of the Jeep, to which W responded that his family was inside of the vehicle. The defendant ran to the passenger side of the vehicle, climbed over M, and got into the driver's seat. Renaldi unsuccessfully attempted to enter the backseat of the Jeep through the passenger side door. Once the defendant was in the

driver's seat, he promptly exited the gas station in the Jeep at a high rate of speed with M, L, and O still inside.

Police officers chased Renaldi, who had exited the parking lot of the gas station on foot and had run onto Route 10. The officers ordered Renaldi to stop running and to get on the ground. Eventually, the officers apprehended Renaldi and recovered his sweatshirt, the stolen cash, which totaled more than $12,000, and the note. Later, Renaldi identified the driver of the Jeep as the defendant.[1]

While at the gas station, Busa observed that the minivan, which was still running, had sustained damage to its front bumper and quarter panel, its rear rim, and its passenger side tires. Busa recovered a wallet on the driver's seat of the minivan. The defendant's license and several other cards with his name on them were located inside of the wallet. Various documents addressed to the defendant, including a letter, a receipt, and an invoice, were also recovered from the minivan.

After exiting the gas station, the defendant drove the Jeep southbound on Route 10 at a high rate of speed. M had to hold onto the dashboard, the handle above the passenger side door, and the inside of the door while he was driving. The defendant asked M about the location of the nearest highway and whether she had a cell phone. M directed the defendant to the entrance of Interstate 84 and, although she initially lied and responded that she did not have a cell phone, eventually gave her cell phone to the defendant for fear that the phone may ring. Throughout the course of the drive, M tried to calm her grandchildren, one of whom was

[1] At some point prior to trial, Renaldi and the defendant were incarcerated in the same correctional facility. Renaldi testified at trial that, during this period of incarceration, the defendant asked him to recant his statement identifying the defendant as the driver of the Jeep. Initially, Renaldi recanted his statement, but he later executed a cooperation agreement under which he agreed to testify at trial against the defendant.

crying, while acknowledging that she "couldn't believe" what was happening. She also told the defendant that she "didn't know" or "care" what he had done, but she "just wanted [her grandchildren] to be safe . . . ." The defendant told M that he "wasn't going to hurt" her and the grandchildren.

The defendant entered Interstate 84 westbound and drove on the highway. Eventually, the defendant pulled the Jeep to the side of the highway and instructed M to quickly exit the vehicle. Although the defendant pulled over on the side of the highway near an exit, he did not exit the highway to release M, L, or O. M exited the Jeep, removed her grandchildren from their booster seats, and shut the door. The defendant immediately drove away without returning M's cell phone to her. M attempted to calm her grandchildren and, shortly thereafter, flagged down a passerby and borrowed his cell phone to call her son. The police subsequently arrived to where the defendant had left them. In total, approximately ten minutes passed between when the defendant gained control of the Jeep at the gas station and when the defendant allowed the victims to exit the vehicle.

On September 25, 2017, the defendant was arrested pursuant to a warrant. Prior to trial, the state filed a corrected substitute information dated September 12, 2019, charging the defendant with one count of robbery in the second degree in violation of § 53a-135 (a) (1) (A), one count of conspiracy to commit robbery in the second degree in violation of §§ 53a-48 and 53a-135 (a) (1) (A), one count of larceny in the second degree in violation of § 53a-123 (a) (1), and three counts of kidnapping in the second degree in violation of § 53a-94. Following a jury trial, the defendant was found not guilty of robbery in the second degree but was found

guilty of all other counts.[2] The defendant was sentenced to a total effective term of twenty-five years of imprisonment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that he is entitled to a new trial on the kidnapping charges because the court improperly failed to provide to the jury an incidental restraint instruction in accordance with *State* v. *Salamon*, supra, 287 Conn. 550, which would have ensured that the defendant could be convicted of kidnapping *only* if the restraint that formed the basis of the kidnapping charges held criminal significance separate and apart from that incidental to or necessary for the completion of the larceny. See *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 423–24, 154 A.3d 1054 (2017). The state concedes that the court improperly declined to provide a *Salamon* instruction in the present case. The state contends, however, that the court's failure to give a *Salamon* instruction was harmless beyond a reasonable doubt because no reasonable juror could have concluded that the defendant did not intend to prevent the victims' liberation for a longer period of time or to a greater degree than that which was incidental to or necessary to commit the underlying larceny. Stated differently, the state argues that the court's failure to provide to the jury an incidental restraint instruction did not affect the verdict. Because we conclude that the state has persuaded us beyond a reasonable doubt that the court's failure to provide a *Salamon* instruction was harmless, we reject the defendant's claim.

[2] The robbery charge of which the defendant was acquitted related to his taking of the Jeep. During oral argument before this court, the state clarified that it did not charge the defendant with any crimes related to the robbery of the bank.

The following additional procedural history is relevant to our resolution of this claim. Throughout the duration of the trial, the court and the parties discussed in chambers whether the court should provide to the jury an incidental restraint instruction in accordance with *Salamon*. The court held a charge conference on September 26, 2019, following the close of evidence and outside of the presence of the jury, in accordance with Practice Book § 42-19. During the charge conference, the defendant requested an incidental restraint instruction. The court informed the parties that, although it preliminarily was inclined not to include such an instruction, it would rule on the defendant's request the following day.

On September 27, 2019, the court denied the defendant's request, stating in its oral ruling that the defendant's restraint of the victims was not incidental to the larceny or the robbery and that it believed that a defendant is entitled to a *Salamon* instruction only if a defendant was charged with kidnapping and another substantive crime arising out of an assault, such as a sexual assault. The court charged the jury later that day and did not provide to the jury a *Salamon* instruction. Following the jury charge and outside of the presence of the jury, the defendant noted on the record his objection to the court's failure to provide a *Salamon* instruction.

We begin by setting forth the applicable standard of review and the relevant principles of law. "The applicability of *Salamon* and whether the trial court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016). Further, "the question of whether conduct bears . . . criminal significance as kidnapping [independent from the completion of another substantive

offense] is one of law. It is, of course, the function of the jury to find the relevant facts, including, ultimately, whether a crime was committed with the intent necessary to qualify as kidnapping, namely, the specific intent to prevent the victim's liberation and not simply to perpetrate the underlying crime. . . . At the same time, it is beyond cavil that it is the role of the judiciary to interpret the relevant statutes and to define, as a matter of law, what type of conduct constitutes kidnapping according to those statutes. . . . As [our Supreme Court] explained in *Salamon*, a necessary corollary is that it falls to the courts to define the intent element of the crime of kidnapping . . . to delineate the ways in which kidnapping differs from coterminous crimes such as robbery and sexual assault . . . and to specify the factors that are relevant to that analysis . . . in light of our understanding of the legislative history of the kidnapping statutes and the policy objectives that animated their modern revision." (Citations omitted.) *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 34, 259 A.3d 1082 (2021).

In *Salamon*, our Supreme Court "reconsidered [its] long-standing interpretation of our kidnapping statutes, General Statutes §§ 53a-91 through 53a-94a. . . . [T]he defendant [in *Salamon*] had assaulted the victim at a train station late at night . . . and ultimately was charged with kidnapping in the second degree in violation of . . . § 53a-94, unlawful restraint in the first degree, and risk of injury to a child. . . . At trial, [the defendant] requested a jury instruction that, if the jury found that the restraint had been incidental to the assault, then the jury must [find him not guilty] of the charge of kidnapping. . . . [Consistent with established precedent of our Supreme Court] [t]he trial court declined to give that instruction [and the defendant was convicted of kidnapping in the second degree in addition to the two other crimes]. . . .

"[The Supreme Court] . . . ultimately concluded that [o]ur legislature . . . intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to [or] necessary for the commission of another crime against that victim.[3] Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime"; (footnote added; internal quotation marks omitted) id.,

[3] In previous *Salamon* cases, our Supreme Court and this court have used a phrase that our Supreme Court refers to as *Salamon*'s " 'incidental and necessary test' "; *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 50–51; that is, that "[o]ur legislature . . . intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely *incidental to and necessary for* the commission of another crime against that victim." (Emphasis added.) *State* v. *Salamon*, supra, 287 Conn. 542. In *Banks*, however, our Supreme Court acknowledged that *Salamon*'s " 'incidental and necessary' " language has created "confusion among litigants and the lower courts" with respect to whether "a defendant [is] entitled to *Salamon*'s protections if *either* prong of the [incidental and necessary] test applies (if, for example, restraint of the victim was incidental to a sexual assault but was not necessary to accomplish the assault)." (Emphasis added.) *Banks* v. *Commissioner of Correction*, supra, 50–51.

In evaluating "whether the incidental and necessary [language in *Salamon*] is to be understood as conjunctive or disjunctive"; id., 51; our Supreme Court stated that the terms "incidental to the underlying crime, necessary to commit the underlying crime, inherent in the nature of the underlying crime, and having no independent criminal significance . . . are merely different ways of expressing the same concept, namely, whether the restraint imposed evidenced an independent criminal intent or subjected the victims to risks distinct from those necessarily entailed by or inherent in the underlying offenses." (Citations omitted.) Id., 54–55. Our Supreme Court concluded that "conduct that is wholly incidental to the commission of an underlying crime cannot qualify as kidnapping, *regardless of whether it is strictly necessary to commit that crime*." (Emphasis added.) Id., 54. Accordingly, the court confirmed that a defendant is entitled to *Salamon*'s protections if his actions are either incidental to *or* necessary to commit the underlying offense. See id., 51–54. Thus, throughout this opinion and in accordance with our Supreme Court's analysis in *Banks*, we use the phrase "incidental

11–12; or than that which was "merely incidental to that underlying crime." Id., 4.

Our Supreme Court thus explained in *Salamon* that "a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during, or after the commission of that other crime, the victim is moved or confined in a way that had independent criminal significance, that is, the victim was restrained to an extent exceeding that which was [incidental to or] necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to [or] necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider . . . various relevant factors . . . ." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 460, 988 A.2d 167 (2009); see also *State* v. *Salamon*, supra, 287 Conn. 542.

Since its decision in *Salamon*, our Supreme Court has reiterated that, "when a criminal defendant is charged with kidnapping in conjunction with another underlying crime . . . the jury must be" provided a *Salamon* instruction. *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 4; see also *State* v. *Fields*, 302 Conn. 236, 247–48, 24 A.3d 1243 (2011). "The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element . . . and thus gives rise to constitutional error"; (internal quotation marks omitted) *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 428; that is subject to harmless error

to *or* necessary for," as opposed to "incidental to *and* necessary for," the commission of another substantive crime.

analysis. *Banks* v. *Commissioner of Correction*, supra, 29–30.

In the present case, the defendant was charged with kidnapping in conjunction with larceny arising from his taking the Jeep with M, L, and O inside. Accordingly, the court was required, as the state concedes, to instruct the jury in accordance with *Salamon* and its progeny. See id., 4; *State* v. *Fields*, supra, 302 Conn. 247. No such instruction, however, was given. Because the court's failure to instruct the jury on an essential element of the offense is constitutional error, the burden shifts to the state to demonstrate that the court's failure to instruct the jury was harmless beyond a reasonable doubt. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 15; see also *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 78, 136 A.3d 596 (2016) ("this standard imposes the burden of persuasion exclusively on the state").

"Under *Neder* [v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)][4] . . . the state must demonstrate that a trial error [of constitutional magnitude] was harmless beyond a reasonable doubt." (Citation omitted; footnote added.) *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 15; see also

[4] In *Banks*, a habeas proceeding, our Supreme Court adopted the harmlessness standard laid out by the United States Supreme Court in *Brecht* v. *Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), under which "the harmlessness of constitutional errors is assessed according to whether the error had [a] substantial and injurious effect or influence in determining the jury's verdict. . . . The *Brecht* standard reserves the remedy of a new trial for errors resulting in actual prejudice, as distinguished from errors giving rise to a mere possibility of harm." (Citations omitted; internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 15–16. The court, however, clarified that a reviewing court assesses harm according to the *Brecht* standard *only* "on collateral review"; id., 18; including in state habeas proceedings. Id., 5, 19. By contrast, a court assesses harm according to the *Neder* standard "on direct review," including in the direct appeal of a defendant's conviction. Id., 17. Thus, "it is undisputed that *Neder* is the proper standard" to assess harm on direct review of cases involving an instructional error pursuant to *Salamon*. Id.

Neder v. *United States*, supra, 15 (articulating test "for determining whether a *constitutional* error is harmless" (emphasis added)). "[T]he test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *State* v. *Hampton*, supra, 293 Conn. 463. Put differently, we evaluate "whether there is a reasonable possibility that a properly instructed jury would reach a different result." *State* v. *Flores*, 301 Conn. 77, 87, 17 A.3d 1025 (2011).

In the present case, the jury, properly instructed, would have been tasked with determining whether the defendant's restraint of the victims was incidental to or necessary for his completion of the larceny. See *State* v. *Hampton*, supra, 293 Conn. 460. To make this determination, the jury should have been instructed to consider a series of factors laid out by our Supreme Court in *Salamon*, namely, "(1) the nature and duration of the victim's movement or confinement, (2) whether that movement or confinement occurred during the commission of the separate offense, (3) whether the restraint was inherent in the nature of the separate offense, (4) whether the restraint prevented the victim from summoning assistance, (5) whether the restraint reduced the perpetrator's risk of detection, and (6) whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 42; see also *State* v. *Salamon*, supra, 287 Conn. 548.

On the basis of our review of the record, we conclude that the court's failure to provide an incidental restraint instruction was harmless because the state has persuaded us that there is no reasonable possibility that the jury, properly instructed, would have reached a

different result concerning whether the defendant's restraint of the victims was incidental to or necessary to complete the larceny. In so concluding, we consider the various relevant factors set forth in *Salamon*;[5] see *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 429; and acknowledge that, "[a]lthough the relative importance of the various factors will vary depending on the context, [our Supreme Court] ha[s] made clear that the touchstone in any *Salamon* case, in assessing whether conduct associated with [another substantive offense] has independent criminal significance as a kidnapping, is the intent of the offender." *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 43.

With regard to the first relevant factor, the nature and duration of the victims' movement or confinement, the state argues that the nature of the defendant's confinement of the victims in a moving vehicle and the distance the defendant moved the victims indicates that the restraint was neither incidental to nor necessary for his completion of the larceny. The defendant disagrees, arguing that this factor weighs in his favor because the larceny and the alleged kidnappings commenced at the same time, the defendant did not harm or threaten to harm the victims while he drove them, and the victims were in the vehicle for no more than ten minutes.

"[T]here are no minimum time or distance requirements to establish a restraint" within the context of kidnapping. *State* v. *Winot*, 294 Conn. 753, 767, 988 A.2d 188 (2010). Nonetheless, our Supreme Court, in *Hinds*, "attempted to categorize various *Salamon* incidental restraint cases with differing degrees of confinement

[5] As this court noted in *White*, "[a]lthough we recognize that the factors enumerated in *Salamon* are not intended to constitute an exhaustive list of the possible factors that may be relevant in a given case, the parties have not identified any other factors relevant to the present case, and, thus, we limit our discussion to those factors expressly identified in *Salamon*." *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 429 n.9.

or movement"; *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 430; and noted that "an important facet of cases where the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. . . . [M]ultiple offenses [like kidnapping and another substantive crime] are more readily distinguishable—and, consequently, more likely to render the absence of a *Salamon* instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement

"Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same determination more difficult and, therefore, more likely to necessitate submission to a jury for it to make its factual determinations regarding whether the restraint is merely incidental to another, separate crime." (Citations omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93. For the purpose of evaluating harm in light of this factor, our Supreme Court in *Hinds* distinguished cases in which a defendant restrained the victims for a longer period of time and confined or moved the victims to a greater degree; *State* v. *Hampton*, supra, 293 Conn. 456, 463–64 (defendant confined victim for approximately three hours before committing substantive crime); *State* v. *Jordan*, 129 Conn. App. 215, 222–23, 19 A.3d 241 (defendant committed substantive crime during forty-five minute period and employed restraint significantly greater than necessary to commit substantive crime), cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011); *State* v. *Strong*, 122 Conn. App. 131, 143, 999 A.2d 765 (defendant restrained victim for more than one hour in multiple locations after making threats), cert. denied, 298 Conn. 907, 3 A.3d 73 (2010); *State* v. *Nelson*, 118 Conn.

App. 831, 860–62, 986 A.2d 311 (defendant assaulted victim, then confined victim for several hours in several locations), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010); from cases in which a defendant restrained the victims for a shorter period of time and subjected the victims to limited confinement or movement, as in *State* v. *Flores*, supra, 301 Conn. 81–82, 89 (defendant's robbery and confinement of victim lasted between five and twenty minutes and remained limited to singular location), and *State* v. *Thompson*, 118 Conn. App. 140, 144, 162, 983 A.2d 20 (2009) (defendant confined victim and committed other substantive crime within fifteen to twenty minute span and subjected victim to limited movement), cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010). See *Hinds* v. *Commissioner of Correction*, supra, 92–93. The Supreme Court concluded that, "where kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime." (Internal quotation marks omitted.) Id., 93.

As we have noted, approximately ten minutes passed between when the defendant gained control of the Jeep at the gas station and when the defendant allowed the victims to exit the vehicle, indicating that the victims were restrained for ten minutes. Although, on its face, a ten minute period of confinement appears to fall within the latter line of cases recognized by our Supreme Court, rather than the former; see id., 91–93; we note that, for the commission of the larceny, the defendant only needed to, "with intent to deprive another of property . . . wrongfully [take], [obtain] or [withhold] [the Jeep] from [its] owner. . . ." General Statutes § 53a-119; see also General Statutes § 53a-123 (a) (1). The larceny statute under which the defendant was convicted did not require that he continuously operate the vehicle for some specified amount of time after

taking it; the defendant could have stopped the vehicle one block or two blocks away from the gas station to release the victims without frustrating his commission of the larceny.[6] The degree to which the defendant moved the restrained victims; see *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92; further supports the state's position. Although, as the defendant contends, the kidnappings and the larceny commenced at the same time, and, by implication, at the same location, he transported the victims on Route 10 in Southington, onto an interstate highway, and on the highway some distance. Put differently, the defendant moved the victims to multiple locations while they were confined to the vehicle. Thus, we conclude that the first factor weighs in favor of the state.

We next address the second relevant *Salamon* factor, that is, whether the movement or confinement occurred during the commission of the separate offense. The state argues that this factor weighs in its favor because the defendant completed the larceny *before* he confined and moved the victims, which the state asserts substantiated the kidnapping charges. The state specifically argues that, once the defendant took possession of the Jeep with the intent to deprive the true owner of it permanently, he successfully satisfied each element of larceny. See *State* v. *Hayward*, 169 Conn. App. 764, 772–73, 153 A.3d 1 (2016), cert. denied, 324 Conn. 916, 154 A.3d 527 (2017). Accordingly, it is the state's position that any additional action the defendant took, specifically, confining and moving the victims for the ten

[6] As we explain in our evaluation of the third *Salamon* factor, the mere fact that a defendant's unlawful actions facilitated his commission of a substantive crime does not necessarily mean that those actions were incidental to or necessary for the completion of that crime. In the present case, the mere fact that the defendant's confinement and movement of the victims facilitated his avoidance of immediate arrest for the larceny because it prevented him from being stopped by the police officers at the gas station does not necessarily mean that the restraint was incidental to or necessary for the successful completion of the larceny.

minutes that followed his gaining control of the Jeep at the gas station, was not necessary to accomplish the already completed offense of larceny. The defendant contends that he restrained the victims *while* committing the larceny because he took control of the Jeep while the victims were already inside and fled the scene with the victims in the vehicle.

Our Supreme Court's analyses in *Banks* and *Bell* v. *Commissioner of Correction*, 339 Conn. 79, 259 A.3d 1073 (2021), guide our analysis in the present case. In *Banks*, the petitioner was convicted of multiple counts of kidnapping in connection with the robberies of two retail stores. *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 5, 10. During both robberies, the petitioner took money from the stores' cash registers while brandishing a gun, then subsequently moved and confined the store employees in the stores' bathrooms before he fled the scenes. Id., 5–9. At the defendant's criminal trial, the court failed to provide a *Salamon* instruction to the jury, and, on review,[7] the habeas court concluded that the instructional error was harmless because the conduct that gave rise to the kidnapping convictions occurred after the petitioner had completed the robberies. Id., 13.

Our Supreme Court, evaluating whether the trial court's failure to provide an incidental restraint instruction constituted harmless error under *Brecht* v. *Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), analyzed whether the restraint occurred during the commission of the robberies. *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 34, 39–40, 42–43.

[7] Although the defendant was convicted of the robberies in 1997, before our Supreme Court decided *Salamon* in 2008; see *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 5, 11; "in *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011), [our Supreme Court] held that *Salamon* applies retroactively in habeas actions." *Bell* v. *Commissioner of Correction*, supra, 339 Conn. 87.

Our Supreme Court noted that the case before it presented "a distinct and novel scenario—asportation and confinement to facilitate a perpetrator's escape following the completion of a robbery"; id., 35; and characterized the case as "categorically distinct from . . . [its] prior *Salamon* cases insofar as the petitioner indisputably had accomplished the criminal objective of his underlying crimes prior to the commencement of the alleged kidnapping." Id., 39. Accordingly, our Supreme Court concluded, the robbery had been completed once the petitioner took the cash, not after he fled the scene. See id.

Our Supreme Court further determined: "Under such circumstances, there simply is no concern that the intent of the legislature will be frustrated by prosecuting a defendant for kidnapping solely on the basis of the restraint inherent in or necessary to accomplish the underlying crime. Many if not most robbers choose to leave the scene immediately upon obtaining the fruits of their crime. . . . [A] perpetrator's choice to remain at the crime scene and further restrict a victim's liberty after having robbed him or her manifests independent, criminal significance." Id. Because the petitioner confined the victims *after* he had taken the cash, his restraint of the victims did not occur during the commission of the separate offense. See id., 43 ("[t]he [kidnapping] conduct at issue occurred after the objective of the robbery had been completed"). In *Bell*, our Supreme Court summarized its holding in *Banks*, stating: "[W]hen it is clear that a perpetrator forcibly moved and restrained his victims *after having taken their property*, for the apparent purpose of escaping undetected and unhindered from the scene of the robbery, a reviewing court typically may conclude *as a matter of law* that such conduct bears independent criminal significance and is not merely incidental to the underlying robbery."

(Emphasis altered.) *Bell* v. *Commissioner of Correction*, supra, 339 Conn. 92.

In *Bell*, the petitioner was convicted of two counts of kidnapping in connection with the robberies of two restaurants. Id., 83, 85. During the first robbery, the petitioner, after stating that he had a gun, instructed a restaurant employee to open the restaurant's safe. Id., 83. While he looted the safe, he confined the employee in the walk-in refrigerator of the restaurant.[8] Id., 83, 93. After looting the safe, he required that the employee remain confined in the refrigerator for a period of time. Id., 83–84. During the second robbery, the petitioner, while appearing to brandish a gun, instructed a restaurant employee to open the restaurant's safe and, *before* extracting money from the safe, instructed her to get into the restaurant's walk-in cooler. Id., 84. The petitioner told the employee that he would "let [her] know when he was finished and when it was safe to come out" and, after waiting several minutes, the employee exited the refrigerator. (Internal quotation marks omitted.) Id. At the petitioner's criminal trial, which was held six years prior to the decision in *Salamon*, the

[8] We acknowledge that, earlier in its opinion in *Bell*, our Supreme Court stated that only "*after* the petitioner [had] finished looting the safe" did he order the employee "to proceed into the refrigerator." (Emphasis added; internal quotation marks omitted.) *Bell* v. *Commissioner of Correction*, supra, 339 Conn. 83. Later in its opinion, however, and as we note in this opinion, the Supreme Court clarified that "[t]he petitioner informed the police that [in each of the two robberies he committed] he took the money from each safe *while the victims were restrained in the refrigerators*." (Emphasis added.) Id., 93. The Supreme Court distinguished *Bell* from its opinion in *Banks* by emphasizing that, in *Bell*, the jury reasonably could have concluded that the petitioner confined the victims to incapacitate them "*while* he completed the robberies." (Emphasis added.) Id. Because the analysis of the Supreme Court hinges on this distinction, we rely on its conclusion that "the jury . . . reasonably could have found that the petitioner forced [the employee of the first restaurant that the petitioner robbed] . . . into the walk-in [refrigerator] not to facilitate his postrobbery escape but, rather, to incapacitate [her] while he completed the robber[y]." Id., 92–93.

court failed to provide a *Salamon* instruction to the jury. Id., 83, 86. On review, after our Supreme Court determined that *Salamon* applied retroactively, the habeas court concluded that the instructional error was harmless because the petitioner's confinement of the victims was not inherent in the robberies themselves and, by contrast, the petitioner confined the victims to reduce the risk that he would be detected. Id., 87–88.

Like in *Banks*, our Supreme Court in *Bell* evaluated whether the court's failure to provide an incidental restraint instruction constituted harmless error and specifically considered whether the restraint occurred during the commission of the robberies. Id., 92–93. Our Supreme Court stated that, "[u]nlike in *Banks*, the jury in the present case reasonably could have found that the petitioner [confined each employee] . . . not to facilitate his postrobbery escape but, rather, to incapacitate them while he completed the robberies. The petitioner informed the police that he took the money from each safe while the victims were restrained . . . . [The employee of the second restaurant that the petitioner robbed] seemed to confirm that account of events, indicating that the petitioner ordered her into the [cooler] immediately after she had opened the safe, and that he stated that he would release her when he was finished, presumably meaning after he was finished emptying the safe. Although [the employee of the first restaurant that the petitioner robbed] testified that the petitioner had ordered her into the refrigerator after he finished looting the . . . safe, she did not directly witness him taking the contents of the safe, and the jury might well have credited his statement that, consistent with his modus operandi in the [second] robbery, he waited to empty the safe until [the employee] was incapacitated so he could do so unobstructed. At the very least, defense counsel should have had the opportunity to make such an argument." (Internal quotation marks

omitted.) Id., 92–93. Thus, the Supreme Court concluded, "[i]f a victim is restrained *in the midst of a robbery*, rather than *after the victim's property has been taken*, then it rarely will be possible to say, as a matter of law, that the restraint bore independent criminal significance and was not merely incidental to the completion of the underlying crime." (Emphasis added.) Id., 93.

The present case presents a situation that does not fall squarely into either of the categories described in *Banks* or *Bell*. In this case, the defendant did not restrain the victims in the middle of the larceny or after having taken the Jeep; see id.; but, instead, he took possession of the Jeep at approximately the same time he first restrained the victims—when he got into the Jeep and drove it out of the parking lot of the gas station. Thus, unlike in *Banks* or *Bell*, the larceny and the initial restraint of the victims appear to have taken place at approximately the same time. We conclude, however, that, because the defendant took the Jeep and initially restrained the victims almost simultaneously, the second factor weighs in favor of the defendant.

We next address the third relevant *Salamon* factor, namely, whether the restraint was inherent in the nature of the other substantive offense. The state argues that the restraint of the victims was not inherent in the larceny of the Jeep and, accordingly, the restraint was neither incidental to nor necessary for the commission of the larceny. The state contends that the defendant was consciously aware of the victims' presence in the car, and he nonetheless confined and moved the victims for ten minutes to facilitate his escape from the scene without being apprehended by the police. The defendant argues that the restraint was inherent in the nature of the larceny because the defendant could not have taken the Jeep and escaped the scene without restraining the victims.

As this court explained in *White*, "our Supreme Court [in *Fields*] expressly rejected the notion that the rationale of *Salamon* is not implicated merely because restraint of the victim is not an essential element of the other substantive offense charged along with kidnapping." *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 436. "On the contrary, restraint may be used in the commission of the underlying offense . . . even though it is not an element of that offense. Thus, depending on the facts of the underlying crime, the fact finder reasonably might conclude that the kidnapping was merely incidental to the underlying crime irrespective of whether that crime requires the use of restraint." *State* v. *Fields*, supra, 302 Conn. 248. Because restraint is not an essential element of larceny in the second degree; see General Statutes §§ 53a-119 and 53a-123 (a) (1); we consider "whether restraint was inherent in the nature of the [larceny] in this particular case." *White* v. *Commissioner of Correction*, supra, 436.

In light of our review of the record, we conclude that the defendant's restraint of the victims was not inherent in the nature of the larceny of the Jeep. After exiting the parking lot of the gas station at a high rate of speed, the defendant drove away from the scene erratically for ten minutes. The defendant continued driving erratically throughout the duration of the drive, despite M's pleas that the defendant not hurt her grandchildren, and confiscated M's cell phone, preventing her from calling for assistance. He did not stop at any point to let the victims free, despite acknowledging their presence in the vehicle by stating that he would not hurt them, until he had merged onto and driven some distance on the highway.

To the extent the defendant contends that, had he allowed the victims to exit the vehicle at the scene or shortly thereafter, he could not have successfully taken the Jeep because he would have been apprehended by

the police, we note that the mere fact that the restraint *facilitated* his commission of the larceny does not mean that the restraint was *incidental to* or *necessary for* the completion of the larceny. Although the defendant escaped from the scene without delay because he did not stop to let the victims out of the Jeep at the gas station or shortly thereafter, his taking of the Jeep would not have been frustrated had he released the victims at any point immediately after taking the Jeep. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 40–41 ("There is nothing specific to—let alone inherent in—the crime of robbery about forcing someone at gunpoint to the back of a store and restraining them in a bathroom or cooler. That conduct could just as well follow, and facilitate the offender's escape from, a physical or sexual assault, or other crime. The purpose is to escape unhindered from a crime scene—which, presumably, is a goal of most criminals . . . ."). In other words, the defendant could have stolen the vehicle without restraining the victims for approximately ten minutes. The fact that he was more likely to be apprehended by the police at the gas station if he had permitted the victims to get out of the car immediately, or at any point shortly thereafter, does not compel a conclusion that the victims' restraint was incidental to or necessary for the commission of the larceny. Thus, we conclude that the third factor weighs in favor of the state.

With regard to the fourth relevant factor, whether the restraint prevented the victim from summoning assistance, the state argues that the defendant's restraint of the victims in a moving vehicle prevented them from exiting the vehicle to summon assistance. The state relies on the fact that the defendant withheld M's cell phone from her, further preventing her from contacting assistance while inside of the vehicle. The defendant argues that, because he released the victims

in a place where they easily could summon help—on the side of a highway—his restraint of the victims did not prevent them from summoning assistance.

As we have explained, the defendant restrained the victims in a moving vehicle, which he operated in an erratic manner and at a high rate of speed, in Southington and on the interstate highway. The two minor victims were strapped into their booster seats, such that they could not escape without being unstrapped, and M could not exit the vehicle to summon assistance without opening the door of a moving car. Only after the defendant released the victims could M flag down a passerby to summon assistance. Further, the defendant confiscated M's cell phone and did not return it to her, even after he let her exit the vehicle. Accordingly, we conclude that the fourth factor weighs in favor of the state.

With respect to the fifth relevant factor, whether the restraint reduced the defendant's risk of detection, the state argues that the defendant's restraint of the victims reduced his risk of detection because the defendant confined the victims inside of a moving vehicle, prevented M from calling the police to report the defendant's location, and left the victims on the side of a highway, rather than in a place of safety, so he could drive away without being detected. The defendant insists that he did not hide the victims. His eventual release of the victims, the defendant contends, in fact increased his risk of detection because the victims were able to contact the police once he released them.

As we explained in our analysis of the fourth relevant *Salamon* factor, the defendant transported the victims in a fast-moving vehicle and withheld M's cell phone, which prevented the victims from summoning assistance. Likewise, the defendant's transportation of the victims in a fast-moving vehicle and the withholding of

M's cell phone prevented the victims from alerting the police to the defendant's location by exiting the vehicle or by calling for help. Moreover, as the defendant argued in his brief and as we noted in our analysis of the third relevant *Salamon* factor, because the defendant did not stop to free the victims at or near the scene, the defendant fled the scene unhindered. Although the defendant freed the victims in public—on a highway—he did not release the victims until he had driven away from the gas station for ten minutes, and he released the victims on the side of the highway, instructing them to exit quickly before he continued driving on the highway. The fifth factor, thus, weighs in the state's favor.

Finally, we address the sixth relevant *Salamon* factor, namely, whether the restraint created a significant danger or increased the victims' risk of harm independent of that posed by the separate offense. The state argues that the defendant's erratic driving and decision to leave the victims on the side of a highway exposed them to significant danger and increased their risk of harm, independent of that posed by the defendant simply taking the Jeep. The state also relies on the fear experienced by M, who fearfully handed her cell phone over to the defendant, and the grandchildren, one of whom was crying during the incident. The defendant contends that his restraint of the victims did not create a significant danger because the victims remained secured in their seats throughout the drive and that the defendant neither harmed nor threatened to harm them at any point during the period of confinement.

To start, we note that the defendant's restraint of the victims was indeed "especially dangerous"; *White* v. *Commissioner of Correction*, 170 Conn. App. 438; even though there was no evidence presented to suggest that the defendant physically assaulted the victims. Nonetheless, the defendant confined the victims within a moving vehicle, which he operated in an erratic manner

and at a high rate of speed, for ten minutes in order to evade arrest by the police. The defendant's attempt to elude the police by driving erratically and at high speeds posed a risk of danger to the victims. Had the victims been outside of the Jeep, as was W, when the defendant took it at the gas station, they would not have been subjected to any risk of harm presented by the defendant's erratic driving. Further, as we have explained, the defendant eventually released the victims from the vehicle onto the side of the highway, without exiting the highway, and refused to return M's cell phone to her before driving away. The defendant's decision to leave the victims on the side of an interstate highway, in and of itself, posed a risk of danger to which they otherwise would not have been exposed, namely, the risk that they could have been injured by a passing car.

Further, as our Supreme Court has explained, "the distinct danger that is relevant to the question of whether criminal conduct bears independent significance as kidnapping need not be physical danger. . . . Criminal conduct that inspires distinct fears or has a uniquely harmful psychological impact on the victim also qualifies." (Citation omitted.) *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 46. In the present case, it is clear that the defendant's confinement and movement of the victims inspired distinct fear in them. While the defendant erratically operated the Jeep, M had to hold onto various parts of its interior, exhibiting the fear she experienced while confined within the car. When the defendant asked M whether she had a cell phone, M initially lied to him and stated that she did not have one, but she eventually surrendered her cell phone to him out of fear that the phone may ring. She additionally pleaded with the defendant not to harm her grandchildren and expressed that she was worried about them, reflecting her fear that he may harm them. Likewise, one of M's grandchildren was crying while in

the Jeep. During the ride and once the victims were released, M attempted to calm both of her grandchildren, reflecting the distinct fear they experienced as a result of their restraint. In sum, therefore, we conclude that the sixth factor weighs in the state's favor.

Balancing the foregoing considerations,[9] we conclude that the state has persuaded us beyond a reasonable doubt that there is no reasonable possibility that the jury, properly instructed, would have reached a different result with respect to whether the defendant restrained the victims "with the intent necessary to qualify as kidnapping . . . and not simply to perpetrate the underlying" larceny. Id., 34. We therefore conclude that the defendant cannot prevail on this claim.

II

The defendant next claims that there was insufficient evidence to support his conviction of three counts of kidnapping in the second degree.[10] With respect to this claim, the defendant makes two related arguments. First, the defendant asserts that, on the basis of the evidence presented at trial, no reasonable jury could determine that the state had proven beyond a reasonable doubt that he intended to abduct, or prevent the liberation of, the victims beyond that which was incidental or necessary to commit the larceny of the Jeep.

[9] To the extent that the second factor cuts in favor of the defendant, we find that it does not trump the significance of the remaining factors that weigh in the state's favor.

[10] This court and our Supreme Court, in previous cases, have addressed claims of insufficient evidence *before* addressing other claims raised on appeal because, "if the defendant prevails on [his] sufficiency claim, [he] is entitled to a directed judgment of acquittal rather than to a new trial." (Internal quotation marks omitted.) *State* v. *Bagnaschi*, 180 Conn. App. 835, 840 n.3, 184 A.3d 1234, cert. denied, 329 Conn. 912, 186 A.3d 1170 (2018); see also *State* v. *Calabrese*, 279 Conn. 393, 401, 902 A.2d 1044 (2006). In the present case, however, we address the defendant's claims in the order in which they were raised in his principal appellate brief because our resolution of his first claim necessarily resolves one of the two arguments related to insufficiency of the evidence that he raised in his second claim.

Second, the defendant argues that no reasonable jury could determine that the state had proven beyond a reasonable doubt that he used or threatened to use physical force or intimidation to restrain the victims. We are not persuaded.

We begin our analysis by setting forth the well established legal principles for assessing an insufficiency of the evidence claim. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test." (Internal quotation marks omitted.) *State* v. *Shin*, 193 Conn. App. 348, 357, 219 A.3d 432, cert. denied, 333 Conn. 943, 219 A.3d 374 (2019). "[W]e first must construe the evidence in the light most favorable to sustaining the verdict . . . ." *State* v. *Rhodes*, 335 Conn. 226, 229, 249 A.3d 683 (2020). "[E]stablished case law commands us to review claims of evidentiary insufficiency in light of all of the evidence [adduced at trial]. . . . In other words, we review the sufficiency of the evidence as the case was tried . . . . Accordingly, we have traditionally tested claims of evidentiary insufficiency by reviewing no less than, and no more than, the evidence introduced at trial." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Petersen*, 196 Conn. App. 646, 656, 230 A.3d 696, cert. denied, 335 Conn. 921, 232 A.3d 1104 (2020).

Second, we must "determine whether, on the basis of those facts and the inferences reasonably drawn from them, the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 229. Put

differently, "before this court may overturn a jury verdict for insufficient evidence, it must conclude that no reasonable jury could arrive at the conclusion the jury did." (Internal quotation marks omitted.) Id., 233. Accordingly, "[a] party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden." (Internal quotation marks omitted.) Id.

"Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) Id. The jury, "[i]n evaluating evidence . . . is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Shin*, supra, 193 Conn. App. 358. "Because [t]he only kind of an inference recognized by the law is a reasonable one [however] . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence." (Internal quotation marks omitted.) *State* v. *Ervin B.*, 202 Conn. App. 1, 6, 243 A.3d 799 (2020).

In light of the foregoing legal principles, we turn to the sufficiency of the evidence as a whole, beginning with the elements of the offense for which the defendant was charged. Section 53a-94 provides in relevant part: "(a) A person is guilty of kidnapping in the second degree when he abducts another person. . . ." Section 53a-91 (2) defines " '[a]bduct' " to mean, in relevant part, "to restrain a person with intent to prevent his

liberation by . . . (B) using or threatening to use physical force or intimidation." Section 53a-91 (1) defines " '[r]estrain' " to mean "to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . ."

The defendant first argues that the evidence in the record is insufficient to prove beyond a reasonable doubt that he intended to prevent the victims' liberation beyond that which was incidental to or necessary for the commission of the larceny of the Jeep. Specifically, he argues that the evidence, namely, the testimony that established that the victims were already in the vehicle when the defendant arrived at the gas station, that the defendant did not further restrain the victims, and that the defendant told the victims that he would not harm them, indicated that his restraint of the victims was incidental to the larceny. The defendant also asserts that he did not restrain, harm, or threaten the occupants in any way beyond what was necessary to commit the larceny. Because, in connection with our resolution of the defendant's first claim, we concluded that the court's failure to provide a *Salamon* instruction to the jury was harmless error because there was no reasonable possibility that a properly instructed jury would find that the defendant's restraint was incidental to or necessary for his completion of the larceny, it necessarily follows that a reasonable view of the evidence supports the jury's finding that the defendant intended to prevent the victims' liberation beyond that which was incidental to or necessary to complete the larceny and, consequently, the jury's verdict of guilty.

The defendant also contends that no reasonable fact finder could conclude that he used or threatened to use

force or intimidation to restrain the victims. Specifically, the defendant argues that there is no evidence that he physically harmed or threatened to physically harm the victims. The defendant asserts that he never physically blocked M from exiting the Jeep before he drove out of the parking lot of the gas station, nor did he brandish a weapon or threaten M to prevent her from exiting the vehicle. Further, the defendant asserts that he did not use physical force to restrain L and O because they were already strapped into their booster seats when he entered the Jeep. In response, the state argues that the defendant used physical force to restrain the victims when he confined them in a moving vehicle for ten minutes and failed to permit them to get out of the car. The state notes that, during that time, M surrendered her cell phone to the defendant out of fear. Accordingly, the state contends, the jury reasonably concluded that the defendant intimidated the victims or, through his actions, implicitly threatened the use of force against them.

A defendant who uses force or threatens to use force "coerc[es] or comp[els] [the victim] by an actual or threatened act," to acquiesce to the defendant's demand. (Internal quotation marks omitted.) *State* v. *Tucker*, 226 Conn. 618, 650 n.37, 629 A.2d 1067 (1993). This court has held that the jury, in evaluating whether a defendant intended to restrain a victim by using threats of force or intimidation, may consider the victim's reasonable belief that, had she tried to escape his confinement, the defendant may have used force against her. See *State* v. *Morlo M.*, 206 Conn. App. 660, 688–90, 261 A.3d 68, cert. denied, 339 Conn. 910, 261 A.3d 745 (2021); *State* v. *Franko*, 142 Conn. App. 451, 461, 64 A.3d 807, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013); see also *State* v. *Wideman*, 36 Conn. App. 190, 196, 650 A.2d 571 (1994) ("[t]he state of mind of the victim is a relevant consideration in" jury's evaluation

of whether defendant restrained victim "by the threat of force" (internal quotation marks omitted)), cert. denied, 232 Conn. 903, 653 A.2d 192 (1995). In *State* v. *Myers*, 129 Conn. App. 499, 513–14, 21 A.3d 499, cert. denied, 302 Conn. 918, 27 A.3d 370 (2011), for example, this court, in affirming the jury's determination that the defendant had used the threat of force to restrain the victim, relied on a victim's testimony that she felt as if she had " 'no choice' " other than to comply with the defendant's demand to get into a car.

The evidence admitted at trial in the present case, and the reasonable inferences from that evidence that the jury was permitted to draw, were more than sufficient to establish that the defendant used or threatened to use force or intimidation to restrain the victims. Contrary to the defendant's contention that he did not prevent M from exiting the Jeep, M testified that, to enter the Jeep, the defendant opened the passenger side door, next to where M was sitting, and climbed over M to get into the driver's seat. M and Ayotte testified that the defendant drove out of the parking lot of the gas station at a high rate of speed, and Ayotte's body camera footage documented that far less than one minute passed between the defendant arriving at the gas station in the minivan and exiting the gas station in the Jeep. M's grandchildren, L and O, were strapped into their booster seats in the backseat. M additionally testified that the defendant drove erratically and at a high rate of speed, such that she had to hold onto the Jeep's interior, and that the defendant drove the Jeep on the highway. From this evidence, the jury reasonably could have inferred that the defendant used force to prevent the victims from exiting the vehicle before he began driving and while the vehicle was in motion.

Further, M testified, she expressed to the defendant that she "just wanted [her grandchildren] to be safe,"

regardless of what the defendant had done. Having heard M's pleas, the defendant nonetheless did not allow the victims to exit the vehicle until after he had driven for ten minutes in total, at which point he pulled over on the side of the highway and instructed M to quickly exit the vehicle. M testified that she was worried about her grandchildren, one of whom was crying. M also testified that the defendant had asked her whether she had a cell phone and that she initially had lied to the defendant by stating that she did not have one. M, however, eventually surrendered her cell phone to the defendant, out of fear that the phone may ring. The jury reasonably could have inferred that M surrendered her only channel of communication because she feared that the defendant may have reacted by using force against her or her grandchildren, had the phone rang. Viewing the evidence in the light most favorable to sustaining the verdict, the jury reasonably could have inferred that the defendant intimidated or threatened to use force to restrain the victims and that M reasonably believed that, if she tried to escape her confinement, the defendant would use force against her or her grandchildren.

In sum, we are not persuaded that the evidence in the present case was insufficient to prove that the defendant intended to prevent the victims' liberation beyond what was incidental to or necessary for the successful completion of the larceny and that he used or threatened to use force or intimidation to restrain the victims. We therefore conclude that there was sufficient evidence from which the jury reasonably could have found the defendant guilty beyond a reasonable doubt of each of the three counts of kidnapping in the second degree.

III

The defendant's final claim on appeal is that the court abused its discretion when it denied his requests to

have his leg shackles removed during the trial[11] and violated his constitutional right to due process by requiring him to be shackled during the trial. Specifically, the defendant argues that the court's denial of his requests to remove his leg shackles without adequately explaining why it denied the requests resulted in the defendant being unfairly restrained, deprived him of his right to a fair trial and undermined his presumption of innocence.[12] The state argues that the court provided sufficient reasons to support its denial of the defendant's requests and, more importantly, the defendant failed to present evidence establishing that the shackles were visible to the jury. Because we find that the defendant has failed to meet his burden of proving that his leg shackles were visible to the jury, the defendant's claim necessarily fails.

The following additional procedural history is relevant to our resolution of this claim. On the first three days of jury selection on September 11, 13 and 16, 2019, the defendant requested that his handcuffs be removed, and, on confirming with the judicial marshals that there existed no security concern, the court granted each request. The court noted on September 11 and 13, 2019, that the defendant's legs remained shackled and that

[11] We note that, although the defendant argues in his brief that the court improperly required his legs to be shackled "during most of his trial," that characterization is somewhat misleading. The court instructed the defendant to request that his shackles be removed on a day-by-day basis. The defendant requested the removal of his leg shackles on September 23, 2019, and the court granted his request. The defendant did not request that his leg shackles be removed on September 25 or 26, 2019, and, thus, it is unclear whether the court would have allowed the leg shackles to be removed on those days if asked.

[12] The defendant also argues that the court's denial of his requests to remove his leg shackles inhibited his ability to assist in his defense, noting that physical restraints generally may inhibit a defendant's ability to interact with counsel or affect his decision to testify. The defendant, however, neither argued nor pointed us to any evidence in the record to suggest that his leg shackles inhibited *his* ability to assist in his defense in this case.

his leg shackles were not visible to the venirepeople. On September 16, 2019, a judicial marshal characterized the defendant's behavior as "[g]reat." On September 19, 2019, the court granted the defendant's request that his shackles be removed.[13]

The trial began on September 23, 2019. During a mid-trial recess on the first day of trial, counsel for the defendant requested in chambers that the defendant's leg shackles be removed. On the record, the court asked the judicial marshals whether they had any safety or behavioral concerns, and the judicial marshals answered that the defendant had not presented any issues. Accordingly, although the court noted that it believed that his leg shackles were not visible to the jury, the court granted the defendant's request and ordered that the leg shackles be removed. A judicial marshal asked the court whether the defendant's legs should remain unshackled for the duration of the trial, and the court clarified that it would reevaluate whether to remove the defendant's leg shackles on each day of the proceedings, at the request of the defendant.

On September 24, 2019, and outside of the presence of the jury, the defendant requested that his leg shackles be removed. The court stated that, on the basis of its conversations with the parties that morning, it anticipated that certain testimony the state planned to elicit from one of its witnesses could produce an emotional reaction from the defendant.[14] The court noted that, although it did not "have a crystal ball," it would be easier to prevent an emotional reaction than to remediate any consequences of one. Consequently, the court denied the defendant's request.

[13] The record, however, is unclear whether the defendant requested that his hand shackles or his leg shackles be removed and, thus, whether the court granted the removal of the defendant's hand or leg shackles.

[14] On September 24, 2019, the state called four witnesses to testify: Renaldi, Sergeant Steve Cifone, Detective Adam Tillotson, and Officer Ryan Lair.

Counsel for the defendant expressed to the court that the defendant was "concerned" that, on the previous day, one of the jurors had seen the shackles. The court, however, explained that, earlier that day, it had instructed one of the judicial marshals to sit in various chairs in the jury box, including in two chairs near the counsel's tables, to determine whether the leg shackles were visible to any juror. The judicial marshal confirmed that the leg shackles were not visible from the various seats in the jury box.

The trial resumed, and, on September 26, 2019, the defense rested. The following day, before the commencement of closing arguments and jury instructions, the defendant once again requested that his leg shackles be removed. The court denied the defendant's request, providing as reasons for its decision that the defendant would not "be moving around the courtroom" during closing arguments and jury instructions, that his leg shackles were not visible to the jury, and that he was not wearing hand shackles.[15]

We begin by setting forth the legal principles that govern our analysis of this claim, including the applicable standard of review. "[I]n reviewing a shackling claim, our task is to determine whether the court's decision to employ restraints constituted a clear abuse of discretion." (Internal quotation marks omitted.) *State* v. *Brawley*, 321 Conn. 583, 589, 137 A.3d 757 (2016).

"Central to the right to a fair trial, guaranteed by the [s]ixth and [f]ourteenth [a]mendments [to the United States constitution], is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion,

[15] Specifically, the court stated: "[The defendant is] not going to be moving around the courtroom. We've noted for the record previously that the shackles are not visible to the jury. He is not wearing hand shackles and this is, I think for today's purposes, the answer is no."

indictment, continued custody, or other circumstances not adduced as proof at trial." (Internal quotation marks omitted.) *State* v. *Marcus H.*, 190 Conn. App. 332, 345, 210 A.3d 607, cert. denied, 332 Conn. 910, 211 A.3d 71, cert. denied, U.S. , 140 S. Ct. 540, 205 L. Ed. 2d 343 (2019). "[C]ourts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Woolcock*, 201 Conn. 605, 613, 518 A.2d 1377 (1986). Thus, "[i]n order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous character whose guilt is a foregone conclusion." (Internal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 455, 680 A.2d 147 (1996).

Accordingly, "[i]t is well established that, [a]s a general proposition, a criminal defendant has the right to appear in court free from physical restraints. . . . Grounded in the common law, this right evolved in order to preserve the presumption favoring a criminal defendant's innocence, while eliminating any detrimental effects to the defendant that could result if he were physically restrained in the courtroom. . . . The presumption of innocence, although not articulated in the [c]onstitution, is a basic component of a fair trial under our system of criminal justice." (Internal quotation marks omitted.) *State* v. *Brawley*, supra, 321 Conn. 587. As this court explained in *Marcus H.*, "the United States Supreme Court [in *Deck* v. *Missouri*, 544 U.S. 622, 628, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005)] stated that . . . [c]ourts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal

defendant has a right to remain free of physical restraints *that are visible to the jury*; [and] that the right has a constitutional dimension . . . .'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Marcus H.*, supra, 190 Conn. App. 347.

''Nonetheless, a defendant's right to appear before the jury unfettered is not absolute. . . . A trial court may employ a reasonable means of restraint [on] a defendant if, exercising its broad discretion in such matters, the court finds that restraints are reasonably necessary under the circumstances.'' (Internal quotation marks omitted.) *State* v. *Brawley*, supra, 321 Conn. 587. For example, a defendant's ''right to remain free of physical restraints that are visible to the jury . . . may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum.'' (Emphasis omitted; internal quotation marks omitted.) *State* v. *Marcus H.*, supra, 190 Conn. App. 347, quoting *Deck* v. *Missouri*, supra, 544 U.S. 628. Because ''[a] trial judge has a duty to do what may be necessary to prevent escape, to minimize danger of harm to those attending trial as well as to the general public, and to maintain decent order in the courtroom . . . [s]hackles may properly be employed in order to ensure the safe, reasonable and orderly progress of trial.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Woolcock*, supra, 201 Conn. 614.

''Despite the breadth of [the court's] discretion, however, [t]he law has long forbidden routine use of *visible* shackles during the guilt phase . . . .'' (Emphasis added; internal quotation marks omitted.) *State* v. *Brawley*, supra, 321 Conn. 587. ''[T]he [United States Supreme] [C]ourt held [in *Deck* v. *Missouri*, supra, 544 U.S. 629] that the [f]ifth and [f]ourteenth [a]mendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest

specific to a particular trial." (Emphasis in original; internal quotation marks omitted.) *State* v. *Marcus H.*, supra, 190 Conn. App. 347.

Practice Book § 42-46 mandates in relevant part: "In ordering the use of restraints or denying a request to remove them, the judicial authority shall detail its reasons on the record outside the presence of the jury. The nature and duration of the restraints employed shall be those reasonably necessary under the circumstances. . . ." See also *State* v. *Brawley*, supra, 321 Conn. 589 ("a trial court must ensure that its reasons for ordering the use of restraints are detailed in the record" (internal quotation marks omitted)). Although a trial court is not mandated to conduct "an evidentiary hearing concerning the necessity for restraints," our "appellate review is greatly aided when a court develops the record by conducting [such] an evidentiary hearing . . . ." (Internal quotation marks omitted.) Id.

If "a court, without adequate justification, orders [a] defendant to wear shackles that *will be seen* by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The [s]tate must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." (Emphasis in original; internal quotation marks omitted.) Id., 588–89. "The negative connotations of restraints, nevertheless, are without significance unless the fact of the restraints comes to the attention of the jury." (Internal quotation marks omitted.) *State* v. *Webb*, supra, 238 Conn. 455. "[T]o establish that he was deprived of his right to a fair trial, the defendant . . . must provide evidence demonstrating that the jury actually saw or otherwise was aware of his restraints." *State* v. *Brawley*, supra, 321 Conn. 590–91. "The defendant bears the burden of showing that he has suffered

prejudice by establishing a factual record demonstrating that the members of the jury knew of the restraints." (Internal quotation marks omitted.) Id., 588.

In light of the foregoing legal principles, we remind courts to follow the prescriptions of Practice Book § 42-46 and to articulate the reasons that support a court's decision to order the use of, or to deny a defendant's request to remove his, leg shackles, regardless of whether the shackles are visible to the jury. See Practice Book § 42-46. We also emphasize the constitutional dimension inherent in a defendant's right to remain free of physical restraints that are visible to the jury during the guilt phase of his trial. See *State* v. *Marcus H.*, supra, 190 Conn. App. 347.

Turning to the present case, our review of the record reveals no evidence to suggest that the jurors actually saw or otherwise knew of the defendant's leg shackles. See *State* v. *Brawley*, supra, 321 Conn. 592. Although defense counsel expressed to the trial court on one occasion that the defendant was "concerned" that one of the jurors had seen his leg shackles, the defendant pointed to no evidence, neither to the court nor in his brief to this court, to support that any juror could see the shackles.[16] By contrast, the court instructed a judicial marshal to sit in various chairs in the jury box to assure that the defendant's leg shackles were not visible to the jury. Because the defendant has failed to satisfy his burden of demonstrating that members of the jury actually saw or otherwise were aware of his restraints,

[16] The defendant also argues that the jurors may have heard the defendant's leg shackles. He has not pointed us to anywhere in the record to support this contention, and our review of the record has uncovered no evidence from which to conclude that the jurors heard the defendant's shackles at any point during the trial. Thus, with respect to this argument, the defendant has not met his burden of "demonstrating that the members of the jury knew of the restraints." (Internal quotation marks omitted.) *State* v. *Brawley*, supra, 321 Conn. 588.

he has failed to establish that the court's denial of his requests deprived him of his right to a fair trial, and, accordingly, his claim fails.[17]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN H. LAMOTTE (AC 43973)

Prescott, Cradle and DiPentima, Js.

Syllabus

Convicted, on pleas of guilty, of two counts of the crime of robbery in the first degree, the defendant appealed to this court, claiming that the trial court improperly denied his request for an evidentiary hearing on his motion to withdraw the pleas. The defendant had been facing a maximum sentence of forty years of imprisonment on the robbery charges. After trial commenced on those charges, the defendant pleaded guilty in exchange for a sentence of six and one-half years of imprisonment followed by seven years of special parole. The trial court accepted the pleas after canvassing him and determining that the pleas were knowingly and voluntarily made with the assistance of competent counsel. The court denied the motion to withdraw the guilty pleas after conducting

[17] The defendant requests that we exercise our "supervisory authority" to require trial courts to conduct an evidentiary hearing to evaluate the necessity for restraints and, should the court determine that restraints are necessary, to create a record detailing the steps it took to assure that the jury is not aware of the restraints. The defendant argues that the protections afforded to him, namely, by the rules of practice and in our Supreme Court's decision in *Brawley*, are insufficient to ensure to him a fair trial and that the state should bear the burden of proving that the defendant's shackles were not visible to the jury.

As we have explained, our Supreme Court in *Brawley* specifically stated that courts need not conduct an evidentiary hearing to evaluate the necessity of restraints and that the burden lies with the defendant to provide evidence demonstrating that the jury was aware of his restraints. *State* v. *Brawley*, supra, 321 Conn. 589–91. "As an intermediate appellate court, we . . . are bound by the decisions of our Supreme Court." *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 805 n.1, 149 A.3d 983, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016). Accordingly, we decline to create such a rule because it is not the province of this panel to disregard binding authority of our Supreme Court.

a hearing during which the defendant claimed that he was under duress during the plea proceeding because he had learned during the trial that an inspector from the state's attorney's office had coerced and given false information to a witness who had not yet testified. The defendant further asserted that his trial counsel rendered ineffective assistance because, inter alia, they failed to pursue an alibi defense on his behalf. *Held* that this court could not conclude that the trial court abused its discretion by not affording the defendant an evidentiary hearing on his motion to withdraw the guilty pleas, as the trial court afforded him ample opportunity to present his claims, clearly addressed each of his arguments appropriately as they were presented and, relying on the transcript of the plea proceeding, concluded that there was no basis for them: as to the ineffective assistance of counsel claim, the court noted that the defendant had indicated on various occasions during the plea canvass that he was satisfied with his counsel, the defendant failed to demonstrate an adequate factual basis to support an evidentiary hearing as to his counsel's alleged failure to pursue the alibi defense, as the defendant indicated during the plea canvass that he understood that, by pleading guilty, he was giving up the right to put on any defenses he might have had, he did not complain then or at any other time that his counsel failed to pursue the alibi defense, the defendant did not proffer facts in support of that defense or claim that he had ever discussed it with his counsel prior to pleading guilty, and neither he nor his counsel proffered whether the defendant possessed such evidence or informed counsel that such evidence existed; moreover, the transcript of the plea proceeding conclusively refuted the defendant's claim of coercion by the state's inspector, as the defendant knew of that incident before pleading guilty, and at no time during the plea proceeding did he mention it to the court.

Argued October 21, 2021—officially released January 18, 2022

Procedural History

Substitute information charging the defendant with two counts of the crime of robbery in the first degree, and with one count each of the crimes of larceny in the third degree and larceny in the fourth degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Jongbloed*, *J.*; thereafter, the defendant was presented to the court, *Strackbein*, *J.*, on pleas of guilty to two counts of robbery in the first degree; subsequently, the court, *Strackbein*, *J.*, denied the defendant's motion to withdraw the pleas and rendered judgment of guilty; thereafter, the state

entered a nolle prosequi as to the charges of larceny in the third degree and larceny in the fourth degree, and the defendant appealed to this court. *Affirmed.*

Jennifer B. Smith, assistant public defender, for the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Jennifer F. Miller*, former assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, John H. LaMotte, appeals from the judgment of conviction rendered by the trial court following the denial of his motion to withdraw his guilty pleas. On appeal, the defendant claims that the court improperly denied his request for an evidentiary hearing on his motion to withdraw those pleas. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant procedural history. In connection with the defendant's alleged commission of two bank robberies in Groton, on December 6, 2016, and September 18, 2017, the defendant was charged, by way of a substitute information dated May 8, 2019, with two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), one count of larceny in the third degree in violation of General Statutes § 53a-124 (a) (2), and one count of larceny in the fourth degree in violation of General Statutes § 53a-125. On May 28, 2019, after his jury trial commenced,[1] the defendant pleaded guilty, under the *Alford*

[1] At the time the defendant entered his guilty pleas, the jury had been empaneled and the state had already presented evidence.

doctrine,[2] to two counts of robbery in the first degree pursuant to a plea agreement. In exchange for those pleas, the defendant agreed to a total effective sentence of six and one-half years of incarceration, followed by seven years of special parole. The court canvassed the defendant, found that the pleas were knowingly and voluntarily made with the assistance of competent counsel and accepted them. The court ordered a presentence investigation and continued the case for sentencing.

Thereafter, the defendant sent a letter, dated June 28, 2019, to the court, seeking to withdraw his guilty pleas on the grounds of a claimed conflict of interest and ineffective assistance of counsel, and asked that new counsel be appointed to represent him. On August 7, 2019, the defendant and his counsel appeared before the court for sentencing, at which time the court addressed the letter it had received from the defendant. The court allowed defense counsel to withdraw, at counsel's request, from the defendant's case. The court indicated that it would conduct a hearing on the defendant's motion to withdraw his guilty pleas and explained to the defendant that he would be assigned new counsel to represent him at that hearing. Thereafter, the defendant told the court that his attorney had a conflict of interest that was not disclosed to him for sixteen months, and, thus, he "wasn't being defended." He stated: "I was brain-dead because they had a fake witness come in, and then they did nothing about it at the trial. . . . And they also caught the prosecution, the

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Celaj*, 163 Conn. App. 716, 718–19 n.3, 141 A.3d 870 (2016).

inspector who was sitting there coercing the witnesses before they even went in front of the jury. And they were informed about it, still didn't do nothing about it. . . . I have a witness here in court that seen it going on . . . and I have another one, a state witness, that'll come in and testify to verify that. . . . Them telling the . . . witnesses that I was guilty. They know I did it. He already signed the confession. You can say whatever you want in front of the jury. It's not gonna matter, and they informed [my counsel] here, and he didn't do nothing about it to stop it; plus, the false witness that they brought in at the end. I told them that days ahead, and nobody's ever gotten to the bottom of that." The court reiterated to the defendant that new counsel would be assigned "who will listen to [the] allegations [underlying his motion] and see whether they think it's valid enough to try to withdraw the plea." The defendant responded: "Most of it is right on the tape, recorded at the trial." The court ordered that new counsel be appointed to represent the defendant and continued the case to give the defendant's new counsel the opportunity to review the motion to withdraw the guilty pleas.

On December 19, 2019, the court conducted a hearing on the defendant's motion to withdraw his guilty pleas. At the hearing, the defendant's new counsel argued: "By way of a proffer, [the defendant] is advancing two arguments why his plea should be withdrawn. The first really goes to the concept that he was under duress or that his plea was not voluntary. And the facts, or the proffer which backs that up, is that [the defendant's] sister was present outside during the trial and overheard one of the state's inspectors speaking to a witness, who had not testified yet, making some comments to the witness that [the defendant] was guilty, that they've got—they've got it on paper that he's done this before.

"There was also an allegation that there was some sort of a confession which—a written confession which

[the defendant] had executed that was being shown to the potential witness, Melanie Brown . . . and that [the defendant's] sister relayed her concerns to that inspector. And, moreover, she relayed those facts to [the defendant] over the weekend during that trial, and . . . that [the defendant] heard these words and in effect realized that the fix was in for him, in not so many words—that he really didn't have a fair opportunity. And that was the duress that he was under when he did enter his plea. He felt that it was the best that he could do and that his—well, his will was overborne as a result of those facts made known to him.

"The second argument that he is advancing is that his prior counsel were ineffective. And I believe that there are two grounds for that: number one, there was a potential conflict of interest with a potential third party, Kyle Hare . . . and that wasn't made known to [the defendant] until immediately before the trial. And the second ground is that his alibi was not adequately pursued in terms of photographs of him at a different location around when the robbery occurred, as [well as] phone records indicating he wasn't in the area.

"Based upon the totality of those facts, Your Honor, I'd respectfully request that you grant [the defendant's] motion to withdraw his guilty plea, or, in the alternative, give him the opportunity of an evidentiary hearing to further lay out those facts for you."

In response, the prosecutor argued that the defendant had been thoroughly canvassed by the court when he entered his guilty pleas, and the record reflected that there "was no indication whatsoever that [the defendant] felt that his will was overborne at any point in time." The prosecutor contended that the defendant simply had "buyer's remorse" after entering his guilty pleas. The prosecutor further argued that the defendant failed to allege sufficient facts to warrant an evidentiary

hearing on his ineffective assistance of counsel claims and that those claims were thus better suited for habeas proceedings in which the defendant could "flesh out any such claims."

Defense counsel then added: "One of the other grounds that [the defendant] is advancing with regard to the ineffective assistance claim is that it was his understanding that a probation which was—he was on probation in Rhode Island. He was informed that, as a condition of the—the deal that he was accepting, that that probation would be terminated, and it was not terminated.

"He has documentation indicating that he's still on the—that probation. So, that's just one of the other grounds on the ineffective assistance claim, Your Honor."

Having heard the arguments of both counsel, the court first noted that, at the time the defendant pleaded guilty, he was "in the middle of trial." The court noted that the defendant was facing a maximum prison sentence of forty years for the two robbery charges and that the sentence that he would receive pursuant to the plea agreement was not "even close to that." The court then explained that it was referring to the transcript of the plea proceeding and recounted that proceeding as follows: "All right, so when you came back from the trial and decided to plea[d], [the prosecutor], who [is] not here, went through the facts of the case and you had pled—that you had pled guilty, and I say at that time, did you have enough time to talk to your lawyers about these cases and your decision to plead guilty under what's known as the *Alford* doctrine, and you said yes.

"And I said, did they go over with you the maximum sentence you could have received in jail if you went to or finished your trial, and if you were convicted on the

evidence the state had to show that you were guilty? And then I go over it: For two counts of robbery in the first degree, each one holds twenty years in jail, so for what you pled to today, just these two counts, you could go to jail for forty years. Did they go over that with you? Yes.

"And so, you're satisfied, then, with this plea agreement and your lawyer's help? Yes.

"And you understand that by pleading guilty, you're giving up your right to actually, basically, to finish the trial. You could have had, as I say, the rest of your trial, and you could have testified if you wanted to, put on witnesses of your own, confronted and cross-examined the witnesses against you, put on any defenses you might have had with the help of your lawyers. But we weren't finishing your trial because of your pleas. Do you understand that? Yes.

"I then say, do you have any other open charges anywhere else? No. I don't. Are you on probation anywhere else? Yes. You are? Yes. Rhode Island.

"And then [the prosecutor] said, my understanding is that [the defendant] had been placed on probation in Rhode Island but had been violated, and I believe that probation may have been terminated. And then [defense counsel] said, that was my understanding.

"So, you're not on probation anywhere else? Are you on parole anywhere else? Am I on parole, you ask. No.

"And this plea agreement—you're in favor of this plea agreement based on the fact that you could have gone to jail for forty years; so you're satisfied then, again, with this plea agreement and your lawyer's help. And you say, I'm going to have to be. And I said, no, you don't have to be because you're in the middle of trial. And you said, it could get worse; I'll take this. I'm satisfied.

"I said, you're satisfied with this plea agreement based on the evidence you've seen so far in the trial and the exposure that you had if you were to be convicted? And you say, um hum. And I say, right? That was forty years. Right? And you say, yes.

"I say, okay, because I need to know that you're satisfied with the plea agreement and your lawyer's help. Okay? You say, yes. And then I went through the part about being a [United States] citizen, is anyone threatening you or forcing you or promising you anything to get you to plea[d], and you say, no. So, your pleas are voluntary? You say, yes.

"Then I say, is it your understanding of the *Alford* doctrine that you might disagree with some of the facts the prosecutor said about the cases, but if you finish your trial there's a good chance you could be convicted and get a much worse sentence than this. Is that your understanding of the *Alford* doctrine? And you say, yes.

"And then I say, you also understand, once I accept your pleas today you can't change your mind later? You say, yes. I said, do you have any questions about the questions I've asked you? And you say, no. And I say, you're clear? And you say, yes.

"And then I asked if there's any reason I shouldn't accept the plea, and [the prosecutor] went on to add some things to the record. And he said, the only thing I wanted to add for the record is to make explicit what has been implicit. Your Honor has referred to it as, at least peripherally in your comments, that we've had several days of trial, and, although obviously I'm not privy to attorney-client communications, the record should reflect that, in terms of understanding what's happening today, it's been my observation and experience that [the defendant] has been energetically and diligently represented, and there's been [an] extensive

amount of communication that I've been at least a witness to visually, if not hearing it. All of that precedes this plea.

"And I say to you, do you understand that? Do you hear what the prosecutor is saying: that you've worked very well with your two lawyers, and that they've worked very hard on your case? And you say: they did. I say, you're acknowledging that? And you say, yes. I say, okay.

"And [the prosecutor] also added: They've kept me and [my cocounsel] very, very busy, meaning the lawyers, because they were so diligently representing you. And I then say, which is their job to do, to keep [the prosecutors] busy. And at a certain point you realize that this agreement will be a much better plan for you. Is that what you've come to understand? And you say, yes.

"Then I ask if there's any reason not to accept the pleas. [The prosecutor] says, no. [Defense counsel] says, no. And I made the finding and the agreed-upon sentence. I said there'd be a presentence investigation. Your lawyer would be notified when it would take place. The agreed-upon sentence: six and a half years followed by seven years of special parole on each count, concurrent.

"And then I told you not to pick up any new charges while you're locked up because you just pled to forty years worth of cases. Okay? So that's where we are.

"Based on that, this transcript, your answers, your total understanding that you had two lawyers working diligently on your behalf, I'm denying your motion to withdraw your plea today."

The following colloquy then occurred:

"The Defendant: Well, the problem I have with it is—is the conflict of interest.

"The Court: Okay. I don't see a conflict of interest here.

"The Defendant: He didn't tell me for sixteen and a half months. I don't even know if he was working on my case.

"The Court: I'm just going by what you said about your lawyers.

"The Defendant: I was boxed in.

"The Court: You were in the middle of trial. . . . [The prosecutor] mentioned that, if you don't like your lawyers, that's not what happens for sentencing. That's not one of the grounds. You had effective assistance of counsel. If you feel you didn't, then you can file a habeas against your other lawyers, but . . . they're going to get a transcript of this and of your original plea at the habeas court and see whether or not they felt that there was effective assistance of counsel.

"The Defendant: Yeah. Well—

"The Court: They did a good job for you . . . .

"The Defendant: One more thing is that he was informed about all the coercing and didn't do nothing about it; he just let it fly.

"The Court: Okay. That's because . . . it's arguable about whether there was any coercing or not. The real bottom line is what happened in this case and what you pled to: two bank robberies.

"The Defendant: Okay. And I understand that.

"The Court: And with your record, I'm just telling you, if you were convicted with your record of—

"The Defendant: The other thing—

"The Court: —forty-four prior charges, including other bank robberies, you would have gotten such a

much higher sentence if you were convicted than six and a half, plus seven, special. You understand that.

"The Defendant: Oh, I understand that.

"The Court: And that's why you took this deal. Right?

"The Defendant: Yeah. I was thinking there was no probation, but basically what I want to go back to is when you told me when the DNA was eliminated from both robberies, that do not let them force you into any pleas when we were talking about going to trial. You told me do not let them force you into any pleas.

"The Court: Right.

"The Defendant: But if at any point in time during the trial you can come back over here and get your original sentence, which was only five years. Now that's—

"The Court: Okay. I never said you would have your—

"The Defendant: —off the table. I don't know if anybody's living up to their word.

"The Court: I never said you would get your original sentence because, once you go to trial, you don't get the original offer.

"The Defendant: You said that.

"The Court: So, at this point, I think that—and then plus, you've been getting credit all the time, and so I understand you'll be getting credit right back. All right?

"The Defendant: That's . . . not the point. That's not the point.

"The Court: Well, I think the point is that you've pled in front of me voluntarily, and you got an excellent deal based on the charges, the evidence the state had, and the amount of work your lawyers did for you. . . .

"The Defendant: It's not the . . . I'm not even supposed to be on probation in Rhode Island. I can go back to Rhode Island and face violation and get ten years suspended and—you know—on the transcript it said probation was terminated. It's not. They lie to your face in open court.

"The Court: Well, they didn't lie. They said it was their understanding that it was over. But, if it—

"The Defendant: They said it was forfeited.

"The Court: You know what? Whether it was or wasn't . . . I have no jurisdiction over that. If you said yes, I'm on probation in Rhode Island, my answer is, I have no control over what happens with that.

"The Defendant: But it was part of the plea bargain all in the same transcript in itself. So, the deal is not even the deal I was offered.

"[The Prosecutor]: I disagree, Your Honor. I think that the record, it's relatively clear—not relatively clear, the record is clear. [The prosecutor] said that it's his understanding, but there were no promises. . . . I didn't hear any promises referenced in that.

"With respect to this coercion claim again, I don't want my silence to in any way be inferred that I would agree with that. I think that . . . is clearly in dispute. And I think there was never any mention during the plea canvass—and Your Honor has not only put it on the record and read it into the record but also is going to make it a court exhibit—that he, at any point, said no . . . I was supposed to get my original offer.

"So, I think the record is clear. Again, it's buyer's remorse. It's an attempt by [the defendant] to . . . have his cake and eat it, too. And what I mean by that is, he saw what the evidence was, he decided to plead guilty under the *Alford* doctrine. He did that. The jury was

dismissed. All of that evidence was for naught for that particular trial, and now he's trying to change it again.

"And I would respectfully submit that we end this and deny the motion and go to the sentencing."

The court then indicated that it was denying the defendant's motion to withdraw his guilty pleas and proceeded to sentencing. When the court asked the defendant if he wanted to say anything prior to the imposition of sentence, the following colloquy ensued:

"The Defendant: Yeah. That's—I don't know. I got nothing to say about nothing, just like when you boxed me in before. Go ahead. Do your thing.

"The Court: Okay. So, you're saying I boxed you in. How?

"The Defendant: No. The lawyers did. It's like they were letting fake witnesses, they weren't caring about the coercion. You know, just a typical New London thing, I guess.

"The Court: Okay. Well, I would take—

"The Defendant: So, just go ahead. It's a circus show. Sentence me and be done with it.

"The Court: I would disagree with your characterization. I think—

"The Defendant: Well, that's what—I'm speaking from the heart. I have nothing to hide here.

"The Court: Well, I'm—you know. Especially when you came back over here and pled. It's not that you aren't familiar with the legal system, based on your record.

"The Defendant: I know how I pled, and I was disturbed at it and you noticed it, too, and you know deep inside.

"The Court: No. I asked you—I asked you—

"The Defendant: That's why you had to keep asking me—

"The Court: Well, I wanted to make—

"The Defendant: Because I didn't want to answer the questions.

"The Court: Well, I wanted to make sure—

"The Defendant: I was boxed in.

"The Court: I just wanted—you weren't boxed in. One of the questions is, is anybody threatening you or forcing you or promising you anything.

"The Defendant: No. Everything's good.

"The Court: You said no.

"The Defendant: Go ahead. You give me something to live for. I mean, just go ahead and sentence me.

"The Court: Okay . . . [t]hat's what I'm going to do."

The court then sentenced the defendant, in accordance with the plea agreement, to a total effective sentence of six and one-half years of incarceration, followed by seven years of special parole. This appeal followed.

On January 21, 2021, the defendant, through counsel, filed a motion for articulation, asking the trial court to articulate its ruling on the defendant's request for an evidentiary hearing on his motion to withdraw his guilty pleas. On January 28, 2021, the court filed a written articulation, in which it indicated that it had implicitly denied the defendant's request for an evidentiary hearing based on the transcript of the plea proceeding and the subsequent hearing that it held on the motion to withdraw. The court also again addressed each of the defendant's arguments advanced in support of his

motion to withdraw his guilty pleas. As to the defendant's claim that his trial counsel "was ineffective for failing to adequately investigate his alibi and by giving him misleading information to induce his plea[s]," the court articulated: "There is no basis for this allegation. On page [11] of the transcript [of the plea proceeding], the court asks the defendant if he understood what the prosecutor was saying—that [the defendant] worked very well with his two lawyers, and they worked very hard on his case, and the defendant responded, 'they did,' and, to emphasize this, the court then said, 'you're acknowledging that?' and the defendant said, 'yes.' " As to the defendant's claim that his trial counsel "had a possible conflict of interest with a potential third-party suspect," the court referred again to the transcript of the plea proceeding, indicating: "As the court informed the defendant, 'you have other remedies for your other complaints. The remedy for this allegation would be a habeas petition where a different forum might be willing to hear evidence on this allegation.' " And, finally, as to the defendant's claim that "his plea was involuntary and made under duress because the state's attorney's inspector was coercing and giving false information to a witness," the court reasoned: "The plea canvass was exceptionally clear regarding the voluntariness of the pleas. Pages [8 and 9] of the transcript cover the voluntariness of the pleas. The court was very careful regarding the defendant's answers because he had been difficult throughout the case, and the court wanted to be sure he was entering his pleas voluntarily. In relevant part, the court said, 'you are satisfied with this plea agreement based on the evidence you've seen so far in the trial and the exposure that you had if you were to be convicted?' The defendant responded, 'um hum' and the court said, '[R]ight? That was forty years, right?'

"The court asks, 'is anyone threatening you or forcing you or promising you anything to get you to plead,' and

the defendant answers, 'no.' The court asks, '[S]o, your pleas are voluntary?' The defendant replies, '[Y]es.'

"There is no mention of coercion or threats or duress. The court's canvass and the defendant's responses are clear. The defendant understood the canvass, asked questions and, with approximately forty-four prior convictions is not unfamiliar with a plea canvass." The court also noted that it had attached a copy of the entire transcript of the plea proceeding to its articulation.

On appeal, the defendant claims that the court erred in denying his request for an evidentiary hearing on his motion to withdraw his guilty pleas. We begin with the standard of review and the relevant principles of law that govern our analysis of the defendant's claim on appeal. "It is well established that [t]he burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is reversible only if that discretion has been abused. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did. . . .

"Motions to withdraw guilty pleas are governed by Practice Book §§ 39-26 and 39-27. Practice Book § 39-26 provides in relevant part: A defendant may withdraw his . . . plea of guilty . . . as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his

. . . plea upon proof of one of the grounds in [Practice Book §] 39-27[3] . . . .

"We further observe that there is no language in Practice Book §§ 39-26 and 39-27 imposing an affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea. . . . [T]he administrative need for judicial expedition and certainty is such that trial courts cannot be expected to inquire into the factual basis of a defendant's motion to withdraw his guilty plea when the defendant has presented no specific facts in support of the motion. To impose such an obligation would do violence to the reasonable administrative needs of a busy trial court, as this would, in all likelihood, provide defendants strong incentive to make vague assertions of an invalid plea in hopes of delaying their sentencing. . . .

"When the trial court does grant a hearing on a defendant's motion to withdraw a guilty plea, the requirements and formalities of the hearing are limited. . . . Indeed, a hearing may be as simple as offering the defendant the opportunity to present his argument on his motion for withdrawal. . . . [A]n *evidentiary* hearing is rare, and, outside of an evidentiary hearing, often a limited interrogation by the [c]ourt will suffice [and] [t]he defendant should be afforded [a] reasonable opportunity to present his contentions. . . .

"Thus, when conducting a plea withdrawal hearing, a trial court may provide the defendant an opportunity

[3] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows . . .

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed . . .

"(4) The plea resulted from the denial of effective assistance of counsel . . . ."

to present a factual basis for the motion by asking open-ended questions. . . . Furthermore, in assessing the adequacy of the trial court's consideration of a motion to withdraw a guilty plea, we do not examine the dialogue between defense counsel and the trial court . . . in isolation but, rather, evaluate it in light of other relevant factors, such as the thoroughness of the initial plea canvass. . . .

"This flexibility is an essential corollary of the trial court's authority to manage cases before it as is necessary. . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . Therefore, the trial court is not required to formalistically announce that it is conducting a plea withdrawal hearing; nor must it demarcate the hearing from other related court proceedings. It may conduct a plea withdrawal hearing as part of another court proceeding, such as a sentencing hearing. . . . When a trial court inquires into a defendant's plea withdrawal motion on the record, it is conducting a plea withdrawal hearing." (Citations omitted; emphasis altered; footnote added; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 836–39, 189 A.3d 1215 (2018).

"In considering whether to hold an evidentiary hearing on a motion to withdraw a guilty plea the court may disregard any allegations of fact, whether contained in the motion or made in an offer of proof, which are either conclusory, vague or oblique. For the purpose of determining whether to hold an evidentiary hearing, the court should ordinarily assume any specific allegations of fact to be true. If such allegations furnish a basis for withdrawal of the plea under [Practice Book § 39–27] and are not conclusively refuted by the record of the plea proceedings and other information contained in the court file, then *an evidentiary hearing is required.* . . .

"An evidentiary hearing is not required if the record of the plea proceeding and other information in the court file conclusively establishes that the motion is without merit. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39–27]." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Salas*, 92 Conn. App. 541, 544–45, 885 A.2d 1258 (2005).

Here, the defendant asserts two grounds on which the court should have afforded him an evidentiary hearing on his motion to withdraw his guilty pleas: (1) his trial counsel was ineffective by failing to pursue an alibi defense; and (2) his pleas were not voluntary because the state's inspector was overheard coercing witnesses.[4] As to the defendant's claim of ineffective assistance of counsel,[5] the court reviewed the entire transcript of the plea proceeding on the record, noting the

[4] The defendant also claims that his trial counsel was ineffective as a result of having given him misleading information regarding his probationary status in Rhode Island to induce his guilty pleas. Because the defendant does not specifically reference his Rhode Island probation in the argument portion of his appellate brief, this claim is inadequately briefed. Accordingly, we decline to afford it review. See, e.g., *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021).

At oral argument before this court, the defendant's appellate counsel conceded that the defendant had waived his conflict of interest claim.

[5] The defendant claims on appeal that the trial court's "mistaken belief that a habeas was the only means by which to address the defendant's ineffective assistance of counsel claims resulted in its failure to give proper consideration to the defendant's request." Although the court did, at one point during the hearing on the motion to withdraw, tell the defendant that a claim of ineffective assistance of counsel is not a ground for withdrawing a guilty plea at the time of sentencing, the court clearly and thoroughly considered his ineffective assistance claims, as set forth in this opinion. We construe the court's statement telling the defendant that he could file a habeas action simply as advising him that he could further pursue his ineffective assistance claims in another forum.

various times that the defendant expressed his satisfaction with his trial counsel. In its written articulation, the court referenced one specific instance during the plea proceeding when the defendant indicated his satisfaction with his trial counsel. In fact, the defendant stated that he was satisfied with the plea agreement and his counsel three additional times during the plea proceeding.[6]

As to the defendant's specific claim that his trial counsel was ineffective in failing to pursue an alibi defense on his behalf, the transcript of the plea proceeding reflects that the defendant was specifically informed by the court of his option to continue with the trial of his case, and that, by pleading guilty, he was giving up the right to "put on any defenses [he] might have had . . . ." The defendant indicated that he understood, and he did not, at that time or any other time during that proceeding, or at any time prior to pleading guilty, complain that his counsel had failed to pursue an alibi defense on his behalf. Moreover, the defendant did not proffer any facts in support of his alleged alibi defense or claim that he had ever discussed an alibi defense with his counsel prior to pleading guilty. Although the defendant's new counsel argued that his trial counsel did not adequately pursue his alibi defense "in terms of photographs of him at a different location around when the robbery occurred, [and] phone records indicating [that] he wasn't in the area," he never expanded on that vague assertion. Neither the defendant nor his counsel proffered whether he was in possession of such

[6] As noted by the case law cited herein, the plea canvass is only one factor in assessing the adequacy of the trial court's consideration of a motion to withdraw a guilty plea. There are, of course, cases in which facts concerning the adequacy of counsel's representation might become known to a defendant after he or she pleads guilty and before the imposition of sentence. In those cases, a defendant's stated satisfaction with his or her counsel's representation during the plea canvass may be afforded less weight than in a case such as this one.

evidence or whether he informed his trial counsel that such evidence existed. Accordingly, the defendant failed to demonstrate an adequate factual basis to support an evidentiary hearing on this claim.[7]

The defendant's claim of coercion is conclusively refuted by the transcript of the plea proceeding. According to the defendant, his sister allegedly informed him, during his trial, that she had overheard the state's inspector coercing and giving false information to witnesses. The defendant therefore knew of these alleged incidents prior to pleading guilty in this case. In fact, when the court initially asked him about the letter that he had written asking to withdraw his guilty pleas, the defendant alleged that he had informed his counsel of this alleged coercion "days ahead" but that they never "[g]ot . . . to the bottom of that." At no time did the defendant mention this to the court during its thorough plea canvass. Rather, the defendant repeatedly told the court that his guilty pleas were voluntary. Based upon the well established principle "that [a] trial court may properly rely on . . . the responses of the [defendant] at the time [he] responded to the trial court's plea canvass"; (internal quotation marks omitted) *State* v. *Stith*, 108 Conn. App. 126, 131, 946 A.2d 1274, cert. denied, 289 Conn. 905, 957 A.2d 874 (2008); the court properly determined that the defendant's claim that his pleas were involuntary did not merit an evidentiary hearing.

In sum, the court conducted a hearing on the defendant's motion to withdraw his guilty pleas and implicitly

[7] Additionally, neither the defendant nor his counsel alleged that he was prejudiced by his trial counsel's failure to pursue an alibi defense on his behalf. He did not allege that, but for his trial counsel's ineffective assistance, he would not have pleaded guilty and would have continued with his trial. In fact, at the hearing on his motion to withdraw his guilty pleas, the defendant told the court that he wanted a five year sentence that apparently had been discussed in earlier plea negotiations. He therefore failed to allege a requisite interrelationship between his counsel's alleged ineffectiveness and his guilty pleas. See *State* v. *Lynch*, 193 Conn. App. 637, 659–60, 220 A.3d 163 (2019), cert. denied, 335 Conn. 914, 229 A.3d 729 (2020).

concluded that an evidentiary hearing was not required. The court afforded the defendant and his newly appointed counsel ample opportunity to present his claims but, relying on the transcript of the plea proceeding, concluded that there was no basis for them. On the basis of our review of the record, the court clearly addressed each of the defendant's arguments appropriately as they were presented. Accordingly, we cannot conclude that the court abused its discretion by not affording the defendant an evidentiary hearing on his motion to withdraw his guilty pleas.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN SALCE *v.* JOAN CARDELLO
(AC 43648)

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

Syllabus

The plaintiff and the defendant were beneficiaries of a will and a trust executed by their mother, M. The will and trust agreement contained in terrorem clauses, which provided, inter alia, that if a beneficiary filed a creditor's claim against the estate, or objected in any manner to any action taken or proposed to be taken in good faith by the fiduciary of either instrument, then that beneficiary would forfeit his or her inheritance. While the fiduciary was administering M's estate, the defendant and her attorney realized that the fiduciary had apparently made errors in connection with a state tax form that he had filed on behalf of the estate. The defendant's attorney raised these concerns with the fiduciary, and the defendant provided the fiduciary with certain documentation at his request, but the fiduciary indicated that he would not amend the state tax form unless he was instructed to do so by the Probate Court. The defendant subsequently filed a request with the Probate Court for a hearing on those issues, but later withdrew that request for unknown reasons. Thereafter, the plaintiff filed a complaint in the Probate Court seeking to enforce the in terrorem clauses against the defendant, and the Probate Court denied his request. Subsequently, the plaintiff appealed to the Superior Court from the Probate Court's decision. The Superior Court held a trial de novo and rendered judgment dismissing the plaintiff's appeal. *Held*:

1. The plaintiff could not prevail on his claim that the defendant violated the in terrorem clauses by filing a creditor's claim against the estate: the Superior Court's finding that the defendant did not make a creditor's claim against the estate was not clearly erroneous because, although the defendant had provided the fiduciary with documentation of expenses she incurred on behalf of the trust, the record contained testimony from the defendant, her attorney, and the fiduciary explaining that it was the fiduciary who had requested that documentation; moreover, the defendant's attorney testified that the defendant never presented the fiduciary with a written request for reimbursement, as required by the applicable statute (§ 45a-358 (a)), no evidence of such a written demand was introduced at trial, the fiduciary himself testified that he did not recall receiving a formal written request for reimbursement, and both the defendant and her attorney testified that the defendant had no intention of being reimbursed.
2. This court concluded that, although the defendant technically violated the in terrorem clauses that prohibited a beneficiary from objecting to any actions taken by the fiduciary when she filed her request with the Probate Court, given the facts of the present case, those clauses were unenforceable against the defendant as a matter of public policy: the application of the clear and unambiguous language of the in terrorem clauses punished M's beneficiaries from objecting to any actions of the fiduciary, including nondiscretionary, ministerial acts, which undermined important private and public interests, such as a beneficiary's interest in protecting the estate's assets, the state's interest in receiving accurate tax filings and payments, and judicial oversight of the fiduciary's actions; moreover, in the present case, the fiduciary unquestionably made a mistake on the state tax form, and, in strictly complying with the in terrorem clauses, the defendant could not seek judicial review to correct that mistake, without risking forfeiture, despite its potential impact on her finances, the assets of the estate, and the accuracy of the fiduciary's filings with the Probate Court and the state of Connecticut.

Argued October 12, 2021—officially released January 18, 2022

Procedural History

Appeal from the decision of the Probate Court for the district of Branford-North Branford denying the plaintiff's request to enforce certain provisions of a will and a trust agreement, brought to the Superior Court in the judicial district of New Haven, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Wilson, J.*; judgment in favor of the plaintiff on the defendant's counterclaim and dismissing the

plaintiff's appeal, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Matthew D. McCormack, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, John Salce, appeals from the judgment of the Superior Court dismissing his appeal from the Probate Court's decision that the defendant, Joan Cardello, did not violate the in terrorem clauses set forth in their deceased mother's will and trust agreement. We affirm the judgment of the Superior Court.

The following facts, as found by the court, and procedural history are relevant to our resolution of this appeal. The plaintiff and the defendant are the son and daughter, respectively, of Mae Salce (Mae). Mae was the settlor of the Amended and Restated Mae Salce Revocable Trust Agreement (trust or trust agreement), which was established on June 29, 2005, and amended on April 3, 2008. The principal asset of the trust was Mae's interest in a piece of real property known as 113 Buffalo Bay in Madison (Buffalo Bay). The trust agreement provided that the defendant would serve as the trustee for the trust until Mae died, at which time Attorney Jay L. Goldstein would become the trustee. Pursuant to the terms of the trust agreement, on December 22, 2005, the defendant, acting as trustee of the trust, transferred a one-half interest in Buffalo Bay to herself. The trust agreement further provided that the defendant would receive the other one-half interest in Buffalo Bay at the time of Mae's death. On the same day that Mae amended the trust, she also executed her last will and testament. Consistent with the terms of the trust agreement, article third of the will provides

that all of Mae's interest in Buffalo Bay was bequeathed to the defendant. It further provides that, if the defendant predeceased Mae, that Mae's interest in Buffalo Bay would be devised to "[the defendant's] issue, per stirpes or if there shall be no such issue to [the plaintiff] if [the plaintiff] shall survive me, of if [the plaintiff] shall not survive me to [the plaintiff's] issue, per stirpes." In article fourth of her will, Mae forgave the plaintiff's obligation to pay any outstanding amounts due to her pursuant to a December 22, 2001 promissory note in the principal amount of $700,000.[1] In article seventh of her will, Mae designated the defendant as the executor of her estate.

Both the trust agreement and the will contain an in terrorem clause providing that, if a beneficiary takes certain actions, he or she forfeits his or her rights as a beneficiary under the instruments. The in terrorem clause in the trust agreement provides in relevant part: "If [a] beneficiary under this Trust Agreement . . . directly or indirectly . . . (iv) objects in any manner to any action taken or proposed to be taken in good faith by any Trustee . . . [and/or] (vii) files any creditor's claim against Trustee (without regard to its validity) . . . then that person's right as a beneficiary of this Trust Agreement and to take any interest given to him or her by terms of this Trust Agreement . . . shall be determined as it would have been determined if the person and the person's descendants had predeceased Settlor without surviving issue." The in terrorem clause in the will likewise states in relevant part: "If [a] beneficiary hereunder . . . directly or indirectly . . . (iv) objects in any manner to any action taken or proposed to be taken in good faith by any Executor or trustee . . . [and/or] (vii) files any creditor's claim against my Executor (without regard to its validity) or trustee . . .

[1] The will describes the payee of the promissory note as Mae's deceased husband, John J. Salce.

then that person's right as a beneficiary of this Will and any Codicil thereto or trust . . . shall be determined as it would have been determined if the person and the person's descendants had predeceased me without surviving issue."

Mae died on April 12, 2012. Thereafter, Attorney Goldstein became the trustee of the trust pursuant to the terms of the trust, as well as the executor of Mae's estate, after the defendant declined to serve as the executor. While administering the estate, Attorney Goldstein sent letters to the beneficiaries, including the defendant, which detailed their required contributions for the payment of certain taxes and fees incurred by the estate. The beneficiaries were also permitted to inspect the Form CT-706/709 Connecticut Estate and Gift Tax Return (CT-706) that Attorney Goldstein had filed on behalf of the estate. When the defendant reviewed the CT-706, she noticed that a Citizens Bank account that belonged solely to her mistakenly had been listed as an asset of the estate. The defendant's attorney, Alphonse Ippolito, also reviewed the CT-706. In doing so, he realized that Attorney Goldstein also had inflated the value of the estate and increased the beneficiaries' tax burdens by failing to deduct two outstanding loans that were secured by mortgages on Buffalo Bay.[2]

Attorney Ippolito raised these apparent errors with Attorney Goldstein, who then asked the defendant to "produce evidence verifying that the income received pursuant to the mortgages was expended in connection with the administration of the trust." The defendant did so, but Attorney Goldstein still refused to amend the CT-706 either to remove the Citizens Bank account or to deduct the outstanding mortgages. Attorney Goldstein

[2] In her role as trustee, the defendant took out two loans that were secured by mortgages on Buffalo Bay so that she could pay for expenses related to the property.

did, however, indicate to Attorney Ippolito that he would amend the return if instructed to do so by the Probate Court. The defendant, on July 30, 2014, filed a request with the Probate Court for a hearing on these issues, but later withdrew the request for unknown reasons.

Thereafter, the plaintiff filed a complaint in the Probate Court alleging that the defendant's filing of her request for a hearing, and the issues raised therein, violated the in terrorem clauses in both the will and the trust agreement. Specifically, the plaintiff argued that the defendant had violated the in terrorem clauses by (1) filing a creditor's claim against the estate and (2) challenging Attorney Goldstein's refusal to amend the CT-706. Enforcement of the in terrorem clauses as requested by the plaintiff would cause Mae's bequeath of her one-half interest in Buffalo Bay to the defendant to be nullified and, pursuant to the terms of her will, result in that interest being bequeathed to the plaintiff. The plaintiff, on December 17, 2015, also instituted a lawsuit in Superior Court seeking to invalidate Attorney Goldstein's December, 2012 transfer by quitclaim deed of the estate's interest in Buffalo Bay to the defendant pursuant to the will and trust. In response to the plaintiff's complaint in the Probate Court, the defendant claimed that the plaintiff violated the in terrorem clauses by delaying the administration of the estate and by instituting the Superior Court action seeking to invalidate the transfer of the estate's remaining interest in Buffalo Bay to the defendant.

Following a hearing, the Probate Court concluded that neither the plaintiff nor the defendant had violated the in terrorem clauses. Furthermore, the Probate Court concluded that Attorney Goldstein had erred in including the Citizens Bank account in the estate's assets and ordered that it be removed from the accounting.

The plaintiff appealed from the Probate Court's refusal to enforce the in terrorem clauses against the defendant to the Superior Court, pursuant to General Statutes § 45a-186 (b).[3] The defendant then filed a counterclaim in that appeal, alleging that the plaintiff had violated the in terrorem clauses by instituting the December 17, 2015 action to invalidate Attorney Goldstein's transfer of the estate's interest in Buffalo Bay to the defendant pursuant to the will and the trust.

The Superior Court held a five day trial de novo[4] on the plaintiff's appeal and the defendant's counterclaim. Thereafter, the court issued a memorandum of decision, in which it concluded that neither party had violated the in terrorem clauses. With regard to the defendant, specifically, the court concluded that she had not violated the clauses because she (1) never filed a creditor's claim against the estate, and (2) acted in good faith, upon probable cause, and with reasonable justification when challenging Attorney Goldstein's actions in administering the estate and the trust, thus excusing any violations of the in terrorem clauses. The plaintiff then appealed to this court.[5] Additional facts will be set forth below as necessary.

We first set forth our standard of review and the applicable law. In appeals in which the trial court has ruled on a probate appeal de novo, "we treat our scope of review as we would with any other Superior Court proceeding." *Hynes* v. *Jones*, 175 Conn. App. 80, 93, 167 A.3d 375 (2017), rev'd on other grounds, 331 Conn.

[3] General Statutes § 45a-186 (b) provides in relevant part: "Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . ."

[4] Because no record was made of the probate proceedings below, the court was "required to undertake a de novo review of the Probate Court's decision." *Hynes* v. *Jones*, 175 Conn. App. 80, 93, 167 A.3d 375 (2017), rev'd on other grounds, 331 Conn. 385, 204 A.3d 1128 (2019).

[5] The defendant did not appeal from the court's judgment on her counterclaim that the plaintiff did not violate the in terrorem clauses.

385, 204 A.3d 1128 (2019). When the court has made factual findings, we defer to those findings unless they are clearly erroneous. Id. "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.) *Stilkey* v. *Zembko*, 200 Conn. App. 165, 178, 238 A.3d 78 (2020). With regard to matters of law, however, including the proper construction of an in terrorem clause, our review is plenary. *Hynes* v. *Jones*, supra, 93; see also *Savage* v. *Oliszczak*, 77 Mass. App. 145, 147, 928 N.E.2d 995 (2010) ("[t]he determination that the defendants' challenge to the will did not trigger the trust's in terrorem clause is a legal conclusion that we review de novo" (internal quotation marks omitted)).

Our primary objective when interpreting a will or trust agreement is to ascertain and effectuate the intent of the testatrix and/or settlor. *Canaan National Bank* v. *Peters*, 217 Conn. 330, 335, 586 A.2d 562 (1991). "In searching for that intent, we look first to the precise wording employed by the testatrix [or settlor] in [the will or trust agreement] . . . for the meaning of the words as used by the testatrix [or settlor] is the equivalent of her legal intention—the intention that the law recognizes as dispositive." (Citations omitted.) Id., 335–36. Where the language of a will or trust agreement is clear and unambiguous, the plain meaning of the instrument controls. *Palozie* v. *Palozie*, 283 Conn. 538, 546–47, 927 A.2d 903 (2007); see also *Canaan National Bank* v. *Peters*, supra, 337 ("[a] court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous" (internal quotation marks omitted)).

An in terrorem clause is a provision within a will or trust agreement that typically states that if a beneficiary to the will or trust contests that instrument, his or her inheritance or benefits under the instrument are forfeited. See *McGrath* v. *Gallant*, 143 Conn. App. 129, 132 n.1, 69 A.3d 968 (2013) ("[a]n in terrorem, or no-contest, clause is [a] provision designed to threaten one into action or inaction; esp., a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will" (internal quotation marks omitted)). As a general rule, in terrorem clauses are valid in Connecticut. See *South Norwalk Trust Co.* v. *St. John*, 92 Conn. 168, 174–75, 101 A. 961 (1917). Such clauses, however, are disfavored by the courts and thus must be construed strictly to prevent forfeiture. *In re Probate Appeal of Stuart*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-11-6010417-S (February 22, 2012) (53 Conn. L. Rptr. 558). Moreover, for an in terrorem clause to be valid, the clause must be certain, lawful, and not opposed to public policy. See *Peiter* v. *Degenring*, 136 Conn. 331, 335, 71 A.2d 87 (1949) ("[a testatrix] may impose such conditions as [she] pleases upon the vesting or enjoyment of the estate [she] leaves, provided they are certain, lawful and not opposed to public policy"). In the case of will contests specifically, Connecticut law also recognizes an exception to the enforcement of in terrorem clauses when a beneficiary's contest of the will was "made in good faith, and upon probable cause and reasonable justification . . . ." *South Norwalk Trust Co.* v. *St. John*, supra, 177.

On appeal, the plaintiff claims that the defendant violated the in terrorem clauses in both the will and the trust agreement by (1) filing a creditor's claim against the estate and (2) objecting to the actions that Attorney Goldstein took with respect to the estate's CT-706. We review each claim in turn.

I

The plaintiff first contends that the defendant violated the in terrorem clauses by filing a creditor's claim against the estate. Specifically, the plaintiff argues that the list of expenses that the defendant provided to Attorney Goldstein, in response to his request that she provide documentation that the proceeds from the loans and mortgages she entered into as trustee were expended in connection with the administration of the trust, constituted a creditor's claim filed against the estate. We are not persuaded.

The in terrorem clauses in both the will and the trust agreement state that a beneficiary forfeits his or her inheritance if he or she files a creditor's claim against either the executor or the trustee. A creditor's claim is a demand for payment or reimbursement from an estate. See General Statutes § 45a-353 (d) and (e). For a creditor's claim to be properly filed, the party with the claim must present the claim, in writing, to the fiduciary. General Statutes § 45a-358 (a) ("[e]very claim shall be presented to the fiduciary in writing"); *Keller* v. *Beckenstein*, 305 Conn. 523, 533, 46 A.3d 102 (2012) ("a party who holds a claim against an estate must present that claim first to the fiduciary").

The court found that the defendant did not make a creditor's claim against the estate because she never submitted a written demand for reimbursement to Attorney Goldstein. Accordingly, the court held that the defendant had not violated the in terrorem clauses by filing a creditor's claim. Because this is a factual finding, we defer to the trial court unless that finding was clearly erroneous. See *Hynes* v. *Jones*, supra, 175 Conn. App. 93. We conclude that this finding was not clearly erroneous.

The defendant, Attorney Ippolito, and Attorney Goldstein all testified that it was Attorney Goldstein who

had requested the documentation of expenses on behalf of the trust and that he had done so to help determine whether it was proper to deduct the outstanding loans from the value of the estate. Attorney Ippolito also testified that the defendant never presented Attorney Goldstein with a written request for reimbursement, as required by § 45a-358 (a). Indeed, Attorney Goldstein himself testified that he did not remember ever receiving a formal written request for reimbursement. Moreover, no evidence of such a written demand pursuant to § 45a-358 (a) was ever introduced at trial, and both the defendant and Attorney Ippolito testified that the defendant had no intention of being reimbursed.[6]

Therefore, because the record supports the court's conclusion that the defendant never filed a creditor's claim against Attorney Goldstein, that factual finding is binding upon this court. Accordingly, we agree with the court's conclusion that the defendant did not violate the in terrorem clauses by filing a creditor's claim.[7]

[6] This testimony appears to conflict with the defendant's application for a hearing before the Probate Court, which stated, in part, that "[t]he petitioner further contends that if the mortgages do not reduce the taxable estate, then the *petitioner's claim to be reimbursed* for payment for maintenance on the property should be recognized." (Emphasis added.) This statement, however, does not change the fact that the defendant never provided Attorney Goldstein with a written claim for reimbursement, as required by § 45a-358 (a). Furthermore, the defendant withdrew her request for a hearing. Moreover, "the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony . . . and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Stilkey* v. *Zembko*, supra, 200 Conn. App. 178. Thus, the existence of this single sentence in the defendant's request for a hearing, which was later withdrawn, does not lead us to conclude that the court erred when it found that the defendant never filed a creditor's claim.

[7] Even assuming that the defendant did file a creditor's claim, and thus violated the in terrorem clauses, we conclude, as discussed in part II of this opinion, that the in terrorem clauses in the present case violate public policy and are thus unenforceable.

II

The plaintiff also contends that the defendant violated the in terrorem clauses when she challenged Attorney Goldstein's refusal (1) to remove her Citizens Bank account from the estate's CT-706 and (2) to deduct the outstanding mortgages from the value of the estate. The court did not address whether the defendant violated the express terms of the in terrorem clauses when she challenged Attorney Goldstein's actions. Instead, the court concluded that the defendant's challenges to Attorney Goldstein's actions did not violate the in terrorem clauses because they were made in good faith, upon probable cause, and with reasonable justification.[8]

The plaintiff argues on appeal that the court erred in its analysis because Connecticut does not recognize a good faith exception to the enforcement of an in terrorem clause that protects a fiduciary's actions from challenge. He thus argues that the defendant's request for a hearing in the Probate Court can be viewed as nothing other than a challenge to Attorney Goldstein's good faith preparation of the estate's CT-706 that violated the express terms of the in terrorem clauses. The defendant argues that the good faith exception applies to in terrorem clauses in all circumstances, but also argues that if the good faith exception does not apply

[8] In the underlying proceeding, the court, on the basis of our Supreme Court's precedent in *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. 177, held that because the defendant acted in good faith, upon probable cause, and with reasonable justification when she challenged Attorney Goldstein's actions, she was not in violation of the in terrorem clauses. Neither this court nor our Supreme Court has ever applied this good faith exception to anything other than a will contest. On appeal, the defendant asks us to hold that the good faith exception created in *South Norwalk Trust Co.* applies not only to will contests but also applies more broadly to challenges to the actions of a fiduciary to a trust or an estate. For the reasons stated in this opinion, we do not reach this issue.

to the terrorem clauses here, the clauses are still unenforceable because they violate public policy. Specifically, the defendant argues that enforcement of the in terrorem clauses as written would limit the judiciary's oversight role, violate her constitutional right to seek redress for injury, improperly give the fiduciary unfettered power, and subvert the statutory probate claims process.

We agree with the plaintiff that the defendant technically violated both clauses when she challenged Attorney Goldstein's actions. We also conclude, however, that, given the facts of the present case, enforcing the in terrorem clauses against the defendant would violate public policy and, thus, the clauses are unenforceable as to the defendant's conduct. Consequently, we do not reach the question of whether a good faith exception applies in this case because the clauses are unenforceable even in the absence of such an exception.

Because the resolution of this claim requires us to interpret the in terrorem clauses at issue, it presents a question of law that is subject to plenary review. See *Hynes* v. *Jones*, supra, 175 Conn. App. 93. Both in terrorem clauses state that a beneficiary forfeits his or her rights as a beneficiary under the instruments if he or she "directly or indirectly . . . objects in *any* manner to *any* action taken or proposed to be taken in good faith" by either the executor or the trustee. (Emphasis added.) This plain language makes clear that all challenges to any actions taken by Attorney Goldstein constitute a violation of the in terrorem clauses. See *Palozie* v. *Palozie*, supra, 283 Conn. 547 (where will or trust agreement is unambiguous, instrument must be given effect in accordance with plain language). Therefore, when the defendant filed an application and request for a hearing before the Probate Court, in which she

challenged Attorney Goldstein's preparation of the CT-706, the defendant objected to his actions and, thus, technically violated both in terrorem clauses.

That, however, is not the end of our analysis. Under Connecticut law, in terrorem clauses are void if they violate public policy. See *Peiter* v. *Degenring*, supra, 136 Conn. 335. We conclude that enforcing the in terrorem clauses to punish the defendant's conduct in this case would violate public policy. As such, the clauses are unenforceable.

A strict reading of both clauses wholly bars Mae's beneficiaries, at the risk of forfeiture, from objecting to any perceived errors that Attorney Goldstein makes while administering the estate and the trust. This punishment precludes objections to his actions that involve the exercise of judgment as well as to actions that are purely ministerial in nature. We recognize that a testatrix or settlor may have a keen interest in protecting her designated fiduciary from attacks on the fiduciary's good faith exercise of judgment, such as how to invest the assets of the trust or at what price to sell assets of an estate. Under most circumstances, an in terrorem clause that has the effect of limiting challenges to such good faith exercises of judgment would not violate public policy.

On the other hand, there is little benefit to, and potentially significant harm from, an in terrorem clause that punishes objections to errors made by the fiduciary in his nondiscretionary administration of a trust or an estate. For example, although there is benefit to a settlor of a trust knowing that her fiduciary can make good faith investment decisions without worrying about being second-guessed by a beneficiary, neither the settlor nor the beneficiaries benefit from the fiduciary making mathematical errors in the calculation of taxes that the trust owes.

In the present case, application of the clear and unambiguous language of the in terrorem clauses punishes the beneficiaries of the estate and the trust from objecting to any actions of the trustee, including nondiscretionary, ministerial acts. Because such a clause undermines important private and public interests with no corresponding benefit, it violates public policy. See, e.g., *Sinclair* v. *Sinclair*, 284 Ga. 500, 502–503, 670 S.E.2d 59 (2008) ("After a will has been admitted to probate, certain duties and obligations are thereupon imposed by law on the named executor. . . . The executor, therefore, remains amenable to law in all his acts and doings as such, and a beneficiary under the will, in seeking to compel the performance . . . of his duty, will not be penalized for so doing. . . ." (Citation omitted.)) Specifically, beneficiaries have important interests in making sure that a fiduciary does the ministerial parts of his job correctly, that the fiduciary's actions do not endanger the estate's assets, and that both the beneficiaries and the estate are paying the correct amount in taxes. See *In re Estate of Wojtalewicz*, 93 Ill. App. 3d 1061, 1063, 418 N.E.2d 418 (1981) (concluding that enforcement of in terrorem clause would contravene public policy because enforcing clause would potentially "endanger the assets of the estate" due to "executor's [alleged] lengthy period of inaction and his failure to file proper tax returns [causing] the estate to incur substantial penalties"). Similarly, the state has a significant interest in receiving correct tax documents and payments. If beneficiaries cannot correct mistakes that fiduciaries make when filing an estate's tax returns, as would be the case here if the in terrorem clauses were enforced pursuant to their plain meaning to punish the defendant's actions in this case, then the state's interest in receiving accurate tax filings and payments is substantially impaired.

Finally, enforcing the in terrorem clauses as suggested by the plaintiff would significantly limit valuable

judicial oversight of the fiduciary's actions. "Courts exist to ascertain the truth and to apply the law to it in any given situation; and a right of devolution which enables a [testatrix] to shut the door of truth and prevent the observance of the law, is a mistaken public policy." *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. 176–77; see also *Griffin* v. *Sturges*, 131 Conn. 471, 482–83, 40 A.2d 758 (1944) (clause barring appellate review of Probate Court's determination as to whether beneficiary was entitled to income from estate was contrary to right to appeal and thus void). Beneficiaries to a trust or an estate must be able to turn to the judicial system for help when a fiduciary's nondiscretionary actions endanger the interests of the beneficiaries or the estate, as occurred here when Attorney Goldstein allegedly overstated the value of the estate and, consequently, increased its tax burden. See Conn. Const., art. I, § 10 ("[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay"). The defendant should not be required to risk forfeiture to ensure that the fiduciary has correctly performed his required legal obligations.

In the present case, Attorney Goldstein unquestionably made a mistake when he listed the defendant's Citizens Bank account as an asset of the estate.[9] In strictly complying with the in terrorem clauses, however, the defendant could not seek judicial review to correct that mistake, without risking forfeiture, despite its potential impact on her finances, the assets of the estate, and the accuracy of Attorney Goldstein's filings with the Probate Court and the state of Connecticut. Such a result would violate public policy.

[9] The court found, and the plaintiff concedes, that this action was erroneous.

For the foregoing reasons, although the defendant technically violated both in terrorem clauses when she challenged Attorney Goldstein's actions in administering the estate and the trust, enforcing the clauses as written would violate public policy. Accordingly, we conclude that the in terrorem clauses are unenforceable against the defendant as a matter of public policy.

The judgment is affirmed.

In this opinion the other judges concurred.

JULIAN POCE ET AL. *v.* O & G INDUSTRIES, INC., ET AL.
(AC 43511)

Alvord, Cradle and Bear, Js.

Syllabus

The plaintiffs sought to recover damages for, inter alia, the defendant O Co.'s negligence related to their exposure to asbestos while working on a construction project. The trial court granted in part O Co.'s motion to strike the plaintiffs' amended complaint. Subsequently, the court granted O Co.'s motion for summary judgment as to the remaining counts against O Co. and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held* that the judgment of the trial court was affirmed; the trial court, having fully addressed the claims and arguments raised in this appeal, this court adopted the trial court's thorough and well reasoned memoranda of decision as proper statements of the relevant facts, issues and applicable law on those issues.

Argued October 13, 2021—officially released January 18, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' negligence, brought to the Superior Court in the judicial district of Hartford, where the plaintiff filed an amended complaint; thereafter, the court, *Noble, J.*, granted in part the defendants' motions to strike; subsequently, the court, *Noble, J.*, denied the motion for summary judgment filed by the defendant Southern Middlesex Industries, Inc., and granted the named defendant's

motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court; thereafter, the plaintiffs withdrew their appeal as to the defendant Southern Middlesex Industries, Inc. *Affirmed.*

Austin Berescik-Johns, with whom, on the brief, was *Paul Levin*, for the appellants (plaintiffs).

Michael S. Lynch, with whom, on the brief, was *Nicole A. Carnemolla*, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiffs, Julian Poce, Skerdinand Xhelaj, Michael Meredith, Erjon Goxhaj, and Fatjon Rapo, appeal from the summary judgment rendered by the trial court in favor of the defendant O & G Industries, Inc.[1] On appeal, the plaintiffs claim that the court improperly granted the defendant's (1) motion to strike and (2) motion for summary judgment. We affirm the judgment of the trial court.

The plaintiffs commenced the present action in December, 2016, and filed the operative complaint in May, 2017. The plaintiffs, mason laborers who were employed by Connecticut Mason Contractors, Inc., alleged that they repeatedly were exposed to asbestos while working on a large-scale construction project at Wethersfield High School in Wethersfield. Relevant to

[1] The plaintiffs also named Southern Middlesex Industries, Inc. (SMI), as a defendant in this action. SMI moved to strike counts twenty-one through thirty of the plaintiffs' operative complaint. The court granted SMI's motion to strike as to counts twenty-one through twenty-five and denied it as to counts twenty-six through thirty. SMI thereafter filed a motion for summary judgment as to counts twenty-six through thirty, which the court denied. On July 20, 2020, the plaintiffs withdrew their action against SMI, and, on August 18, 2020, the plaintiffs withdrew their appeal as to SMI. Accordingly, we refer in this opinion to O & G Industries, Inc., as the defendant and to SMI by name.

this appeal, each of the five plaintiffs asserted claims against the defendant, the construction/project manager for the Wethersfield High School project, sounding in negligence, negligent infliction of emotional distress, premises liability, and recklessness. On March 29, 2017, the defendant filed a motion to strike the claims against it. The plaintiffs filed an objection. On December 5, 2017, the court, *Noble*, *J.*, issued its memorandum of decision, in which it granted the motion to strike in part as to the plaintiffs' claims of negligence, premises liability, and recklessness.

On September 7, 2018, the defendant filed a motion for summary judgment as to the plaintiffs' remaining claims against it, which sounded in negligent infliction of emotional distress. The plaintiffs filed an objection and a memorandum in opposition to the defendant's motion for summary judgment. Oral argument was held on June 3, 2019. On September 30, 2019, the court, *Noble*, *J.*, issued its memorandum of decision, in which it granted the defendant's motion for summary judgment and rendered judgment thereon. This appeal followed.

On appeal, the plaintiffs claim that the court improperly granted the defendant's motion to strike and motion for summary judgment. Our examination of the record on appeal, and of the briefs and oral arguments of the parties, persuades us that the judgment of the trial court should be affirmed. Because the court's memoranda of decision fully address the arguments raised in the present appeal, we adopt the court's thorough and well reasoned decisions as proper statements of the facts and applicable law as to the claims against the defendant.[2] See *Poce* v. *O & G Industries*, *Inc.*, Superior

[2] Both memoranda of decision address claims against SMI. See footnote 1 of this opinion. Because SMI is no longer a party to this action, we adopt the trial court's memoranda of decision only as they relate to the claims against the defendant.

Court, judicial district of Hartford, Docket No. CV-17-6074254-S (December 5, 2017) (reprinted at 210 Conn. App. 85, A.3d); *Poce* v. *O & G Industries, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-17-6074254-S (September 30, 2019) (reprinted at 210 Conn. App. 97, A.3d). It would serve no useful purpose for us to repeat the discussions contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 647–48, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

The judgment is affirmed.

APPENDIX

JULIAN POCE ET AL. *v.* O & G INDUSTRIES, INC., ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-17-6074254-S

Memorandum filed December 5, 2017

Proceedings

Memorandum of decision on motion to strike. *Motion granted in part.*

Austin Berescik-Johns and *Paul Stewart Levin*, for the plaintiffs.

Michael S. Lynch, for the named defendant.

Michael J. Dugan and *Eric R. Schwerzmann*, for the defendant Southern Middlesex Industries, Inc.

Opinion

NOBLE, J. "For more than 150 years, the law in Connecticut, and elsewhere, has limited tort liability to cases involving physical harm to person or property."

* Affirmed. *Poce* v. *O & G Industries, Inc.*, 210 Conn. App. 82, A.3d (2022).

(Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 646, 126 A.3d 569 (2015). The motions to strike of the defendants, O & G Industries, Inc. (O & G), and Southern Middlesex Industries, Inc. (SMI), Entries ## 109 and 120 respectively, assert that the harms alleged in the plaintiffs' complaint—the increased risk of contracting asbestos related pulmonary disease and future medical monitoring as a result of exposure to asbestos by the tortious conduct of the defendants—fail to state a claim upon which relief may be granted because they do not represent an actual injury or actionable harm. The court agrees that claims of negligence, premises liability and recklessness require actual physical injury and grants the motion to strike as to those counts. Because a claim for negligent infliction of emotional distress, however, does not require a present bodily injury, the motions to strike those counts are denied.

FACTS

The plaintiffs, Julian Poce, Skerdinand Xhelaj, Michael Meredith, Erjon Goxhaj, and Fatjon Rapo, commenced this action on December 27, 2016, against O & G and SMI. The thirty count complaint alleges the following facts. The plaintiffs are mason laborers employed by Connecticut Mason Contractors, Inc. While working on a project at Wethersfield High School at 411 Talcott Hill Road in Wethersfield (project site), the plaintiffs were repeatedly exposed to asbestos. The work areas designated by the project manager, O & G, entailed the disturbing of floors, walls and ceilings which, unbeknownst to the plaintiffs, contained asbestos.

O & G had actual and/or constructive knowledge of the dangerous project site conditions and premises defects present on the property, "including asbestos

and PCBs," and had the authority to remediate the hazards present; controlled and supervised all phases of the work at the project site; exercised possession and control of the project site, including the premises where the plaintiffs were injured; and had the authority to prevent or and/or suspend work in areas of the building containing asbestos. Areas where the plaintiffs performed work were not properly sampled, remediated and tested before the plaintiffs became exposed to asbestos, and the plaintiffs were not provided with, or required to wear, personal protective equipment.

During the time that the plaintiffs performed work at the project site, the asbestos conditions were disturbed in such a manner making it highly probable that toxic substances would be breathed, thus repeatedly exposing the plaintiffs to the asbestos without protective gear, hazard reduction training, or advance warning. O & G was aware of the repeated exposure despite the fact that the contracts executed between the town of Wethersfield, O & G, and Connecticut Mason Contractors, Inc., required O & G to observe safety protocols and procedures so as to avoid injury and occupational exposures to the plaintiffs. O & G was aware that the plaintiffs were masons, and not experienced and trained in asbestos protection. O & G did not arrange adequately for asbestos protection or hazard reduction training at the project site. None of the laborers were provided with, or advised of the need to use, asbestos protection at the project site, and O & G had advised the plaintiffs' employer that laborers would only be dispatched to areas of the building that did not contain asbestos, or areas where suitable asbestos remediation had already been accomplished.

During this time period, SMI undertook specified demolition work involving asbestos remediation on the premises. SMI's conduct contributed to the failure to

follow reasonable protocols by failing to properly cordon off what should have been regulated work areas to assure that the plaintiffs were not inadvertently exposed to the hazardous materials being remediated. SMI failed to adequately test and sample the materials being removed so that substances, and the nature of exposures, could be adequately documented; and, SMI failed to provide advance warning to the plaintiffs so that they could protect themselves from potentially hazardous exposure, given the proximity of the plaintiffs' work area to the demolition and remediation underway.

In counts one through twenty, each plaintiff alleges their own separate counts of negligence (counts one through five), negligent infliction of emotional distress (counts six through ten), premises liability (counts eleven through fifteen) and recklessness (counts sixteen through twenty) against O & G. Counts twenty-one through thirty separately allege counts of negligence (counts twenty-one through twenty-five) and negligent infliction of emotional distress (counts twenty-six through thirty) against SMI. Each count contains an allegation that the respective plaintiffs were repeatedly exposed to known carcinogens requiring medical evaluations and lifetime medical monitoring, an increased risk of contracting asbestos related pulmonary disease and/or cancer, and will be required in the future to spend sums of money for medical evaluation and medical monitoring in the event that "asbestos and/or PCP[1] related disease becomes active and will be the source of continuing pain, mental and emotional distress." The counts alleging the negligent infliction of emotional distress additionally allege that O & G and SMI created an unreasonable risk of causing emotional distress to the plaintiffs severe enough that it might result in illness or bodily harm, and that it was foreseeable that such

[1] The complaint does not define "PCP" or the nature of a "PCP related disease."

distress might result from the defendants' conduct, which was the cause of the plaintiffs' emotional distress.

On March 29, 2017, O & G moved to strike counts one through twenty of the plaintiffs' complaint on the ground that, as a matter of law, the complaint fails to state claims upon which relief can be granted. In its view, the plaintiffs have failed to allege any facts sufficient to support their claims of negligence, premises liability, recklessness and emotional distress. In their memorandum of law, O & G argues that the plaintiffs have not alleged an actionable harm, because the plaintiffs fail to allege that they suffer from present injury. Rather, the complaint merely alleges an increased risk of future harm, which is insufficient under any of the theories alleged, including the counts asserting a claim for the negligent infliction of emotional distress. Moreover, the plaintiffs are not without remedy, as the statute of limitations in General Statutes § 52-577c, which the legislature enacted specifically for asbestos related illness, does not begin to run until injury is discovered, providing the plaintiffs with a cause of action should they manifest symptoms of asbestos related diseases in the future.

On May 15, 2017, the plaintiffs filed their objection, arguing that the harms they allege constitute actual injuries as defined by Connecticut case law, and that each respective claim alleges elements of damage and actual harm required in order to recover under those claims. In support, the plaintiffs cite to the recent matter of *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 114–18, 156 A.3d 539 (2017), which explicitly defines asbestos exposure as an injury and a harm, and impliedly defines asbestos exposure as an actionable harm. This, the plaintiffs argue, leaves no doubt that a person is legally injured at the point of

exposure to asbestos, thus satisfying the element of harm necessary to adequately plead the claims alleged.

On May 19, 2017, the plaintiff filed their first amended complaint as to counts twenty-six through thirty. Thereafter, on June 13, 2017, in a motion virtually identical to that of O & G, SMI moved to strike counts twenty-one through thirty of the plaintiffs' complaint on the ground that the plaintiffs, as a matter of law, fail to state claims upon which relief can be granted. Like O & G, SMI argues in its memorandum of law that the plaintiffs' claims do not allege actual harm, only exposure to asbestos, which places the plaintiffs at increased risk for contracting asbestos related diseases, which will require future medical evaluations and monitoring.

The plaintiffs filed their objection to SMI's motion on July 5, 2017, arguing that the harms alleged constitute actual injuries pursuant to Connecticut case law, and their claims meet the legal elements required in order to recover under theories of negligence and negligent infliction of emotional distress.

On August 2, 2017, O & G replied to the plaintiffs' objection by distinguishing *R.T. Vanderbilt Co.* from the present matter. *R.T. Vanderbilt Co.* was a declaratory judgment action, whereby the plaintiff sought a determination as to which of its general liability insurance carriers were obligated to defend and indemnify the claims against it in light of multiple lawsuits alleging injuries from exposure to asbestos. Id., 75. The Appellate Court was asked to interpret the contractual language of the various policies in order to determine when insurance coverage was triggered for asbestos related injuries. Id., 75–76. The Appellate Court did not define asbestos exposure as a legally compensable injury, nor did it consider that issue, as all underlying lawsuits alleged that the plaintiffs suffered from asbestos related

diseases such as mesothelioma, other asbestos related cancer, and asbestosis. See id. The Appellate Court only determined when coverage was triggered and did not make any determinations as to when asbestos exposure becomes a legally compensable injury; rather, it interpreted contractual terms, specifically the meaning of the word "injury," contained in policies of insurance, and found that there are physical consequences of asbestos exposure which fall within the definition of "injury." (Internal quotation marks omitted.) Id., 118–23. O & G points out, moreover, that in the present case, the plaintiffs are not alleging present physical injuries or an asbestos related disease, only exposure to asbestos, which is not an actionable harm.

LEGAL STANDARD

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003).

"[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency . . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . . Moreover . . . [w]hat is necessarily implied [in an allegation] need not be expressly alleged . . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal

quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard* v. *People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). "In ruling on a motion to strike the trial court is limited to considering the grounds specified in the motion." *Meredith* v. *Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980).

ANALYSIS

Negligence, Premises Liability and Recklessness

The negligence counts directed at both O & G and SMI, as well as the premises liability and recklessness counts directed solely against O & G, contain common allegations of injury, essentially, an increased risk of contracting asbestos related diseases and medical monitoring. The complaint itself does not allege any express physical manifestations of symptoms of any asbestos related disease.

As an initial matter, it is necessary to review the elements of a claim in negligence. The long-standing, well accepted elements of a negligence action are "duty; breach of that duty; causation; and actual injury." *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 328, 107 A.3d 381 (2015). The existence of an "actual injury," contrasted with a legal technical injury or an invasion of a legal right, is a sine qua non for a claim of negligence. *Right* v. *Breen*, 277 Conn. 364, 377, 890 A.2d 1287 (2006). The Supreme Court in *Right* addressed the question of whether a plaintiff in a negligence action must be awarded nominal damages, thereby making the defendant potentially liable for costs, when the defendant admits liability but denies causing an injury and the plaintiff fails to prove that he suffered an actual injury. Id., 365–66. It concluded that an "actual injury"

was required. Id. While the *Right* decision did not expressly define "actual injury," indeed the parties' briefs or the court's research has not revealed a definitive definition by a Connecticut appellate court, it held that "bruises, contusions and physical injuries constitute actual damage . . . ." (Internal quotation marks omitted.) Id., 375. The defendants argue that increased risk of contracting asbestos related diseases and medical monitoring alleged by the plaintiffs is not an actual injury or actionable harm. They cite to two Superior Court decisions, *Bowerman* v. *United Illuminating*, Superior Court, judicial district of New London, Docket No. X04-CV-94-0115436-S, 1998 WL 910271 (December 15, 1998) (23 Conn. L. Rptr. 589),, and *Goodall* v. *United Illuminating*, Superior Court, judicial district of New London, Docket No. X04-CV-95-0115437-S, 1998 WL 914274 (December 15, 1998), which held that exposure to asbestos, absent manifestation of symptoms of any asbestos related disease, does not constitute actionable harm.[2] The dispositive question decided by Judge Koletsky in those cases was whether "the scarring of lung tissue and implantation of asbestos fibers in the lungs due to asbestos exposure, as alleged in the plaintiffs' amended complaint, are compensable injuries as a matter of law." (Emphasis added.) *Bowerman* v. *United Illuminating*, supra, 23 Conn. L. Rptr. 590; *Goodall* v. *United Illuminating*, supra, 1998 WL 914274, *3.

The manner in which the answer was framed was informed by this question. "To successfully maintain an action in negligence, a plaintiff must demonstrate: 1) that the defendant has acted in a tortious manner; 2) that the plaintiff has sustained actual injury as a result of the defendant's actions; and 3) that the plaintiff knows of the causal connection between the defendant's tortious conduct and the resulting injury to the

[2] Both cases were before the court on motions for summary judgment by the defendants, rather than the motion to strike presently before this court.

plaintiff. . . . Regardless of any breach of a standard of care by a defendant, a compensable injury must occur in order for an action in negligence to survive." (Emphasis in original.) *Bowerman* v. *United Illuminating*, supra, 23 Conn. L. Rptr. 590; *Goodall* v. *United Illuminating*, supra, 1998 WL 914274, *3. Judge Koletsky concluded that the asymptomatic scarring of lung tissue and the implantation of fibers in the lungs due to asbestos exposure did not constitute detrimental physical harm that was actionable. In large part, his decision was due to the inability of the plaintiffs to demonstrate on summary judgment that they indeed suffered from the conditions alleged in their complaint. *Bowerman* v. *United Illuminating*, supra, 23 Conn. L. Rptr. 593; *Goodall* v. *United Illuminating*, supra, 1998 WL 914274, *7.

More recently, the Superior Court has had the occasion to revisit this issue in *Dougan* v. *Sikorsky Aircraft Corp.*, Superior Court, judicial district of Hartford, Docket No. X03-CV-12-6033069 (March 28, 2017) and concluded, in granting summary judgment, that Connecticut tort law does not permit recovery based on asbestos exposure in the absence of any present clinical injury or physical symptom of an asbestos related illness or disease. The court's decision was based not on whether the plaintiffs, who all alleged "subclinical" injuries—defined as not detectable or producing effects that are not detectable by the usual clinical tests—alleged an "actual injury" but whether Connecticut recognizes a duty to prevent such harm. Id. The court applied the four factor test employed to determine whether public policy supports the imposition of a duty in cases alleging subclinical asbestos exposure claims and determined that it did not.[3] Id.

[3] The four factors are "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." (Internal quotation marks omitted.) *Dougan* v. *Sikorsky Aircraft Corp.*, supra, Supe-

The plaintiffs argue not that Connecticut law recognizes claims for subclinical injuries not demonstrably capable of proof but, rather, relying on *R.T. Vanderbilt Co.*, that exposure to asbestos has been conclusively recognized as causative of a physical injury. Indeed, the Appellate Court indicated that it "had no difficulty concluding that asbestos exposure damages, harms, hurts, weakens, and impairs the body, beginning at the time of exposure and continuing throughout the latency period until the development of malignancy and the ultimate manifestation of cancer." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 117. This was in large part because it is universally recognized that medical science confirms that some injury to body tissue occurs on the inhalation of asbestos fibers and that once lodged, the fibers pose an increased likelihood of causing or contributing to disease. Id., citing *Owens-Illinois*, Inc. v. *United Ins. Co.*, 138 N.J. 437, 454, 650 A.2d 974 (1994). As noted previously, *R.T. Vanderbilt Co.* decided only whether the physical effects of asbestos exposure fell within the definition of the word "injury" as commonly used in a policy of insurance. *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 118–23.

In the present case, whether the issue is framed as one of duty or actionable harm, the court need not decide whether Connecticut recognizes an absolute duty to prevent the exposure to asbestos resulting in the type of injury to the body found by the court in *R.T. Vanderbilt Co.* to be medically inescapable, or whether such presymptomatic and subclinical injury constitutes actionable harm, for the simple reason that the plaintiff has no allegations that any physical manifestation occurred as a result of the exposure. That is, the complaint is devoid of any allegation of scarring to

rior Court, Docket No. X03-CV-12-6033069, quoting *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 650.

the lungs, implantation of asbestos fiber, pleural thickening or any other physical component following the exposure.[4] The court holds that "actual injury" as an element of negligence requires the pleading and proof of some physical component of injury. See *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 646; *Right* v. *Breen*, supra, 277 Conn. 375. The absence of such an allegation renders the negligence, premises liability and reckless claims legally insufficient even under the conclusions reached by the court in *R.T. Vanderbilt Co*. The motions to strike these claims are granted.

Negligent Infliction of Emotional Distress

The defendants urge the court to strike the claims for negligent infliction of emotional distress for the identical reasons asserted against the other claims. The court is not persuaded. The elements of a claim for negligent infliction of emotional distress are well settled. A plaintiff must allege an unreasonable risk of causing the plaintiff emotional distress, the plaintiff's distress was foreseeable, the emotional distress was severe enough that it might result in illness or bodily harm, and, finally, that the defendant's conduct was the cause of the plaintiff's distress. *Olson* v. *Bristol–Burlington Health District*, 87 Conn. App. 1, 5, 863 A.2d 748 (2005), cert. granted, 273 Conn. 914, 870 A.2d 1083 (2005) (appeal withdrawn May 25, 2005). "In order to state a claim for negligent infliction of emotional distress, the plaintiff must plead that the actor should have foreseen that her behavior would likely cause harm of a specific nature, i.e., emotional distress likely to lead to illness or bodily harm." Id. Such a claim does not require the allegation or proof of a present physical injury. Rather, it requires only an emotional injury that might result in bodily harm. The plaintiffs have alleged

[4] Similarly, these motions do not require the court to answer whether all exposures to asbestos result in clinical disease or illness.

exactly the requisite elements by their allegations that the defendants "created an unreasonable risk of causing emotional distress to the plaintiff severe enough that it might result in illness or bodily harm. . . . It was foreseeable that such distress might result from the defendant's conduct . . . [which] was the cause of the [plaintiffs'] emotional distress." Plaintiffs' Complaint, ¶¶ 20–22, counts six through ten and twenty-six through thirty. The defendants' motions to strike these counts are denied.

CONCLUSION

Based upon the foregoing the motions to strike are granted as to counts one through five and eleven through twenty-five but denied as to counts six through ten and counts twenty-six through thirty.

APPENDIX

JULIAN POCE ET AL. *v.* O & G INDUSTRIES, INC., ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-17-6074254-S

Memorandum filed September 30, 2019

Proceedings

Memorandum of decision on motion for summary judgment. *Motion granted in part.*

Austin Berescik-Johns and *Paul Levin*, for the plaintiffs.

Michael S. Lynch, for the named defendant.

Michael J. Dugan and *Jacqueline A. Maulucci*, for the defendant Southern Middlesex Industries, Inc.

* Affirmed. *Poce* v. *O & G Industries, Inc.*, 210 Conn. App. 82, A.3d (2022).

Opinion

NOBLE, J. At issue in this asbestos exposure case is whether a genuine issue of material fact exists as to whether the defendants owed these plaintiffs a duty of care. In separate motions for summary judgment, the defendants each argue they owed no duty of care to the plaintiffs. The plaintiffs argue that they were owed a duty of care, which can arise outside of a contract and based on circumstances. For the following reasons, the defendant O & G's motion for summary judgment is granted, and the defendant SMI's motion for summary judgment is denied.

FACTS

This action arises from a building project that took place at Wethersfield High School. The plaintiffs, Julian Poce, Skerdinand Xhelaj, Michael Meredith, Erjon Goxhaj, and Fatjon Rapo, worked on that project during which they allege that they were exposed to asbestos. The plaintiffs commenced this action with a thirty count complaint against the defendants, Southern Middlesex Industries, Inc. (SMI), and O & G Industries, Inc. (O & G), on December 27, 2016, and later filed an amended complaint on May 19, 2017. Following separately filed motions to strike by both defendants, the court issued a memorandum of decision on December 5, 2017, granting the motions to strike counts sounding in negligence as to both defendants; premises liability as to O & G; and recklessness as to O & G. Counts six through ten and twenty-six through thirty of the plaintiffs' complaint remain viable, sounding in negligent infliction of emotional distress as to both defendants.

In their complaint, the plaintiffs allege the following facts. The plaintiffs were employed as mason laborers by Connecticut Mason Contractors, Inc. At various times between 2013 and 2016, the plaintiffs were assigned to a building project at Wethersfield High

School. While working there, the plaintiffs were repeatedly exposed to asbestos by working in areas of the building designated by the defendant O & G, the project manager, thereby disturbing the floors, walls, and ceilings, which contained asbestos.

The plaintiffs further allege that O & G had actual or constructive notice of dangerous site conditions and defects, including the presence of asbestos and PCBs, and failed to remediate the hazards. O & G, as construction manager, supervised all phases of work at the high school, exercising possession and control of the site. O & G controlled, or had the ability to control, the means and methods of work being performed at the site, and could have prevented the designation of work and/or suspended work in areas of the building that contained asbestos. Work areas, however, were not sampled, remediated, and tested prior to the plaintiffs' exposure, and the plaintiffs were not provided appropriate protective equipment. Asbestos conditions were present and disturbed in such a manner as to make it highly probable toxic substances would be breathed. O & G was aware of the exposure and allowed it to repeatedly occur, in spite of an agreement signed by the town of Wethersfield, O & G, and the plaintiffs' employer that required O & G to observe safety protocols and procedures. The plaintiffs, mason laborers, were not trained in asbestos protection, and O & G did not arrange for proper training at the site. The plaintiffs had not been advised of a need for asbestos protection. O & G told the plaintiffs' employer that the plaintiffs would only be required to work in areas that did not contain asbestos or where suitable asbestos remediation had been effected.

Finally, the plaintiffs allege that the defendant SMI performed demolition work involving asbestos remediation at the site. SMI did not properly section off regulated work areas to ensure the plaintiffs were not

exposed to hazardous materials being remediated. SMI's conduct contributed to the lack of adequate testing and sampling of materials, and to the lack of advance warning to the plaintiffs.

In their allegations of negligent infliction of emotional distress, the plaintiffs incorporate the prior allegations of the complaint and allege that the defendants created an unreasonable risk of causing emotional distress serious enough that it may result in illness or bodily harm; it was foreseeable that such distress could result from the defendants' conduct; and that the defendants' conduct was the cause of the plaintiffs' emotional distress.

The present motions for summary judgment were filed on September 7, 2018, by the defendant O & G, and on October 31, 2018, by the defendant SMI. In support of its motion, O & G submitted as exhibits document #028216, dated October 15, 2013; AIA Document C132, the August 15, 2012 standard form of agreement between the town of Wethersfield and O & G for additions and renovations to Wethersfield High School; and AIA Document A232, general conditions of the contract for construction, with the same parties. SMI submitted with its motion the sworn affidavit of Michael J. Dugan, Esq.; deposition transcripts of Jeff Bridges; the sworn affidavit of Darrell MacLean; AIA Document A132, the November 22, 2013 standard form of agreement between the town of Wethersfield and SMI regarding additions and renovations to Wethersfield High School; and a change order dated July 27, 2016. The plaintiffs filed an objection to O & G's motion for summary judgment on December 4, 2018, and to SMI's motion on March 25, 2019. In opposing the two motions separately, the plaintiffs submitted another AIA Document A132, standard form of agreement between the town of Wethersfield and Connecticut Mason Contractors, Inc., for additions and renovations to Wethersfield High School; notes from a meeting of the Wethersfield Town Council;

a page of SMI's website; and the affidavits and depositions of multiple persons speaking to O & G's general authority on the project site and SMI's experience in asbestos remediation and inadequate performance on site. O & G filed a reply on January 10, 2019, and SMI did so on April 16, 2019, with a copy of an asbestos abatement monitoring report. The plaintiffs filed surreplies on April 26, 2019, with the sworn affidavit of Franklin A. Darius, Jr.[1] Oral argument was heard on both the present motions for summary judgment on June 3, 2019.

LEGAL STANDARD

"Summary judgment is a method of resolving litigation when 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 a judgment as a matter of law." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534, 51 A.3d 367 (2012). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to 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." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 1195 (2015).

[1] Practice Book § 11-10 (c) provides: "Surreply memoranda cannot be filed without the permission of the judicial authority." The plaintiffs did not request permission of the court to file a surreply. Our courts, however, have exercised discretion to consider surreplies filed without permission; see *Viradia* v. *Quartuccio*, Superior Court, judicial district of New Haven, Docket No. CV-17-6070053-S (February 27, 2018) (66 Conn. L. Rptr. 1); and the court in its discretion will consider it. Secondly, the plaintiffs have submitted evidence with their surreplies. "It is within the trial court's discretion whether to accept or decline supplemental evidence in connection with a motion for summary judgment." *Corneroli* v. *Kutz*, 183 Conn. App. 401, 425 n.10, 193 A.3d 64 (2018). In its discretion, the court will also consider these submissions.

"It is axiomatic that in order to successfully oppose a motion for summary judgment by raising a genuine issue of material fact, the opposing party cannot rely solely on allegations that contradict those offered by the moving party . . . such allegations must be supported by counteraffidavits or other documentary submissions that controvert the evidence offered in support of summary judgment." *GMAC Mortgage, LLC* v. Ford, 144 Conn. App. 165, 178, 73 A.3d 742 (2013). "Mere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material fact capable of defeating summary judgment." (Internal quotation marks omitted.) *Citi-Mortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 193, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016).

ANALYSIS

I

O & G's MOTION FOR SUMMARY JUDGMENT

The defendant O & G argues that summary judgment should be granted on the ground that it owed no duty to the plaintiffs because issues relating to hazardous materials were specifically excluded in its contract from its scope of work. The plaintiffs counter, arguing that legal duty is a question of fact; that O & G supervised safety at the worksite; that it had a duty of care to third parties because it was in control of the site; and that it had a duty of care under OSHA regulations. In its reply, O & G further argues that its contract provides that it did not have control over construction means or safety precautions at the site, and that it had no duty under the common law or OSHA regulations.

"A cause of action in negligence is comprised of four elements: duty; breach of that duty; causation; and actual injury . . . . Whether a duty exists is a question of law for the court, and only if the court finds that such a duty exists does the trier consider whether that duty was breached." (Citation omitted.) *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 328, 107 A.3d 381 (2015). "To prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." (Internal quotation marks omitted.) *Grasso* v. *Connecticut Hospice, Inc.*, 138 Conn. App. 759, 771, 54 A.3d 221 (2012); see also *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 446–48, 815 A.2d 119 (2003). "[L]ike all negligence claims, both subsets of negligent infliction of emotional distress claims require proof of the breach of a legally recognized duty, causing injury." *Marsala* v. *Yale-New Haven Hospital, Inc.*, 166 Conn. App. 432, 444–45, 142 A.3d 316 (2016).

"[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Levine* v. *Massey*, 232 Conn. 272, 277–78, 654 A.2d 737 (1995). "It is the general rule that a contract is to be interpreted according to the intent expressed in its language and not by an intent the court may believe existed in the minds of the parties." Id., 278. "It is axiomatic that a party is entitled to rely upon its written contract as the final integration of its rights and duties." Id., 279. "Negligence cannot be predicated upon the failure to perform an act which the actor was under no duty or obligation to perform."

Behlman v. *Universal Travel Agency, Inc.*, 4 Conn. App. 688, 691, 496 A.2d 962 (1985).

In the present case, the defendant's contract provides in relevant part: "The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral." Def. Ex. 2, AIA Doc. A232 § 1.1.2. Its contract further provides that "[u]nless otherwise required in this agreement, the Construction Manager shall have no responsibility for the discovery, presence, handling, removing or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site." Def. Ex. 2, AIA Doc. C132, § 10.6. O & G is named in the agreement as the construction manager. Def. Ex. 2, AIA Doc. C132, 1. Under the terms of its contract, O & G was not responsible for discovering or removing any asbestos on the worksite. Accordingly, it owed no duty to the plaintiffs regarding any exposure to the substance that they may have suffered.

The plaintiffs first argue that a proper analysis of legal duty ordinarily leads to a question of fact. Such issues, on the contrary, pose questions of law for the court. See *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 328. The plaintiffs contend that O & G was charged with supervising safety, and had the authority to control work performed by the plaintiffs, which creates a genuine issue of material fact as to who was in control of the project site and whether O & G was responsible for avoiding exposures. The question of which party was in control of the site is not at issue in the present case. Nonetheless, the defendant's contract provides that "[t]he Construction Manager . . . will not have control over . . . the safety precautions and programs in connection with the work . . . ." Def. Ex.

2, Doc. A232, § 4.2.5. Additionally, as has been established in the previous paragraphs, under the terms of its contract, the defendant was not responsible specifically for the discovery or removal of asbestos at the worksite. Thus, O & G was not in control of the relevant worksite safety procedures.

The plaintiffs contend that O & G owed them a duty of care as third parties under Connecticut common law. With regard to third-party liability, "the undertaking party not only will assume duties to third parties expressly set forth in the contract itself, as well as pass-through duties owed by the hiring party that are assigned or transferred to the undertaking party, but also will assume a duty of care to protect third parties from foreseeable, physical harm within the scope of the services to be performed." (Emphasis in original.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 846, 208 A.3d 626 (2019). O & G did not assume a contractual duty to the plaintiffs, nor was it assigned any such duties by the town. Consequently, any duties that it assumed to the plaintiffs were limited to foreseeable physical harm within the scope of the services to be performed. As responsibility for discovering and removing asbestos was specifically excluded from the scope of O & G's services, it did not owe the plaintiffs a duty under a theory of third-party liability.

Lastly, the plaintiffs claim that O & G owed them a duty of care arising from OSHA regulations. "Both the federal and state OSHA statutes provide that such regulations may not be used to create a private cause of action for injuries arising out of or in the course of employment." *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 112, 491 A.2d 368 (1985). "OSHA regulations, if applicable, may be used as evidence of the standard of care in a negligence action against an employer . . . . Where an OSHA regulation applies in a civil case, it can provide helpful guidance to the jury in its deliberations."

(Citation omitted; internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 188, 700 A.2d 38 (1997). Nonetheless, "even if an OSHA violation is evidence of [a defendant's] negligence . . . [the defendant] must owe a duty . . . under a theory of liability independent of OSHA . . . . OSHA regulations can never provide a basis for liability . . . . The [Occupational Safety and Health] Act itself explicitly states that it is not intended to affect the civil standard of liability." (Citations omitted; internal quotation marks omitted.) *Ellis* v. *Chase Communications, Inc.*, 63 F.3d 473, 478 (6th Cir. 1995). In the present case, the plaintiffs have not provided an OSHA statute that is applicable to O & G. Nonetheless, it has already been established that O & G did not owe the plaintiffs a duty of care with regard to the discovery and removal of asbestos, and OSHA cannot establish such a duty independently. Accordingly, there is no genuine issue of material fact that O & G did not owe the plaintiffs a duty of care with regard to the discovery and removal of asbestos and its motion for summary judgment is granted.

II

SMI's MOTION FOR SUMMARY JUDGMENT

The defendant SMI also moves for summary judgment on the ground that it owed no duty to the plaintiffs. SMI argues that it owed no duty of care to the plaintiffs because it was not hired to identify asbestos; rather, it was hired to remove hazardous materials that had already been identified by other contractors. The plaintiffs contend that an analysis of legal duty ordinarily leads to a question of fact; SMI was in the best position to ensure the safety of the plaintiffs; SMI performed its work in such a way as to create hazardous situations; SMI owed a duty of care under Connecticut common law; and SMI owed the plaintiffs a duty of care arising from OSHA regulations. SMI argues in its reply that it

had no duty to perform work that was beyond the scope of its contract.

"Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant . . . . [T]he test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular, consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Sic* v. *Nunan*, 307 Conn. 399, 407–408, 54 A.3d 553 (2012). When a "case is close enough to the margin of reasonable foreseeability . . . it would be inappropriate to foreclose the foreseeability inquiry as a matter of law." *Ruiz* v. *Victory Properties, LLC*, 135 Conn. App. 119, 127, 43 A.3d 186 (2012), aff'd, 315 Conn. 320, 107 A.3d 381 (2015).

SMI's contract provides in relevant part that "[t]he Contractor shall perform all work required by the Contract Documents for Bid Package 2.01—Abatement & Demolition." Def. Ex. C, AIA Doc. A132, Art 2. In his sworn deposition, former Wethersfield town manager Jeff Bridges stated that "Southern Middlesex Industries was retained or hired to perform both clean and hazardous material demolition." Def. Ex. A, Bridges Dep., 12. Bridges further stated that it was correct that "between EnviroMed and Fuss & O'Neill, those entities, as part of their job, identified hazardous materials within the Wethersfield High School . . . . And based upon the work that Fuss & O'Neill and EnviroMed did in identifying the hazardous materials, the town then hired an

abatement contractor to remove the hazardous materials that had previously been identified . . . .'' Def. Ex. A, Bridges Dep., 71. SMI's President, Darrell MacLean, states in his sworn affidavit that ''SMI submitted a bid to the [t]own of Wethersfield . . . to perform demolition and hazardous material removal, including asbestos abatement, for the renovation of the Wethersfield High School . . . .'' Def. Ex. B, MacLean Aff., 1. MacLean further stated that ''Fuss & O'Neill conducted an environmental assessment of the building for the purpose of identifying and locating the presence of hazardous materials in the building which would have to be removed.'' Def. Ex. B, MacLean Aff., 1.

On the other hand, Carlos Texidor, project manager for Fuss & O'Neill, when asked in his deposition whether anyone was keeping an eye out for suspect materials at times when Fuss & O'Neill were not present, stated: ''To my knowledge I don't know, other than SMI.'' Pl. Ex. 4, 37. Darrell MacLean, President of SMI, stated that his employees on several occasions came across suspicious material that was found to be asbestos. Pl. Ex. 5, 39–45. The procedure was that ''[i]f [the employees] have any doubt, they're supposed to just stop, identify it, and notify the supervisor.'' Pl. Ex. 5, 39. SMI additionally is alleged to have created a hazard by placing material into non-asbestos dumpsters that was found to contain asbestos. Pl. Ex. 4, 32–33.

It is evident that SMI was not hired for the specific purpose of identifying and locating hazardous materials. That alone, however, does not establish that it bore no responsibility whatsoever for the identification and discovery of asbestos on the worksite while it performed its demolition and remediation duties. Questions of fact therefore remain regarding SMI's capacity to identify any previously undiscovered hazardous materials to which the plaintiffs allege they were

exposed. The defendant SMI's motion for summary judgment is accordingly denied.

CONCLUSION

For the foregoing reasons, the defendant O & G's motion for summary judgment is granted and the defendant SMI's motion for summary judgment is denied.

ANTHONY J. MARSHALL III *v.* COMMISSIONER OF MOTOR VEHICLES (AC 44191)

Prescott, Alexander and DiPentima, Js.

Syllabus

The plaintiff, who had been arrested for operating a motor vehicle while under the influence of intoxicating liquor in violation of statute (§ 14-227a), appealed to the trial court from the decision of the defendant, the Commissioner of Motor Vehicles, suspending the plaintiff's motor vehicle operator's license for forty-five days and requiring the installation of ignition interlock devices on his motor vehicles pursuant to statute (§ 14-227b). At the administrative hearing, no testimony was presented, but the Department of Motor Vehicles offered into evidence as an exhibit a standard A-44 form that was completed by the arresting officer, H, together with H's narrative report and the results of the breath analysis tests he administered to the plaintiff. The plaintiff objected to the admission of the exhibit on the ground that it had not been mailed to the department within three business days as required by § 14-227b (c). The hearing officer admitted the exhibit into evidence, and the plaintiff appealed to the trial court, challenging the hearing officer's admission of the exhibit and contending that the A-44 form and the narrative police report were not completed until five days after his arrest and were not received by the department until nine days after his arrest. The trial court rendered judgment dismissing the appeal, holding that the failure to satisfy the three day mailing requirement did not undermine the reliability and trustworthiness of the information reported in the exhibit, as the A-44 form and its attachments were signed by H, thus, the exhibit properly was admitted into evidence. On the plaintiff's appeal to this court, *held* that the trial court properly found that the hearing officer did not abuse her discretion in admitting the A-44 form and its attachments into evidence: although § 14-227b (c) provides that the arresting police officer "shall mail" a report of the incident and a copy of the chemical test results within three business days, the statute does not

expressly invalidate the report or test results upon noncompliance with the three day requirement, and the purpose of the statutory provision is to provide sufficient indicia of reliability so that the police report can be introduced into evidence at a license suspension hearing as an exception to the hearsay rule, thus, the time requirement for mailing the report and test results is a matter of convenience rather than substance and is therefore directory rather than mandatory; moreover, as H completed and signed both the A-44 form and the narrative police report under oath and signed the plaintiff's breath analysis test results, and the A-44 form and its attachments set forth the grounds for H's belief that there was probable cause to arrest the plaintiff and stated that the plaintiff had submitted to breath analysis tests, the A-44 form and its attachments provided a sufficient indicia of reliability to be admitted into evidence without H's testimony.

(*One judge dissenting*)

Submitted on briefs September 9, 2021—officially released January 18, 2022

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's license and requiring the installation of an ignition interlock device on the plaintiff's vehicles, brought to the Superior Court in the judicial district of New London and transferred to the judicial district of New Britain, where the matter was tried to the court, *Cordani, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Cody A. Layton, filed a brief for the appellant (plaintiff).

Drew S. Graham, assistant attorney general, with whom were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, filed a brief for the appellee (defendant).

Opinion

DiPENTIMA, J. The plaintiff, Anthony J. Marshall III, appeals from the judgment of the Superior Court rendered in favor of the defendant, the Commissioner of Motor Vehicles (commissioner), dismissing his appeal

from the decision of the commissioner to suspend his motor vehicle operator's license, pursuant to General Statutes § 14-227b, for forty-five days and requiring an ignition interlock device in his motor vehicles for six months. On appeal, the plaintiff claims that the court improperly determined that the hearing officer did not abuse her discretion in admitting into evidence a report, which consisted of an A-44 form,[1] a narrative police report and the results of the plaintiff's breath analysis tests, that did not comply with the three day mailing requirement in § 14-227b (c).[2] We affirm the judgment of the Superior Court.

[1] "This form is entitled: Officer's OUI Arrest and Alcohol Test Refusal or Failure Report. The A-44 form is used by the police to report an arrest related to operating a motor vehicle under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." (Internal quotation marks omitted.) *Nandabalan* v. *Commissioner of Motor Vehicles*, 204 Conn. App. 457, 461 n.5, 253 A.3d 76, cert. denied, 336 Conn. 951, 251 A.3d 618 (2021). "The provisions of . . . § 14-227b (c) and § 14-227b-19 of the Regulations of Connecticut State Agencies permit the admission of the police report on a form approved by the defendant, as the A-44 form has been, together with additional sheets or materials necessary to explain the report, which are considered part of the report." (Footnotes omitted.) *Paquette* v. *Hadley*, 45 Conn. App. 577, 580–81, 697 A.2d 691 (1997).

[2] General Statutes § 14-227b (c) provides: "If the person arrested refuses to submit to such test or analysis or submits to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicate that such person has an elevated blood alcohol content, the police officer, acting on behalf of the Commissioner of Motor Vehicles, shall immediately revoke and take possession of the motor vehicle operator's license or, if such person is a nonresident, suspend the nonresident operating privilege of such person, for a twenty-four-hour period. The police officer shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report and a copy of the results of any chemical test or analysis to the Department of Motor Vehicles within three business days. The report shall contain such information as prescribed by the Commissioner of Motor Vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for a violation of section 14-227a or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n and shall state that such person had refused

The following facts, as found by the court in its memorandum of decision regarding the suspension of the plaintiff's license, and procedural history are relevant. On July 14, 2019, at approximately 5:31 p.m., after hearing an announcement over the police radio that a particular vehicle with a specified Connecticut registration allegedly had been involved in a "hit and run" accident in Westerly, Rhode Island, Officer Jeffrey Hewes of the Stonington Police Department observed and stopped the specified vehicle. On approaching the vehicle, Hewes identified the plaintiff as the operator and noticed that his eyes were glassy and bloodshot, his speech was slow and there was the smell of alcohol on his breath. Hewes administered the standardized field sobriety tests, which the plaintiff failed. The plaintiff was then arrested and transported to police headquarters where he consented to taking breath alcohol tests. The first test, which was administered at 6:48 p.m., yielded a result of 0.1936 percent blood alcohol content, and the second test, which was administered at 7:07 p.m., yielded a result of 0.1860 percent blood alcohol. The plaintiff was charged with driving under the influence of intoxicating liquor in violation of General Statutes § 14-227a.

On July 24, 2019, the plaintiff was issued a notice informing him of the suspension of his operator's license pursuant to § 14-227b. An administrative hearing

to submit to such test or analysis when requested by such police officer to do so or that such person submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content. The Commissioner of Motor Vehicles may accept a police report under this subsection that is prepared and transmitted as an electronic record, including electronic signature or signatures, subject to such security procedures as the commissioner may specify and in accordance with the provisions of sections 1-266 to 1-286, inclusive. In any hearing conducted pursuant to the provisions of subsection (g) of this section, it shall not be a ground for objection to the admissibility of a police report that it is an electronic record prepared by electronic means."

was held before the commissioner's hearing officer on August 9, 2019, to determine whether the plaintiff's operator's license should be suspended pursuant to § 14-227b. At the hearing, the plaintiff's counsel objected to the admissibility of the A-44 form and its attachments because it had not been mailed to the Department of Motor Vehicles (department) within three business days as required by § 14-227b (c). The hearing officer overruled the objection and admitted into evidence the packet containing the A-44 form and its attachments as state's exhibit A. It was the only evidence submitted at the hearing. The A-44 form is stamped "Department of Motor Vehicles . . . 2019 Jul 23 AM 10:23," and both the narrative police report and the A-44 form are signed under oath by Hewes and dated July 19, 2019. The document containing the breath analysis tests results is dated July 14, 2019, and is also signed by Hewes. The hearing officer found that the plaintiff was operating a motor vehicle, was arrested and submitted to breath alcohol tests, the results of which indicated a blood alcohol content of 0.08 percent or more, and that there was probable cause to arrest the plaintiff. The hearing officer suspended the plaintiff's operator's license for forty-five days and required the installation of an ignition interlock device for six months.

On August 28, 2019, the plaintiff appealed the decision of the hearing officer to the Superior Court. In his brief filed in the Superior Court, the plaintiff argued that the hearing officer acted contrary to the law when she admitted the A-44 form and its attachments into evidence because that report was not mailed to the department within three business days as required by § 14-227b (c) and, therefore, was inadmissible. He contended that the A-44 form and the narrative police report were not completed until five days after his arrest and that the A-44 form is time-stamped by the defendant nine

days after his arrest. The plaintiff argued that the packet containing the A-44 form and its attachments was the only evidence submitted by the defendant at the administrative hearing, and, without that report, there was not substantial evidence to suspend his license.

On July 8, 2020, the court issued a memorandum of decision dismissing the appeal. The court reasoned that the "[f]ailure to meet the conditions for admissibility specified in . . . § 14-227b (c) does not necessarily mean that the report is absolutely inadmissible. The rules of evidence, including the hearsay rules, are not strictly applied in administrative hearings. The law remains that, in the setting of an administrative hearing such as the underlying hearing in this matter, police reports, and other hearsay documents, are admissible without the testimony of the author, if the documents are reasonably found to bear indicia of trustworthiness and reliability. Such is the case here." The court reasoned that the failure to satisfy the three day mailing requirement did not undermine the reliability and trustworthiness of the information reported therein, as the A-44 form and its attachments were signed by the arresting officer. The court thus concluded that exhibit A properly was admitted into evidence. This appeal followed.

The plaintiff claims that exhibit A, the A-44 form and its attachments, is inadmissible because that report was not submitted to the department within three business days as required by § 14-227b (c). The plaintiff notes, and the commissioner does not dispute, that the A-44 form and the narrative police report were not completed until July 19, 2019, five days after his July 14, 2019 arrest and were not received by the department until July 23, 2019, nine days after his arrest. As a result, he concludes, the A-44 form and its attachments lacked sufficient indicia of reliability to be admissible at the administrative hearing. We are not persuaded.

At the outset we note that "[j]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "The plaintiff bears the burden of demonstrating that a hearing officer's evidentiary ruling is arbitrary, illegal or an abuse of discretion." (Internal quotation marks omitted.) *Paquette* v. *Hadley*, 45 Conn. App. 577, 580, 697 A.2d 691 (1997).

Section 14-227b (c) provides in relevant part that if a person arrested for operating a motor vehicle while under the influence of intoxicating liquor submits to a breath analysis test that indicates such person has an elevated blood alcohol content then "the police officer . . . shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report and a copy of the results of any chemical test or analysis to the Department of Motor Vehicles within three business days. The report shall contain such information as prescribed by the Commissioner of Motor Vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for a violation of section 14-227a or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n and shall state that such person had refused to submit to such test or analysis

when requested by such police officer to do so or that such person submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content. . . .''

Because the plaintiff argues that the A-44 form and its attachments were rendered inadmissible as a result of noncompliance with the three day mailing requirement, we first consider whether that requirement in § 14-227b (c), which provides that the police officer ''shall'' mail or otherwise transmit the report within three business days, is mandatory or directory. Because this claim regarding § 14-227b (c) requires us to construe the relevant statute, our standard of review is plenary. See *Ives* v. *Commissioner of Motor Vehicles*, 192 Conn. App. 587, 595, 218 A.3d 72 (2019).

The use of the word ''shall'' in § 14-227b (c) does not, in and of itself, create a mandatory duty to mail the report within three business days. ''[T]he use of the word shall, though significant, does not invariably create a mandatory duty. . . . In order to determine whether a statute's provisions are mandatory we have traditionally looked beyond the use of the word shall and examined the statute's essential purpose.'' (Citations omitted; internal quotation marks omitted.) *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 445–46, 685 A.2d 670 (1996). In doing so here, we consider whether the time limitation on mailing the report is a matter of substance or convenience. ''The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is

generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words. . . . Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply. . . . A reliable guide in determining whether a statutory provision is directory or mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the provision." (Citation omitted; internal quotation marks omitted.) *Lauer* v. *Zoning Commission*, 246 Conn. 251, 262, 716 A.2d 840 (1998).

Although the statute provides that the police officer "shall mail" the report and test results within three business days, the statute does not expressly invalidate the report or test results upon noncompliance with the three day mailing requirement. The statute does not specifically mention admissibility, except with respect to electronic reports, which is not applicable in the present case, and does not state that a failure to mail the report within three days renders the report inadmissible. "A statutory provision that is directory prescribes what shall be done but does not invalidate action upon a failure to comply." (Internal quotation marks omitted.) *Francis* v. *Fonfara*, 303 Conn. 292, 302, 33 A.3d 185 (2012). Furthermore, the legislative provision at issue is designed to secure order, system and dispatch in the proceedings by ensuring that the report is reliable and can be admitted into evidence. The purpose of § 14-227b (c) is to "provide sufficient indicia of reliability so that the [police] report can be introduced in evidence as an exception to the hearsay rule, especially in license suspension proceedings, without the necessity of producing the arresting officer." (Internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 668–69, 200 A.3d 681 (2019). "That license

suspensions hearings are limited to the four issues specified in subsection (f) of § 14-227b [now § 14-227b (g)] indicates that the legislature did not intend compliance with . . . subsection (c) to be an essential condition for suspension." *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 711, 692 A.2d 834 (1997). We conclude that the time requirement for mailing the report and test results of § 14-227b (c) is a matter of convenience rather than a matter of substance and, therefore, is directory.

We next turn to the plaintiff's contention that the court improperly determined that the hearing officer did not abuse her discretion in admitting the A-44 form and its attachments into evidence because that report was reliable and trustworthy despite the fact that it was not mailed to the department within three business days. With regard to the admissibility of such reports, § 14-227b-19 of the Regulations of Connecticut State Agencies[3] provides that "the report filed or transmitted by the arresting officer" and the chemical test results submitted contemporaneously with the report shall be admissible into evidence at the hearing if it conforms to the requirements of § 14-227b (c). The plaintiff relies

[3] Section 14-227b-19 of the Regulations of Connecticut State Agencies provides in relevant part:

"(a) The report filed or transmitted by the arresting officer shall be admissible into evidence at the hearing if it conforms to the requirements of subsection (c) of section 14-227b of the . . . General Statutes.

"(b) The chemical test results in the form of the tapes from a breath analyzer or other chemical testing device submitted contemporaneously with the report shall be admissible into evidence at the hearing if they conform to the requirements of subsection (c) of section 14-227b of the . . . General Statutes.

"(c) An electronic record that contains electronic signatures of persons required to sign in accordance with subsections (a), (b) and (c) of section 14-227b-10 of the Regulations of Connecticut State Agencies shall be admissible at a hearing to the same extent as a report containing written signatures, as provided in subsection (c) of section 14-227b of the . . . General Statutes."

on the following language from *Do:* "Subsection (c) of § 14-227b itself provides that the report, to be admissible, must be submitted to the department within three business days, be subscribed and sworn to by the arresting officer under penalty of false statement, set forth the grounds for the officer's belief that there was probable cause to arrest the driver, and state whether the driver refused to submit to or failed a blood, breath or urine test." *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 668. We agree with the trial court as to the import of this language: "[Section] 14-227b (c) provides a safe harbor. Strict compliance with the conditions of § 14-227b (c) establishes the admissibility of the report. Our Supreme Court in *Do* confirmed this, finding that a report that had substantial inconsistencies was still admissible simply because it met the conditions for admissibility specified in the statute. However, the converse is not the law. Failure to meet the conditions for admissibility specified in § 14-227b (c) does not necessarily mean that the report is absolutely inadmissible."[4] (Footnote omitted.)

The admissibility of hearsay evidence is determined on the basis of whether it is reliable. "Administrative

[4] The plaintiff contends that viewing § 14-227b (c) as a safe harbor results in there being "virtually no situation where a report could be kept out of evidence at an administrative per se hearing. The hearing officer would essentially have carte blanche to consider any and/all evidence put before it. Such a position does not comport with due process and the facilitation of justice." The primary purpose of license suspension hearings is "to protect the public by removing potentially dangerous drivers from the state's roadways with all dispatch compatible with due process." (Internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 679. The focus of § 14-227b (c) is whether a report has a sufficient indicia of reliability to be admissible without the testimony of the arresting officer. Id., 668–69. Allowing the hearing officer in the present case, in which the report was mailed a few days late, to determine whether the report, nonetheless, was reliable promotes the state's interest in removing potentially dangerous drivers from the roadways with all dispatch, compatible with due process while also promoting the purpose of § 14-227b (c), which is admitting, without the necessity of producing the arresting officer, only reports that are *reliable*.

tribunals are not strictly bound by the rules of evidence . . . so long as the evidence is reliable and probative." (Internal quotation marks omitted.) *Bialowas* v. *Commissioner of Motor Vehicles*, supra, 44 Conn. App. 712. We, again, note that compliance with the admissibility requirements in § 14-227b (c) is designed to provide sufficient indicia of reliability so that the report can be introduced in evidence as an exception to the hearsay rule without the necessity of producing the arresting officer. *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 668–69.

In the present case, the arresting officer completed and signed both the A-44 form and the narrative police report under oath and signed the plaintiff's breath analysis test results. Additionally, the A-44 form and its attachments satisfied additional requirements in § 14-227b (c) in that the report set forth the grounds for the officer's belief that there was probable cause to arrest the plaintiff and stated that the plaintiff had submitted to breath analysis tests. Under the facts in the present case, the A-44 form and its attachments, which were completed and signed, provide a sufficient indicia of reliability to be introduced into evidence without the testimony of the arresting officer. The plaintiff has not demonstrated that the short delay in mailing the A-44 form and its attachments affected the reliability of that report. See *Packard* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New London, Docket No. CV-90-0514307-S (September 18, 1991) (5 Conn. L. Rptr. 5) (failure to comply with three day mailing requirement in § 14-227b (c) had no impact on indicia of reliability), aff'd, 29 Conn. App. 923, 616 A.2d 1177 (1992); *Peters* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of Hartford, Docket No. 701413 (July 11, 1991) (4 Conn. L. Rptr. 301) (failure to mail police report within three business days as required by § 14-227b (c) did not affect reliability or trustworthiness of report), aff'd, 26

Conn. App. 937, 601 A.2d 1 (1992). We conclude that the hearing officer had sufficient evidence from which to determine that the A-44 form and its attachments were reliable and trustworthy. Accordingly, the trial court properly found that the hearing officer did not abuse her discretion in admitting the A-44 form and its attachments into evidence.

The judgment is affirmed.

In this opinion ALEXANDER, J., concurred.

PRESCOTT, J., dissenting. In a driver's license suspension proceeding conducted by the Department of Motor Vehicles (department), the department's hearing officer typically, and often exclusively, relies on an A-44 report prepared by one or more police officers to determine whether the driver's privilege to operate a motor vehicle should be suspended pursuant to General Statutes § 14-227b.[1] Under our regulatory scheme, the A-44 report is admissible without providing to the accused driver any practical opportunity to cross-examine the author of the report. I continue to have concerns with the admission and reliability of some A-44 reports, particularly in light of the operator's lack of any practical

[1] General Statutes § 14-227b provides in relevant part: "If [a] person arrested [for operating a motor vehicle under the influence of intoxicating liquor or any drug or both in accordance with General Statutes § 14-227a] refuses to submit to [a blood, breath, or urine] test or analysis or submits to such test or analysis . . . and the results of such test or analysis indicate that such person has an elevated blood alcohol content, the police officer, acting on behalf of the Commissioner of Motor Vehicles, shall immediately revoke and take possession of the motor vehicle operator's license . . . for a twenty-four-hour period. . . . [U]pon receipt of [a police] report [documenting the incident giving rise to the arrest], the Commissioner of Motor Vehicles may suspend any operator's license . . . effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of such person's arrest by the police officer. Any person whose operator's license or nonresident operating privilege has been suspended in accordance with this subdivision shall automatically be entitled to a hearing before the commissioner . . . ."

opportunity to cross-examine the author of the report concerning the accuracy of the information contained in it. Furthermore, our Supreme Court has indicated in two cases that A-44 reports that fail to comply with the admissibility requirements set forth in General Statutes § 14-227b (c) are not admissible. *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 669, 200 A.3d 681 (2019); *Volck* v. *Muzio*, 204 Conn. 507, 518, 529 A.2d 177 (1987). In light of these concerns, I respectfully dissent from the decision of the majority affirming the hearing officer's admission of the A-44 report despite its undisputed failure to comply with the requirements of § 14-227b (c).

An A-44 report "shall be admissible into evidence at [a license suspension] hearing if it conforms to the requirements of subsection (c) of [§] 14-227b . . . [which] provides that the report, to be admissible, must be submitted to the department within three business days, be subscribed and sworn to by the arresting officer under penalty of false statement, set forth the grounds for the officer's belief that there was probable cause to arrest the driver, and state whether the driver refused to submit to or failed a blood, breath or urine test." (Emphasis omitted; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 668. Indeed, one of the plain and unambiguous requirements imposed by § 14-227b (c) is that "[t]he police officer shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report . . . to the Department of Motor Vehicles *within three business days*." (Emphasis added.) General Statutes § 14-227b (c).

There is no dispute in the present case that the A-44 report was neither created nor sent to the department within the three day period required by § 14-227b (c).[2]

[2] Because the majority opinion accurately sets forth the facts and procedural history of this case, I see no need to repeat them here.

As the majority correctly states, the report was prepared five days after the incident giving rise to the plaintiff's arrest and was not transmitted to the department until nine days after the incident. Our Supreme Court has explained, "the admissibility requirements set forth in [§ 14-227b (c)] *provide sufficient indicia of reliability* so that the [A-44] report can be introduced in evidence as an exception to the hearsay rule, especially in license suspension proceedings, *without the necessity of producing the arresting officer*." (Emphasis added; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 678. In my view, the three day requirement imposed by § 14-227b (c) exists, at least in part, to heighten the reliability of A-44 reports, because it requires a police officer to prepare the report while his or her recollection of the incident is most fresh. According to prior appellate precedent and, now, in accordance with the majority's decision in this case, an A-44 report is admissible, even if the report contains significant and obvious factual errors; see id., 656; and even though it fails to comply with the admissibility requirements set forth by statute. See General Statutes § 14-227b (c).

It is important to emphasize that, under the existing regulatory scheme, a report is admissible without providing the accused individual with any practical opportunity to cross-examine the author of the report concerning the reliability of the information contained therein. The lack of the opportunity to cross-examine the author of the report is the result of § 14-227b-18 of the Regulations of Connecticut State Agencies, which is titled "Attendance of arresting officer at hearing," and provides in relevant part: "(b) A person arrested for an enumerated offense may at such person's own expense and by such person's own solicitation summon to the hearing the arresting officer and any other witness to give oral testimony. *The failure to appear at*

the hearing of any witness summoned by the person arrested shall not be grounds for such person to request a continuance or dismissal of the hearing. . . ." (Emphasis added.)

As I stated in *Do* v. *Commissioner of Motor Vehicles*, 164 Conn. App. 616, 626–27, 138 A.3d 359 (2016), rev'd, *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 200 A.3d 681 (2019), "[a]lthough § 14-227b-18 of the Regulations of Connecticut State Agencies permits a person arrested for violating § 14-227a . . . to summon the arresting officer to the administrative hearing, if the subpoenaed arresting officer does not appear, the person arrested is not entitled to a continuance or a dismissal. Thus, even though an arrested person can subpoena the arresting officer, if the officer does not appear, the arrested person is deprived of his or her ability to cross-examine the officer regarding any errors in the A-44 form." (Footnote omitted.) Indeed, on the basis of my prior experience serving as the presiding judge of the tax and administrative appeals session of the Superior Court, it is my experience that the author of an A-44 report rarely testifies in these proceedings. I remain concerned that the confluence of this regulatory scheme, the Supreme Court's decision in *Do*, and the majority's decision in the present case risk depriving operators of fundamental fairness before they lose the privilege to drive. "This court is aware of the carnage associated with drunken drivers. . . . Nevertheless, in our endeavor to rid our roads of these drivers . . . we cannot trample on the constitutional rights of other citizens. They are entitled to a fair hearing. . . . An operator's license is a privilege that the state may not revoke without furnishing the holder of the license due process as required by the fourteenth amendment." (Citations omitted; internal quotation marks omitted.) *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 718, 692 A.2d 834 (1997). I also am of the

view that, under existing law, including this court's decision today, police officers have become disincetivized to ensure that A-44 reports comply with § 14-227b (c).

With these concerns in mind, it is important to focus on two cases decided by our Supreme Court that have stated that an A-44 report that fails to comply with the admissibility requirements set forth in § 14-227b (c) will not be admissible. In *Volck* v. *Muzio*, supra, 204 Conn. 507, the plaintiff was arrested for operating a motor vehicle under the influence of intoxicating liquor or drugs. Id., 508–10. At the plaintiff's license suspension hearing, the hearing officer considered various police documents, including a police report that documented that the plaintiff had refused to submit to a blood, breath, or urine test on the day of the incident. Id., 509–10. The plaintiff did not object to the admission of any of the documents introduced at the hearing, including the police report. Id., 510–11. Following the hearing, the hearing officer determined that there was probable cause to arrest the plaintiff, that the plaintiff had been arrested, that he had refused to submit to a blood, breath, or urine test, and that he was operating a motor vehicle. Id., 511–12. Accordingly, the department suspended the plaintiff's license. Id., 508.

The plaintiff appealed the suspension of his license to the Superior Court, arguing, inter alia, that the report, which documented the plaintiff's refusal to submit to testing, was not "endorsed by a third [party who] witness[ed]" the refusal. Id., 509–10; see also General Statutes § 14-227b (c). Although the court agreed with the plaintiff that the report failed to comply with the admissibility requirements in § 14-227b (c) because it had not been endorsed by a third-party witness to the refusal, the court nonetheless dismissed the plaintiff's appeal because it determined that the nonconformity did not

negate the hearing officer's findings. *Volck* v. *Muzio*, supra, 204 Conn. 516.

On appeal, our Supreme Court stated: "The absence of the endorsement of a third person who witnessed the [plaintiff's] refusal of testing *would have rendered* [*the police officer's*] *report inadmissible if the plaintiff had objected thereto*. No objection was raised, however, to its use at the license suspension hearing." (Emphasis added.) Id., 518. Thus, the Supreme Court indicated that, had the plaintiff objected to the admission of the police report, it would have been inadmissible because it failed to comply with one of the admissibility requirements set forth in § 14-227b (c). See id. Because the "hearsay statements . . . c[a]me into [the] case without objection" by the plaintiff, "they [could] be relied upon by the trier, in proof of the matters stated therein, for whatever they were worth on their face." (Internal quotation marks omitted.) Id. Accordingly, the hearing officer's findings were "not flawed [despite] his reliance upon the unwitnessed report of the police officer." Id.

In *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 651, the Supreme Court likewise indicated that a report that fails to comply with the admissibility requirements contained in § 14-227b (c) should not be admissible. The plaintiff in *Do* was arrested for operating a motor vehicle under the influence of intoxicating liquor or drugs. Id., 658. The arresting officer prepared an A-44 report, documenting the incident, and sent a copy to the department. Id., 657–58. The report complied with the admissibility requirements set forth in § 14-227b (c). Id., 658.

At the plaintiff's license suspension hearing, the plaintiff objected to the admission of an exhibit which contained the A-44 report, a police investigation report, and the results of the plaintiff's breath analysis test from the night of the incident. Id., 658–59. The plaintiff

argued that the exhibit was unreliable because it contained the following internal discrepancies: "(1) the A-44 form state[d] that, at the time of her arrest, the plaintiff was driving a 2007 Audi A4 with Massachusetts license plates whereas the investigation report state[d] that the plaintiff was driving a 2006 Mercedes-Benz S28 with Connecticut license plates; (2) after [the arresting officer] had subscribed and sworn to the information contained in the A-44 form, [his supervisor] altered . . . that form by crossing out . . . the date of the incident and writing in [a different date]; (3) [the supervisor] . . . crossed out the name [of] . . . a person who witnessed the plaintiff's [alleged] refusal to perform a breath analysis test [although the results of the plaintiff's breath analysis test were included in the exhibit]; and (4) . . . the investigation report . . . state[d] that the plaintiff informed [the arresting officer] that she was wearing contact lenses whereas the summary of the plaintiff's . . . test results in the same report state[d] that the plaintiff performed th[e] test with and without her glasses on." (Footnote omitted; internal quotation marks omitted.) Id., 659. The hearing officer overruled the plaintiff's objection, determining that the discrepancies went to the weight to be given to the exhibit, not to its admissibility, and admitted the exhibit into evidence. Id., 660. The hearing officer ultimately determined that there was probable cause to arrest the plaintiff, that the plaintiff had been arrested, that she had submitted to a test and the results indicated a blood alcohol content of 0.08 percent or more, and that she was operating a motor vehicle. Id. Consequently, the department suspended the plaintiff's license. Id.

The plaintiff appealed the suspension of her license to the Superior Court. Id., 661. The court determined that the hearing officer did not abuse his discretion by admitting the exhibit into evidence because the exhibit complied with the requirements of § 14-227b (c). Id.

The plaintiff appealed to this court; see id., 663; and this court reversed the judgment of the Superior Court, concluding that the "A-44 form contain[ed] so many significant internal discrepancies and errors that it [wa]s rendered unreliable, *at least in the absence of testimony by the arresting officer or other evidence that support*[*ed*] *its reliability*." (Emphasis added.) *Do* v. *Commissioner of Motor Vehicles*, supra, 164 Conn. App. 627.

Our Supreme Court reversed the decision of this court, concluding that the plaintiff had failed to demonstrate that the hearing officer had abused his discretion by admitting the exhibit and relying on the exhibit to support his findings. *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 668. Our Supreme Court determined that the exhibit met each of the requirements set forth in § 14-227b (c): "[I]t was submitted to the department within three business days; it was subscribed and sworn to by the arresting officer; it set forth the grounds for the officer's belief that there was probable cause to arrest the plaintiff; and it stated whether the plaintiff submitted to a blood test." Id., 669. Because it complied with the admissibility requirements set forth in § 14-227b (c) and set forth evidence to support the hearing officer's findings, the exhibit was admissible. See id., 669, 680. The factual discrepancies within the exhibit "[went] to the weight to be accorded the exhibit by the hearing officer, not to its admissibility." Id., 671.

Importantly, our Supreme Court in *Do* noted that "[n]either [our Supreme Court] nor [this court] has ever recognized any basis for excluding a police report from evidence at a license suspension hearing *other than the failure to comply with § 14-227b (c)*. Indeed, [our Supreme Court] ha[s] rejected claims that a report should be excluded for any other reason." (Emphasis added.) Id., 669. The Supreme Court cited *Volck*, noting

that, in that case, "[the] arresting officer's failure to comply with [the] statutory dictates of § 14-227b [b] provided [an] insufficient ground for overturning [the] [C]ommissioner [of Motor Vehicle's] suspension of [the plaintiff's] license, *but* [*the*] *absence of* [*the*] *endorsement of* [*a*] *third person to* [*the*] *plaintiff's refusal to submit to* [*a*] *breath analysis test as required by § 14-227b* [*c*] *would be* [*a*] *ground for* [*the*] *exclusion of* [*the*] *report* . . . ." (Emphasis added.) Id. Thus, the Supreme Court has indicated for a second time that an A-44 report's noncompliance with the admissibility requirements set forth in § 14-227b (c) renders the report inadmissible, at least in the absence of testimony by the arresting officer.

I recognize that the statements by our Supreme Court in *Volck* and *Do* are arguably dicta. Nonetheless, I am persuaded, in light of my concerns for fundamental fairness, that this court should adhere to the Supreme Court's statement in two cases that the A-44 reports, in the absence of testimony by the author of the report, are not admissible if they fail to comply with the strictures of § 14-227b (c). If the Supreme Court ultimately disavows its statements in *Volck* and *Do*, and holds that an A-44 report is admissible even if it does not comply with the statutory requirements and the author is not subject to cross-examination, I, of course, am duty bound to follow that decision. Accordingly, I conclude that the hearing officer improperly admitted the A-44 report because it failed to comply with § 14-227b (c) and would reverse the judgment of the Superior Court affirming the decision with direction to sustain the plaintiff's appeal.

In light of the foregoing considerations, I respectfully dissent.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 210

MEMORANDUM DECISIONS

GEORGE BERKA *v.* CITY OF WATERBURY (AC 44395)

Prescott, Suarez and Palmer, Js.

Submitted on briefs January 4—officially released January 18, 2022

Plaintiff's appeal from the Superior Court in the judicial district of Waterbury, *Roraback*, *J.*

Per Curiam. The judgment is affirmed.

MTGLQ INVESTORS, L.P. *v.* GEORGE S. LAKNER (AC 44017)

Alvord, Clark and Harper, Js.

Argued January 5—officially released January 18, 2022

Defendant's appeal from the Superior Court in the judicial district of New Haven, *Baio*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

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SUPREME COURT PENDING CASES

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

STATE OF CONNECTICUT *v.* JAYVELL WASHINGTON, SC 20495
Judicial District of Fairfield

Criminal; Prosecutorial Impropriety; Jury Instructions. Whether Trial Court Erred in Admitting Jailhouse Phone Recordings as Adoptive Admissions; Whether Trial Court Erred in Denying Defendant's Motion for New Trial Where Jury Deliberations Took Place during Early Stages of COVID-19 Pandemic. The defendant was seated in the driver's seat of a vehicle parked at a gas station in Bridgeport when the victim, Eugene Rogers, approached the vehicle. An exchange of gunfire broke out between the victim and an occupant of the vehicle, resulting in the victim's death. The defendant was subsequently arrested after police identified him from the gas station's surveillance video footage. While in custody, the defendant's phone calls to his sister were recorded. In the recordings, the sister stated that she and two male acquaintances were watching the video footage of the shooting. While watching the footage, the sister said to the defendant, "That's you in the car." The defendant did not respond. As the sister and one of the men watched the footage and described it to the defendant, the defendant repeatedly said "yeah" and "right" in response. When one of the men observed that the victim tried to get away from the defendant's car when "he saw you had it," the defendant did not deny that characterization or otherwise respond. At trial, the defendant filed a motion in limine to exclude the recordings, which the court denied on the ground that the defendant's failure to deny his involvement in the shooting during the phone conversations could constitute an adoptive admission of his criminal conduct. During its case-in-chief, the state elicited testimony from the defendant's sister identifying the defendant as one of the people depicted in the surveillance video. In closing argument, the state, commenting on the defendant's self-defense theory, suggested that either the defendant had been the initial aggressor or the altercation was the product of combat by agreement. The state also attempted to refute the defendant's claim that someone else in his car had committed the shooting by questioning why the defendant did not mentioned this to his sister. Following closing arguments, the court instructed the jury regarding adoptive admissions and combat by agreement. In March, 2020, the jury found the defendant guilty of first-degree intentional manslaughter with a firearm and two firearm-related offenses. In July, 2020, the defendant

filed a motion for a new trial on the ground that the COVID-19 pandemic impacted the jury's deliberations. The court denied the motion as untimely and sentenced the defendant to a total effective term of imprisonment of forty years. The defendant this appeal, which is before the Supreme Court pursuant to General Statutes § 51-199 (b) (3). The defendant claims that the trial court violated his constitutional rights, as recognized in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), in admitting the recordings of his phone conversations and subsequently instructing the jury regarding adoptive admissions; improperly instructed the jury regarding combat by agreement where, according to the defendant, the evidence did not support such an instruction; and erroneously denied his motion for a new trial. The defendant also claims that the state committed improprieties in eliciting identification testimony from the defendant's sister that embraced an ultimate issue of fact, in violation of *State* v. *Finan*, 275 Conn. 60 (2005), and making statements during closing argument that relied on facts not in evidence.

STATE OF CONNECTICUT *v.* METESE HINDS, SC 20555
Judicial District of New London

Criminal; Prosecutorial Impropriety; Whether Defendant Was Deprived of Fair Trial by Prosecutor's Closing Argument that (1) Jury Should Infer that Trial Testimony of State's Witness Was Consistent with His Prior Statements to Police and (2) Jury Need Only Determine Whether Prosecution's Version of Events Was More Credible Than Defendant's Version. The defendant was charged with murder and carrying a dangerous weapon in connection with the stabbing death of a man in a New London apartment building. At the time, the defendant had been staying in the second-floor apartment occupied by James Cody Lewis. On the day of the stabbing, the victim, Raheeim General, was consuming alcohol with friends in the third-floor apartment. At some point, the defendant entered the third-floor apartment, and an argument ensued. The police were subsequently called to the building for a reported stabbing. When the police arrived, they found the victim on the second-floor fire escape landing suffering from fatal injuries to his torso. As police were tending to the victim, the defendant emerged from the adjacent second-floor apartment and attempted to kick the victim as he ran by, precipitating the defendant's arrest. The police found Lewis in the second-floor apartment that the defendant had exited. Lewis was cooperative and gave a statement to police. At the defendant's jury trial, Lewis testified that, after the defendant returned to the second-floor apartment on

the evening of the stabbing, he heard the defendant rummaging in the kitchen and then observed the defendant engage in a physical altercation with the victim on the fire escape landing outside the apartment. Lewis further testified that, when the defendant reentered the apartment, he saw that the defendant was holding one of Lewis' kitchen knives. In his closing argument, the prosecutor pointed out that defense counsel had not attempted to establish on cross-examination that Lewis' prior statement to police was inconsistent with his trial testimony. The prosecutor argued that the jurors could therefore "conclude from [their] common sense that [Lewis'] testimony during the trial [was], essentially, the same as the information he [had] provided to the police shortly after the incident." The prosecutor also argued that the state had presented a version of events that was simple and commonsensical whereas the defendant's version was a "sort of unreal complex story." The prosecutor then suggested that the jury could decide which version to believe by applying the principle known as Occam's razor—that the simplest of competing theories should be preferred over more complex ones. The defendant did not object to the state's closing argument, and he was subsequently convicted as charged. The defendant appeals from the judgment of conviction directly to the Supreme Court under General Statutes § 51-199 (b) (3), claiming that he was deprived of a fair trial as a result of the prosecutor's allegedly improper statements during closing argument. The defendant argues that the prosecutor's invitation to the jury to infer that Lewis' prior statements were consistent with his trial testimony was improper because (1) it amounted to impermissible vouching of Lewis' credibility and (2) such statements were never offered into evidence, and, if they had been, they would have been inadmissible hearsay. The defendant also argues that the prosecutor's suggestion that the jury need only determine which version of events was more credible constituted an impermissible dilution of the state's burden of proof.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

State of Connecticut
Department of Public Health

Notice of Declaratory Ruling Proceeding

The Department of Public Health (''DPH'') hereby gives notice of its intention to issue a declaratory ruling on a request for declaratory ruling filed by the Town of Suffield (''petitioner'') pursuant to Conn. Gen. Stat. § 4-176, regarding the chlorine levels for the public water system in Suffield, Connecticut. maintained by Aquarion Water Company.

The Department of Public Health will issue a ruling as to the following:

1 Is Aquarion Water Company appropriately chlorinating public drinking water in Suffield, Connecticut pursuant to Regulations of Connecticut State Agencies § 19-13-B102?

2 What are the appropriate levels of chlorine in drinking water for public water systems pursuant to Regulations of Connecticut State Agencies § 19-13-B102?

3 How does the Department of Public health monitor residual chlorine levels in public water systems pursuant to Regulations of Connecticut State Agencies§ 19-13-B102?

4 What public process needs to take place before the decision by a utility company to add chlorine to drinking water is instituted pursuant to Regulations of Connecticut State Agencies § 19-13-B102?

The Department of Public Health has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Connecticut General Statute 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

All persons seeking status to participate must petition the DPH by February 8, 2022. All requests seeking status to participate in this matter shall be submitted in writing in accordance with § 4-176(d) of the Connecticut General Statutes and § 19a-9-26 through § 19a-9-28 of the Regulations of Connecticut State Agencies. All filings to be submitted to the DPH shall be sent by email to the DPH, Public Health Hearing Office at phho.dph@ct.gov. It is anticipated that the Hearing Officer will rule on petitions for status by February 15, 2022. A date for hearing will thereafter be scheduled by the Hearing Officer.

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing and may also be utilized by the Department of Public Health, on a case by case basis, in future proceedings before it.

Stacy M. Schulman
Hearing Officer
January 7, 2022

DEPARTMENT OF SOCIAL SERVICES
DEPARTMENT OF DEVELOPMENTAL SERVICES

Notice of Intent to Submit Emergency Preparedness and Response Amendment (Appendix K) to the Comprehensive Supports Medicaid Waiver, Individual and Family Support Medicaid Waiver, and Employment and Day Supports Medicaid Waiver

In accordance with the provisions of section 17b-8 of the Connecticut General Statutes, notice is hereby given that the Commissioner of the Department of Social Services (''DSS'' or the ''Department'') intends to submit an Emergency Preparedness and Response Amendment (''Appendix K amendment'') to the Centers for Medicare and Medicaid Services (''CMS'') related to the following 1915(c) home and community-based services waivers operated by the Department of Developmental Services (DDS):

- Comprehensive Supports Medicaid waiver
- Individual and Family Support Medicaid waiver
- Employment and Day Supports Medicaid waiver

Appendix K amendments are temporary and expire six months following the expiration of the federal public health emergency related to the continued consequences of the Coronavirus Disease (COVID-19) pandemic. The following is a summary of the proposed changes, as more fully described in the Appendix K amendments:

- As permitted by Section 2 of CMS State Medicaid Director (SMD) Letter #21-003, DDS is proposing to permit an additional three 30-day periods of provider retainer payments, retroactive to January 2021, for all habilitation programs (both residential and day supports) that include personal care to ensure continuous operations and sustainability of waiver services. Each episode of retainer payments may not exceed 30 consecutive days. DDS is choosing to utilize multiple 30-day retainer payment periods with a limit of three. These three 30-day periods are in addition to the initial three 30-day retainer payment periods contained in the Appendix K amendments to these waivers approved by CMS on November 5, 2020 (CMS Amendment Control Numbers CT.0426.R03.05, CT.0437.R03.04 and CT.0881.R01.05).

- Stabilization payments to certain qualified provider types covered under the waivers listed in this Appendix K. Rate methodology would be increased proportionally by stabilization funds during the approved rate setting process. The intent of the payments is to assist qualified providers impacted by the pandemic, as well as to assist with recruitment and retention of provider staff.

- Incentive-based outcome payments to any qualified residential provider covered under the waivers listed in this Appendix K that transitions a waiver participant from a congregate residential setting toward a more integrated community-based setting.

- Temporary rate increases for specific employment and residential waiver service authorizations covered under the waivers listed in this Appendix K that move a waiver participant toward a more independent residential setting or toward competitively-based employment.

- Temporary rate increases for qualified residential and day provider types covered under the waivers listed in this Appendix K to allow such providers to modernize technology-based infrastructure, including billing processes and systems.
- Temporary increase in the service amount cap for the Assistive Technology service covered under the waivers in this Appendix K from $15,000 to $30,000.

A copy of the complete text of the Appendix K amendments are available, at no cost, upon request from: Krista Ostaszewski, Health Management Administrator, DDS Central Office, 460 Capitol Avenue, Hartford, CT, 06106, or via email at Krista.Ostaszewski@ct.gov. It is also available on the DSS website, www.ct.gov/dss, under ''News and Press,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications. In addition, it is available on the DDS website, https://portal.ct.gov/dds, under ''Latest News.''

All written comments regarding these applications must be submitted by February 17, 2022 to: Krista Ostaszewski, Health Management Administrator, DDS Central Office, 460 Capitol Avenue Hartford, Connecticut, 06106, or via email at Krista.Ostaszewski@ct.gov.

NOTICES

Notice of Certification as Authorized House Counsel

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

Certified as of November 30, 2021:

Justin F. Heinrich	Exela Technologies, Inc.

Certified as of December 15, 2021:

Boris Rappoport	Strategic Value Partners, LLC

Certified as of December 16, 2021:

Andrew Ceppos	Connecticut Housing Finance Authority

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Reprimand of Attorneys

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

Reviewing Committee Reprimands

October 15, 2021: Thomas J. Love, Jr. - 302956

November 5, 2021: Frank J. Romeo III - 413324

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