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of the generation site, or an unconditional right, granted by the property owner, to acquire such control . . . .'' Section 2.4.1 further specifies what is required for ''Proof of Site Control,'' stating in relevant part: ''The Bidder must demonstrate that it has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control. . . . In order to be considered to have site control for generation, the Bidder must provide copies of executed documents between the Bidder and [the] property owner showing one of the following: (a) that the Bidder owns the site or has a lease or easement with respect to the site on which the [facility] will be located . . . or (b) that the Bidder has an unconditional option agreement to purchase or lease the site . . . .''

The plaintiff and the company each submitted bids in response to the request. The company proposed a 2.8 megawatt fuel cell facility on land owned by the city of Derby (city) and located at 49 Coon Hollow Road (property). Its bid included the affidavit of Richard Dziekan, the mayor of the city, in which he attested that the company had ''control of the generation site, or an unconditional right . . . to acquire such control.''[1] That bid also included a copy of an option to lease agreement between the city and FuelCell regarding the property (option agreement), as well as an assignment of that option from FuelCell to the company (assignment).[2] The company's bid ultimately was selected for a project in United Illuminating territory.

The plaintiff thereafter commenced the present action against the defendants. The operative complaint is dated December 21, 2020, and contains three counts.[3] In count one, the plaintiff sought a declaratory ruling that the option agreement ''does not provide the defendants

[1] A copy of the company's bid was submitted as an exhibit to Wolak's affidavit in support of the defendants' motion to dismiss.

[2] The company is a subsidiary of FuelCell.

[3] This action was commenced by service of process on November 2, 2020.

with any legally enforceable rights" due to the city's alleged failure to comply with the requirements of the city charter and General Statutes § 7-163e. In count two, the plaintiff alleged that the defendants had submitted "a false bid certification" in violation of CUTPA as a result of the city's alleged failure to comply with the requirements of the city charter and § 7-163e "prior to executing" the option agreement. In count three, the plaintiff alleged that the submission of a false bid certification by the defendants constituted tortious interference with prospective contractual relations.

On December 10, 2020, the defendants filed a motion to dismiss the action, alleging, inter alia, that the plaintiff lacked standing. That motion was accompanied by Wolak's affidavit and copies of the request, the company's bid, the option agreement, and the assignment. On December 21, 2020, the plaintiff filed an objection to the motion to dismiss, but did not submit counteraffidavits or any other evidence.

On February 18, 2021, the court ordered "all briefing, documentation and affidavits" related to the motion to dismiss to be filed by March 19, 2021. In accordance with that order, both parties filed supplemental briefs on March 19, 2021. At that time, the plaintiff offered the affidavit of its attorney, Thomas Melone, who averred that the plaintiff had provided notice of the action to the city. The defendants also submitted additional documentation.[4] In its "further objection" to the motion to

[4] The defendants appended six documents to their March 19, 2021 filing. Exhibit A is a copy of the January 22, 2021 notice from PURA informing the parties that it had denied the plaintiff's challenges to the bid submitted by the company because they "do not rise to the level of a programmatic deficiency . . . ." Exhibits B and C are notices from PURA regarding its "Review of Statewide Shared Clean Energy Facility Program Requirements," while Exhibit D is the "Shared Clean Energy Facility ('SCEF') Tariff Terms Agreement Subscriber Organization" dated January 22, 2021. Exhibit E is a twenty-two page document titled "The United Illuminating Company Shared Clean Energy Facility Rider Subscriber Organization Terms and Conditions," and Exhibit F is a research report from the Office of Legislative Research dated October 1, 2018, on energy procurements.

dismiss, the plaintiff stated in relevant part: "The foundation of the plaintiff's challenge rests on the nonbinding option [agreement] executed between [the defendants] and the [city]. . . . The [city] failed to engage in any competitive process for its disposition of a real property interest, violating its city charter and [§] 7-163e."

By memorandum of decision dated April 30, 2021, the court granted the motion to dismiss. The court first concluded that the plaintiff's request for a declaratory ruling was not ripe for adjudication, as "PURA [had] not yet approved the [company's] bid . . . ." For the same reason, the court concluded that the plaintiff's tortious interference with prospective contractual relations claim was "premature" and "unripe." The court then concluded that the plaintiff lacked standing to bring its CUTPA claim against the defendants, as its alleged injuries "are remote and indirect." Accordingly, the court rendered a judgment of dismissal, and this appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that it lacked standing to maintain the CUTPA action alleged in count two of its complaint.[5] We do not agree.

"The issue of standing implicates a court's subject matter jurisdiction and is subject to plenary review." *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 137, 161 A.3d 1227 (2017). "To establish standing to raise an issue for adjudication, a complainant must make a colorable claim of direct injury." *Connecticut Associ-*

[5] In this appeal, the plaintiff does not contest the propriety of the court's determination that the request for a declaratory ruling and the tortious interference with prospective contractual relations claim set forth in counts one and three were not ripe for adjudication.

ated Builders & Contractors v. *Hartford*, 251 Conn. 169, 178, 740 A.2d 813 (1999). "The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [When], for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Citations omitted.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347–48, 780 A.2d 98 (2001). As our Supreme Court has explained, "notwithstanding the broad language and remedial purpose of CUTPA, we have applied traditional common-law principles of remoteness . . . to determine whether a party has standing to bring an action under CUTPA." (Footnote omitted.) *Vacco* v. *Microsoft Corp.*, 260 Conn. 59, 88, 793 A.2d 1048 (2002).

Connecticut courts "employ a three part policy analysis . . . [in applying] the general principle that plaintiffs with indirect injuries lack standing to sue. . . . First, the more indirect an injury is, the more difficult it becomes to determine the amount of [the] plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary [when] there are directly injured parties

who can remedy the harm without these attendant problems." (Internal quotation marks omitted.) *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 469–70, 28 A.3d 958 (2011).

It is undisputed that the company, as part of its bid, submitted both the affidavit of Mayor Dziekan, in which he attested that the company had "control of the generation site, or an unconditional right . . . to acquire such control," and a copy of the option agreement between the city and FuelCell, which option was assigned to the company. Those materials demonstrate that the company's bid comported with the requirement, set forth in §§ 2.4.1 and 4.4 of the request, that a bidder submit proof "that it has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control."

The plaintiff's quarrel is not with the adequacy of the company's bid, but rather its legitimacy. In its complaint, the plaintiff alleged that the city's failure to comply with the "bid process" requirements of § 22 of the city charter and § 7-163e rendered the option agreement "unlawful," "without legal effect," and "void and illusory." The plaintiff further alleged that, as a result of the city's failure to comply with those requirements, "the [option agreement] does not provide the defendants with the unconditional right required by the [request] requirements." For that reason, the plaintiff alleged that the defendants had submitted "a false bid certification" in violation of CUTPA, which allegedly caused the plaintiff to suffer "an ascertainable loss of money because [it] will lose the revenue from the [shared clean energy facility program] that it would have received but for [the] defendants' submission of a false bid certification."

In its memorandum of decision, the trial court noted that, if the option agreement was unlawful and without legal effect as the plaintiff alleged, and the defendants did not have control of the site, the defendants "will be unable to fulfil their obligations under the contract. Presumably, the project would then be the subject of another [request for production], in which the plaintiff most strenuously asserts it will prevail. The direct recipient of any injury resulting from false certification would be [United Illuminating], the beneficiary of the project. [United Illuminating] would presumably have at least one cause of action against the defendants. Additionally, the real party with purported unclean hands is [the city], which is claimed to have ignored its own city charter in order to furnish the option to lease to the defendants. The plaintiff has not brought an action against [the city], nor does it appear that the plaintiff has standing to maintain such an action. The plaintiff's claims are remote and indirect. If there is a potential victim of the defendants' alleged duplicity, it is [United Illuminating], not the plaintiff. The plaintiff lacks standing to bring the CUTPA claim."

We concur with that reasoning. If the defendants knowingly submitted a false bid, as the plaintiff alleges, the utility company that was a party to the contract for the shared clean energy facility would be a directly injured party and would be best suited to seek a remedy for the harm. Moreover, although the plaintiff claims that it was "100 percent certai[n]" to receive the shared clean energy facility contract in question if the defendants lacked the necessary site control, that contention is undermined by the plain language of the request. On its first page, the request states: "EVERSOURCE AND [THE UNITED ILLUMINATING COMPANY] RESERVE

CONNECTICUT REPORTS

Vol. 345

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* RONY ELIZER ORTEGA
(SC 20235)

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

Syllabus

Pursuant to the tender years hearsay exception (§ 54-86*l* (a) and Conn. Code Evid. § 8-10), "a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child . . . shall be admissible in a criminal . . . proceeding . . . if [inter alia] (1) [t]he court finds, in a hearing conducted outside the presence of the jury . . . that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness . . . ."

Convicted of numerous crimes, including sexual assault in the first degree and risk of injury to a child, in connection with the sexual abuse of the victim, N, the defendant appealed. N was three years old at the time of the abuse and is the daughter of the defendant's cousin, J. The abuse occurred when N was alone with the defendant at his house, and N made four disclosures concerning the abuse shortly after it occurred. N made the first disclosure to J's mother, B, after B picked N up from the defendant's house on the day of the incident. B asked if N would like to return to the defendant's house to see his cat again, and N replied that she did not because the defendant had pulled down her pants. The second disclosure occurred shortly after N and B returned home, during which N told J that the defendant had seen her "behind." In response, J asked N if the defendant had also touched her behind, and N pointed to her "front private area." J spoke to B and then went to change N's clothes, when N made the third disclosure. J asked N if the defendant had pulled down her shorts. N initially said "no" but then said "yes." When J asked if the defendant had pulled down her underpants, N initially said nothing but then said that he had. N then demonstrated how the defendant had touched her by inserting her finger inside "where you pee . . . ." N made the fourth disclosure to J the next morning, while J was bathing N. J made an audio recording of their conversation, which was in Spanish. J asked N what had happened at the defendant's house, and N made substantially the same allegations she did the night before. N stated that the defendant had touched her "pola," which J testified is a Spanish term that they used to denote the vaginal area, and again demonstrated the defendant's actions by touching herself. On the first day of trial, the court held a hearing, outside the presence of the jury, on the state's notice of intent to present tender years evidence.

After hearing testimony from J, the court found that the statements N made to J during N's bath were admissible under the tender years exception because, inter alia, they were made under circumstances that provided particularized guarantees of trustworthiness. The court, however, declined to admit the audio recording of that conversation due to concerns regarding the accuracy of the corresponding transcript, which had been prepared by a translator and interpreter contracted by the state. The transcript included the Spanish transcription of the conversation and a line-by-line English translation, but, in places where the translator was unable to understand what was said, the transcript was marked "inaudible." On the second day of trial, the state proffered a modified transcription of the audio recording, in which J had filled in the sections marked "inaudible" with what she believed had been said. Defense counsel objected, arguing that the defense had no advance notice of the modified transcript and that, because J was not a disinterested witness, the modified transcript was unreliable. Defense counsel also stated that, if the court ruled that the modified transcript was admissible, he would need an opportunity to have Spanish translators review it and to do his own investigation. The trial court, however, admitted the modified transcript. It noted that the defense had had ample opportunity to obtain its own translator to prepare an alternate transcription but stated that counsel would have the ability to ask for additional time to have an interpreter review J's minor modifications to the original transcription. Defense counsel, however, never specified to the court the amount of time he sought and, instead, elected to proceed. On the defendant's appeal from the judgment of conviction, *held*:

1. The trial court correctly determined that the statements N made to J during the bath were made under circumstances that provided particularized guarantees of trustworthiness, and, accordingly, that court did not abuse its discretion in admitting those statements under the tender years exception to the hearsay rule:

Whether N's statements were made with particularized guarantees of trustworthiness is an issue that was properly analyzed under the totality of the circumstances, and factors that may be considered in determining whether hearsay statements made by a child witness in a child sexual abuse case are reliable include consistent repetition by the declarant, the degree of spontaneity inherent in the making of the statements, the declarant's mental state, use of terminology not within the average ken of a child of similar age, and the existence of a motive to fabricate or lack thereof.

The challenged statements by N were largely consistent with her prior disclosures, in which she told B that she did not want to return to the defendant's house because he had pulled down her pants and in which, after telling J that the defendant had seen her behind, N pointed to her

private area in response to J's question regarding whether the defendant had touched her, and the only inconsistencies, namely, N's initial denial that the defendant had pulled down her shorts and her initial silence when J asked if he had pulled down her underpants, did not render the trial court's conclusion that N's statements were trustworthy an abuse of discretion, particularly when the statements at issue viewed in the context of all four of N's disclosures and in light of the fact that N provided consistent answers within moments of her inconsistent statements and demonstrated her willingness and ability to contradict J when N's own version of events did not coincide with an assertion contained in J's questioning.

Although none of N's statements during her bath was purely spontaneous, insofar as each statement followed a question or statement by J, N's statements were consistent with her initial disclosure to B, which was a completely spontaneous response to a neutral question, and N's initial, core allegation during the bath, namely, that the defendant had touched her vaginal area, was spontaneous in nature, as it was completely nonresponsive to J's neutral, preceding question regarding whether N wanted to go see the defendant's cat.

There was no merit to the defendant's claim that the statements N made to J during the bath were unreliable insofar as J asked questions so rapidly that she effectively cross-examined N in order to produce a coerced confession because, in the context of child sexual abuse cases, the use of leading questions with a child does not necessarily render that child's responses untrustworthy.

The evidence regarding N's mental state at the time she made the bath time statements was ambiguous, as the transcript and audio recording of the bath time conversation revealed that N played and made sounds typical of a child her age while she was being bathed, whereas J testified that N looked sad when N first indicated that the defendant had pulled down her pants and touched her, but N's repeated statements that she did not want to return to the defendant's house provided some evidence that N's attitude toward the defendant had changed in a manner consistent with the content of N's statements to J, and, although there was some evidence that N engaged in sexualized behavior during the bath and the night before when J changed N's clothes, no conclusions could be drawn as to what that behavior revealed about N's mental state in the absence of any expert testimony on that point.

The terminology that N used to describe the defendant's behavior was appropriate for her age, as J testified that the she and N used the word "pola" to denote N's vaginal area, and N's physical demonstrations to J, both during the bath and the night before, provided the greatest amount of detail regarding the defendant's actions and were much more specific than her verbal descriptions, consistent with the fact that a child of N's

age would be expected to lack the vocabulary necessary to describe the charged sexual acts.

The trial court found that N had no motive to fabricate the allegations against the defendant, with whom N had little familiarity and had never been alone, and the record revealed no such motive.

2. This court declined to review the defendant's claim that the trial court had abused its discretion in admitting the modified transcription, prepared by J, of the conversation between N and J during N's bath on the ground that the modified transcription constituted improper lay opinion testimony, that claim having been unpreserved:

Defense counsel did not raise the issue of J's status as a lay witness or object on the basis that the state had failed to proffer J as an expert in the area of creating translated transcriptions, and the objections that defense counsel did raise before the trial court concerning J's bias and the state's failure to provide sufficient notice of its intent to proffer the modified transcript were insufficient to alert either opposing counsel or the trial court of the claim that the defendant raised in this appeal.

3. The defendant could not prevail on his claim that the trial court had abused its discretion in denying defense counsel's request for a continuance, as the record did not support that claim:

In its ruling admitting the modified transcript, the trial court made it clear that, although it would not grant a continuance for the purpose of allowing the defense to produce an alternative transcript, it would consider granting a continuance for the purpose of allowing the defense time to consult with an interpreter regarding J's modifications to the original transcript, but defense counsel, rather than assenting to the court's offer of a continuance and specifying the amount of time he sought, elected to proceed, and, in the absence of any indication as to the length of time defense counsel sought for the continuance, the trial court lacked a proper factual predicate for exercising its discretion to grant the continuance.

Argued April 25—officially released November 8, 2022

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and risk of injury to a child, and one count of the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Danbury and tried to the jury before *Pavia*, *J.*; verdict

and judgment of guilty of one count each of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and sexual assault in the fourth degree, and two counts of risk of injury to a child, from which the defendant appealed. *Affirmed.*

Peter G. Billings, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky*, state's attorney, and *Deborah Mabbett*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. The principal issue in this appeal presents a matter of first impression under the tender years exception to the hearsay rule, namely, delineating the proper bases for the trial court's finding, following a hearing, "that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness . . . ." General Statutes § 54-86*l* (a) (1); accord Conn. Code Evid. § 8-10. The defendant, Rony Elizer Ortega, appeals[1] from the judgment of conviction, rendered after a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), attempt to commit sexual assault in the first degree in violation of § 53a-70 (a) (2) and General Statutes § 53a-49 (a) (1), sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (2). On appeal, the defendant claims that the trial court abused its discretion by, inter alia, (1) admitting into evidence certain

[1] The defendant appealed from the judgment of conviction to the Appellate Court. Because this court has direct jurisdiction over this appeal pursuant to General Statutes § 51-199 (b) (3), this court transferred the appeal to itself pursuant to Practice Book § 65-4.

out-of-court statements of the victim, N,[2] under the tender years exception to the hearsay rule, (2) admitting a transcript, which had been modified by N's mother, Joselin, of a recorded conversation between N and Joselin, and (3) denying the defendant's request for a continuance during trial. We conclude that the trial court did not abuse its discretion in admitting the out-of-court statements of N under the tender years exception. We further conclude that the defendant failed to preserve his claim that the court abused its discretion in admitting the modified transcript and that the record does not support the defendant's claim that the court denied his request for a continuance. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On the afternoon of June 13, 2015, Joselin and her mother, Belia, were at the mall with Joselin's three year old daughter, N. Rigoberto, N's father and Joselin's husband, watched their one month old baby at home. While Joselin and the others were still at the mall, the defendant, who is Joselin's first cousin and was thirty-three years old at that time, arrived unexpectedly at the home. The defendant asked Rigoberto where N was and said that he would like to take N to see the fire trucks at the fire station, where the defendant's then wife, Jennifer, worked with the junior firefighters program. Rigoberto, who deferred such decisions to Joselin, did not give the defendant permission to take N. Instead, he called Joselin to tell her about the defendant's request. The defendant and Joselin were not close, and N had never been alone with him, so Joselin did not want the defendant taking N on an outing without other adults present.

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

The defendant was still there when Joselin arrived home with her mother and N, sometime between 3:30 and 4 p.m. Because Joselin needed to breastfeed the baby and use the breast pump afterward, she went upstairs after spending only a couple of minutes with the defendant. Rigoberto, who had been waiting until Joselin returned home to finish working on the brakes of his car, went to the garage. Belia was in the kitchen. N was playing outside. The defendant went outside, placed N in his truck, and drove away. The defendant did not tell anyone that he was leaving or that he was taking N with him. Rigoberto, who was under his car working on its brakes, realized that the defendant was leaving only when he saw the defendant's truck drive away. Rigoberto did not know that N was in the truck with the defendant.

While Joselin was still using the breast pump, Belia came upstairs and knocked on the door. Belia told Joselin that the defendant had left and taken N with him. Neither Joselin nor Rigoberto had given the defendant permission to take N with him, and Belia also had not given him permission.[3]

[3] The defendant was tried twice for the charges at issue in this case, with his first trial ending in a mistrial and the second trial resulting in the judgment of conviction from which the defendant now appeals. At the defendant's first trial, Belia, who was both N's grandmother and the defendant's aunt, repeatedly stated that she was testifying against her will. She nonetheless testified during the first trial that she did not give the defendant permission to take N. During the second trial, Belia testified, however, that she gave the defendant permission to take N. At the state's request, the trial court concluded that Belia's testimony in the first trial was a prior inconsistent statement admissible for its substance pursuant to this court's decision in *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), which is codified at § 8-5 (1) of the Connecticut Code of Evidence. Accordingly, consistent with the judgment of conviction, the jury reasonably could have credited Belia's prior testimony that she did not give the defendant permission to take N with him.

The trial court also ruled that two additional statements from Belia's testimony in the defendant's first trial constituted prior inconsistent statements admissible for their substance pursuant to *Whelan*, namely, that (1) when she picked up N from the defendant's house, she noticed that N's

The defendant took N to the fire station, where they briefly saw Jennifer, who was assisting in the preparations for a parade that evening in Beacon Falls. When Jennifer saw N with the defendant, she was surprised because she had never before seen the defendant alone with N. She asked N if she wanted to sit inside the fire truck. She placed N in the driver's seat of the truck, and the defendant took a photograph of N. Jennifer then returned to her duties and did not see the defendant and N leave. She previously informed the defendant that she would be attending the parade and would be gone all day. Consistent with her stated plans, Jennifer went to the parade from the fire station and did not stop at home on her way there. She returned home from Beacon Falls sometime between 9 and 9:30 p.m.

When Joselin discovered that the defendant had taken N with him, she was concerned, so she texted him from Rigoberto's cell phone because she did not have the defendant's phone number. In the text message, she asked the defendant if he was only bringing N to the fire station or if he also was bringing her to his house. Sometime after 4:13 p.m., the defendant responded by texting the photograph of N sitting in the firetruck. Joselin called the defendant on her cell phone and asked him where he was; he replied that he had just arrived at his house. Joselin asked when the defendant was bringing N home. He replied "in a little bit . . . ." Joselin told the defendant that she would pick up N. When Joselin finished the call, however, her baby had woken up, so she asked Belia to retrieve N from the defendant's house.

shorts were rolled down, and (2) N had told Belia that she did not want to go back to the defendant's house because he had pulled down her pants. The jury, therefore, reasonably could have credited that testimony.

Consistent with both the trial court's ruling and the judgment of conviction, our summary of the facts incorporates all three *Whelan* statements, as testified to by Belia in the defendant's first trial.

Sometime around 4:30 p.m., while the defendant and N were alone in the defendant's house, he digitally penetrated N's labia majora and attempted to perform cunnilingus on her.

N made one disclosure to Belia and three disclosures to Joselin regarding what occurred at the defendant's house. The first disclosure was to Belia. When Belia picked up N from the defendant's house, she noticed that N's shorts were rolled down slightly. See footnote 3 of this opinion. While Belia was driving N home, she asked N if she would like to go back to the defendant's house to see his cat again. N said that she did not wish to go back because the defendant had pulled down her pants. See id. Belia arrived at home with N shortly after 5 p.m.

N made her second disclosure, to Joselin, soon after she returned home. Joselin asked N if she went to the fire station. N said that she had and that she had seen fire trucks and a black and white dog. When Joselin asked N if she had seen the defendant's cat, N said "yes," and then added that the defendant had seen "[her] behind." Joselin asked N if the defendant only saw her behind or if he also touched it. In response, N "pointed [to] her front private area." Concerned, Joselin asked Belia if anything had happened when she picked up N from the defendant's house.

Shortly thereafter, N made the third disclosure, to Joselin. After speaking to Belia, Joselin took N upstairs to change her clothes. On the basis of her conversation with Belia, Joselin asked N if the defendant had pulled down her shorts. N said "no," but, when Joselin pulled down N's shorts, N said, "with a very sad expression on her face," "yes, mommy, he did, like that . . . ." Joselin then asked if the defendant had pulled down N's underpants. N said nothing, but, when Joselin pulled down her underpants, N said, "yes, he did." Joselin then

placed her hand over N's private area and asked if the defendant had touched her "like this . . . ." N said, "no, not like that . . . ." N then inserted her finger inside "where you pee" and touched herself. As she touched herself, N said "chupar," which, Joselin testified, means "suck" in Spanish. Joselin placed N's shorts, underpants, socks and shirt inside the hamper in N's room, without turning them inside out. She then told Rigoberto what N had told her, and they drove to the defendant's house to confront him regarding N's statements.

At the defendant's house, Rigoberto waited in the car while Joselin went to the door. When the defendant came to the door, she asked him if he had taken N to use the bathroom while she was there. The defendant said he had not. When Joselin told him about N's statements, he denied touching N but told Joselin that she "ha[d] to listen to [her] child."

N made the fourth disclosure, which was also to Joselin, the next morning, on June 14, 2015. While giving N a bath, Joselin asked N again what had happened while N was at the defendant's house. Because she wanted Rigoberto to hear what N told her, she used her cell phone to make an audio recording of the conversation, which was in Spanish. During this conversation, N made substantially the same allegations regarding the defendant's conduct, stating that the defendant had touched her in her private area (bath time statements). Specifically, Joselin testified that N told her that the defendant touched her "pola."[4] At one point during the bath time statements conversation, Joselin asked N to show her how the defendant had touched N. N responded by licking her finger, then touching herself inside her

[4] "Pola" is a Spanish term that Joselin and N used to denote the vaginal area.

labia on the "little thing where you pee" with a rotating movement while saying, "like this, like this, like this."[5]

The following day, on June 15, 2015, Joselin called a hotline number to report the suspected abuse. That afternoon, investigators from the Department of Children and Families (department) arrived. That same day, the department notified the Danbury Police Department, which immediately began its own investigation of the allegations.

Joselin turned over her cell phone and N's shorts and underpants to the police for use during the investigation. The police sent samples, including cuttings and swabs taken from N's underpants and shorts, to the state forensic science laboratory (lab) to be analyzed. They also sent DNA samples taken from the defendant and N to the lab. One of the samples sent to the lab, a swabbing from the interior front panel of N's underpants, was identified as having two contributors: N and the defendant.[6] As to the defendant's identification as a contributor, testimony at trial established that the expected frequency of individuals who could be a contributor to the sample "was less than one in seven billion in the African American, Caucasian, and Hispanic male populations."

On June 30, 2015, Detective Thomas Collins of the Danbury Police Department contacted the defendant and asked if he would be willing to be interviewed at the police station. The defendant agreed and drove to the station that day, where Collins and another detective questioned him.[7] During the course of the interview,

[5] Although Joselin did not use the term "labia" during her testimony, she stated that N touched herself on "the inside of her private area," which she described as an area "inside the lips . . . [where] there's a little thing where you pee . . . ."

[6] A person is included as a contributor to a tested sample when all of his or her "DNA types" are detected in the sample.

[7] A redacted recording of the interview was introduced into evidence and published to the jury.

the defendant made several incriminating statements. One of the detectives asked the defendant if he knew what DNA was and, as an illustration, touched the desk in front of him and said, "if you touch right here . . . I can get your DNA off this . . . ." The defendant indicated that he understood the principle. The detective then asked the defendant if there was any reason why his DNA would be on N's underwear.[8] The defendant first responded, "if I touched her, yes," and then added, "what do mean, like . . . saliva . . . ?" The detectives questioned why the defendant would have thought to ask about saliva but obtained no explanation.

The detectives then asked the defendant if, at any point on the day in question, he had reached inside N's shorts—they informed him that his DNA would not transfer to N's underwear through the outside of N's shorts. As an explanation for the possible presence of his DNA on N's underpants, the defendant claimed that he had been playing with N, holding her by the waist, lifting her up over his shoulders and swinging her. Jennifer, he said, was home and saw him playing with N in this manner. He claimed, in fact, that Jennifer had been home until about five minutes before Belia arrived to pick up N. These latter statements are incriminating because they were contradicted by Jennifer's own testimony at trial.[9]

The defendant was arrested on March 22, 2016, and, on February 20, 2018, he was charged by a substitute long form information in seven counts, with two counts each of sexual assault in the first degree, attempt to

[8] It is undisputed that, at the time the detectives asked the defendant this question, they did not have any evidence that the defendant's DNA had been detected on N's underpants.

[9] At trial, Jennifer, who was at that time no longer married to the defendant, testified that, after she saw the defendant with N at the fire station, she went directly to the parade in Beacon Falls and did not return home until approximately 9:30 p.m. that night.

commit sexual assault in the first degree, and risk of injury to a child, and one count of sexual assault in the fourth degree. The defendant's first trial ended in a mistrial. See footnote 3 of this opinion.

In the defendant's second trial, which gave rise to this appeal, the state proceeded on the February 20, 2018 substitute long form information. Following trial, the defendant was found not guilty of one count of sexual assault in the first degree and one count of attempt to commit sexual assault in the first degree. The jury found him guilty of the five remaining counts. The trial court rendered judgment of conviction in accordance with the jury's verdict and imposed a total effective sentence of twenty years of imprisonment, execution suspended after twelve years, followed by twenty-five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the trial court abused its discretion in admitting N's bath time statements under the tender years exception, codified at both § 54-86*l* (a) and in § 8-10 of the Connecticut Code of Evidence.[10] Specifically, the defendant contends that the trial court incorrectly concluded that N's bath time statements to Joselin, which Joselin recorded on her cell phone, were made under circumstances that provided "particularized guarantees of . . . trustworthiness," as required by the tender years exception.[11]

[10] The defendant does not challenge in this appeal the trial court's admission into evidence of N's first three disclosures, made to Joselin and Belia on June 13, 2015, namely, her statement to Belia on the way home from the defendant's house, and her statements to Joselin when she first arrived home and while Joselin changed her clothes.

[11] In arguing that N's statements lacked particularized guarantees of trustworthiness, the defendant does not advance independent arguments regarding the statements, as testified to by Joselin, and the statements, as admitted through the audio recording. Indeed, we question whether it would be possible to draw such a distinction. The inquiry into whether the statements

General Statutes § 54-86*l* (a) (1); accord Conn. Code Evid. § 8-10. The defendant argues that the statements lack such particularized guarantees of trustworthiness because Joselin did not employ proper safeguards during her conversation with N but, instead, elicited responses from N through leading questions and physical prodding.[12] The defendant additionally contends that N's statements lacked the requisite spontaneity; she did not exhibit any sexualized behavior, and she was inconsistent in her account of what had occurred at the defendant's house. In response, the state contends that N's statements were spontaneous and consistent, and that her mental state supported a finding of trustworthiness, because her responses went well beyond Joselin's prompts; N consistently stated that the defendant pulled down her pants and touched her in the vaginal area, and N repeatedly stated that she did not want to return to the defendant's house. Additionally, the state contends that N's young age supports the trial court's finding that she had no motive to fabricate the allegations. We agree with the state and conclude that the trial court did not abuse its discretion in determining that N's bath time statements were made under circumstances that provided particularized guarantees of trustworthiness.[13]

were made under circumstances that provided particularized guarantees of trustworthiness centers on "whether the child declarant was particularly likely to be telling the truth when the statement was made." (Internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 639, 835 A.2d 895 (2003). The answer to that question does not vary depending on whether the statements are introduced through the testimony of a witness or through an audio recording.

[12] We note that the defendant did not seek to proffer an expert to testify regarding the use of leading questions to elicit statements from a child alleging sexual abuse.

[13] The defendant also claims that the trial court abused its discretion in ruling, in the alternative, that N's statements were admissible as a prior inconsistent statement for substantive purposes pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Because we conclude that the trial court acted within its discretion in admitting N's statements under the tender years exception to the hearsay rule, we need not reach the separate question

The tender years exception to the hearsay rule provides in relevant part: "Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or guardian or any other person exercising comparable authority over the child at the time of the offense, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, *that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness*, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) . . . (A) the child testifies and is subject to cross-examination at the proceeding . . . ."[14] (Emphasis added.) General Statutes § 54-86*l* (a); accord Conn. Code Evid. § 8-10.

The following additional facts and procedural history are relevant to our resolution of the defendant's challenge to the admission of the bath time statements pursuant to the tender years exception. During the first day of evidence, the court held a hearing outside the

whether the court properly admitted those statements on the ground that they satisfied the requirements of *Whelan*.

[14] The language of § 54-86*l* (a) and § 8-10 of the Connecticut Code of Evidence is identical. For ease of discussion, we use the phrase "tender years exception" to refer collectively to both the statutory and evidentiary code provisions.

presence of the jury on the state's notice of intent to present tender years evidence.[15] In its proffer, the state presented the testimony of Joselin, who began by recounting N's second and third disclosures, both made to Joselin, when N first arrived home from the defendant's house and then later while Joselin was changing N's clothes. The prosecutor then questioned Joselin regarding N's bath time statements. Joselin testified that she used her cell phone to record the conversation with N because Rigoberto had not heard N's disclosures the evening before, and, if N repeated her statements, Joselin wanted Rigoberto to hear them. Joselin drew the bath for N and then asked N if she wanted to go see the cat again, referring to the cat in the defendant's home. N replied that she did not because the defendant "sees her private area." When Joselin asked N what happened, N told her that the defendant had looked at and touched her "pola . . . ."[16] Joselin asked N how the defendant had touched her "pola." Joselin testified

[15] At the outset of the hearing, the state indicated that it would argue that N's bath time statements were also admissible pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Specifically, the state contended that N's statements to Joselin were inconsistent with N's testimony in court, namely, that N, who was six years old at the time of trial, could not recollect *any* of the relevant events, and that she had no idea who the defendant was when he was pointed out to her in the courtroom. Because her bath time statements were recorded, and N had authenticated the audio recording by identifying both her voice and Joselin's, the state argued that N's statements and the audio recording were admissible pursuant to *Whelan*. As we previously explained, we do not reach the issue whether the trial court correctly concluded that the statements and the audio recording were admissible pursuant to *Whelan*. See footnote 13 of this opinion.

[16] We note that the transcript produced by the translator and transcriptionist, Maria Jose Pastor, used the term "cola," translated as "tail," rather than "pola," which N and Joselin used to refer to N's vaginal area. The modified transcript produced by Joselin changed the transcript to reflect that N used the word "pola." Joselin also testified, based on her independent recollection, that the word that N used during their conversation was "pola." Accordingly, the jury reasonably could have credited Joselin's testimony and found that N told Joselin that the defendant touched her "pola," or vaginal area.

that, in response, N "brought her finger and—and licked it," and she "touched her private area in a rotation—like [a] rotating motion." When asked to specify in greater detail where N touched herself, Joselin clarified that N touched herself "*inside* her private area." (Emphasis added.) While she touched herself, N pursed her lips as though she were sucking on something.

Through defense counsel's cross-examination of Joselin during the state's proffer, Joselin admitted that she, rather than N, initiated all three of their conversations regarding what had happened at the defendant's house: when N first arrived home from the defendant's house, when Joselin changed N's clothes, and when N made the bath time statements. Defense counsel then asked Joselin if she had ever seen the transcript of the audio recording—in the original Spanish, along with an English, line-by-line translation—that had been prepared by Maria Jose Pastor, a translator and interpreter contracted by the prosecutor's office. Joselin said that she had seen the transcription. Defense counsel then asked Joselin to pinpoint which part of the transcript corresponded to N's physical demonstration of how the defendant had touched her. Joselin said that she could not.

Defense counsel also called Joselin's attention to the portions of the transcript that reflect that N said "ow" and asked Joselin whether she had pinched or poked her daughter during their conversation. Joselin responded that she had not. Defense counsel then read from the transcript and asked Joselin whether she had asked N multiple questions in a row without receiving a response from N.[17] Joselin pointed out that the tran-

[17] Specifically, defense counsel stated that the transcript reflected that Joselin asked N: "What happened, my love?" "[D]oes it hurt?" "Why did you say 'ow,' does your tail hurt?" "Why does it hurt?" And "[d]o you want to go see the cat?" Joselin denied that she had used the Spanish word for "tail" but agreed that she had asked N each of these questions.

script did not indicate that N had not responded but, rather, that her response was inaudible. Defense counsel asked Joselin whether, prior to the bath time conversation, she had conducted Internet searches regarding how to determine whether a child has been abused. Joselin responded that she had done so. Defense counsel then asked whether Joselin's purpose in recording the conversation was to create a record for reporting the incident. Joselin reiterated that her purpose in recording the conversation was to share it with her husband.

Defense counsel also highlighted inconsistencies in N's statements the night before, when Joselin was changing N's clothes. Specifically, he emphasized that N's initial response when Joselin asked whether the defendant had removed her underpants was "no." Defense counsel asked whether, when Joselin pulled off N's underpants, she asked N a second time if the defendant had removed them. Joselin said she had not. She testified that she asked N only once whether the defendant had removed her underpants. When Joselin pulled down N's underpants, N said, "he did, just like that, mommy."

The state argued that N's statements to Joselin met the requirements of the tender years exception to the hearsay rule and also sought to admit into evidence the audio recording of those statements. Defense counsel objected to the admission of all three of N's disclosures to Joselin, but particularly to the admission of her statements while Joselin changed N's clothing, to the bath time statements and to the audio recording of the bath time statements. Defense counsel contended that N's statements were not reliable. The sheer number of leading questions, he claimed, demonstrated that N's statements, rather than spontaneous, were akin to a "forced confession . . . ."

As to the audio recording, defense counsel argued that, because the recording was turned over to the authorities the next day, Joselin's motivation to record the conversation was unclear. Defense counsel emphasized both Joselin's inability to identify the portion of the transcript that corresponded with N's demonstration of how the defendant touched her and Joselin's testimony that some portions of the translation were inaccurate. Finally, defense counsel relied on the law of the case doctrine to argue that the ruling of the court in the defendant's first trial, precluding admission of the audio recording, controlled during the second trial.

The trial court found that N's statements were "of a trustworthy nature" for purposes of the tender years exception.[18] In support of that conclusion, the court made the following findings: The statements were made proximate in time to the occurrence of the incident. There was no evidence that N had been coached or forced to make the statements or that N had any reason to fabricate the story. As for the leading nature of some of Joselin's questions, the court acknowledged its importance but determined that that factor went to the weight rather than the admissibility of the statements and was a proper subject for defense counsel to explore on cross-examination. The court initially declined to admit the audio recording because it had some concerns regarding the accuracy of the transcription. The court

[18] The trial court also found that, at the time the statements were made, N was under twelve years of age. The court further found that, rather than statements made in preparation for trial, N's statements were the result of a mother's attempt to determine the specifics of the allegations her daughter was making. The court observed that Joselin had not spoken to the police, an attorney, or any other person with the idea of pursuing the arrest or prosecution of the defendant in connection with N's disclosures. The court found that N had testified, had been made available for, and, in fact, had been subject to cross-examination, and that the state had provided the required notice to the defendant of its intent to offer the statements under the tender years exception. The defendant does not challenge any of these findings on appeal.

specifically referenced Joselin's testimony that the transcription incorrectly recorded the word "pola" as "cola." See footnote 16 of this opinion. The court also relied on the fact that various portions of the audio recording were marked "inaudible" in the transcription. The court indicated, however, that it would entertain additional arguments on the issue of the admissibility of the audio recording.

The next day, during a second hearing held outside the presence of the jury, the trial court revisited its ruling declining to admit the audio recording. To address the court's concerns regarding the accuracy of the transcription, the state offered a version of the transcript that had been modified by Joselin to fill in some of the sections marked "inaudible" in the original transcript and to reflect that N had used the word "pola" rather than "cola." As to the audio recording, the state argued that the mere fact that some portions of Pastor's transcription indicated that segments of the audio recording were "inaudible" did not render the recording inaccurate. The state also contended that there was no "better way," than by listening to the actual recording of the statement, for the jurors to evaluate the credibility of N's statement and to consider whether to credit the various challenges raised by the defendant—including the claims that Joselin pinched or poked her in order to induce N's statements and that she had asked a rapid sequence of leading questions that effectively constituted a cross-examination. Defense counsel argued in response that the court should not admit the audio recording because (1) given N's inability to recall the events, counsel could not cross-examine N regarding the bath time statements, (2) under the law of the case doctrine, the court was bound by the ruling of the court in the defendant's first trial, (3) the statements were unreliable, and (4) the modified transcript was unrelia-

ble and had been disclosed too late in the proceedings, causing unfair prejudice to the defendant.

The court concluded that the audio recording was admissible under the tender years exception to the hearsay rule and, in the alternative, pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). See footnote 13 of this opinion. The court observed that the audio recording constituted the best evidence of N's statements and would assist the jury in evaluating defense counsel's arguments that the statements should not be credited. The audio recording, the court explained, would allow jurors to hear the inflections in the speakers' voices and to evaluate any pauses between Joselin's questions and N's answers. Jurors would be able to listen for themselves and to decide whether to credit the defense's theories that Joselin was pinching and/or poking N to produce the desired response and that she also was asking questions so quickly and repeatedly that she effectively was cross-examining N in order to produce "a coerced confession . . . ."

We emphasize that the sole issue that we are called on to resolve with respect to the admission of N's bath time statements under the tender years exception to the hearsay rule is whether the trial court correctly determined that the statements were made under circumstances that provided "particularized guarantees of . . . trustworthiness . . . ." General Statutes § 54-86*l* (a) (1); accord Conn. Code Evid. § 8-10; see footnote 18 of this opinion. We begin with the standard of review. "Unless an evidentiary ruling involves a clear misconception of the law, [t]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling

. . . .” (Footnote omitted; internal quotation marks omitted.) *State* v. *Aaron L.*, 272 Conn. 798, 811, 865 A.2d 1135 (2005).

This appeal presents our first opportunity to consider the nature of the “particularized guarantees of . . . trustworthiness” that will support the admission of a statement under Connecticut’s tender years exception.[19] General Statutes § 54-86*l* (a) (1); accord Conn. Code Evid. § 8-10. The following general principles guide our analysis. “An out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . As a general rule, such hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule.” (Citation omitted.) *State* v. *Merriam*, 264 Conn. 617, 633, 835 A.2d 895 (2003). “Beyond these general evidentiary principles, the state’s use of hearsay evidence against an accused in a criminal trial is limited by the confrontation clause of the sixth amendment.” Id.

“For purposes of the confrontation clause, [nontestimonial] hearsay statements are admissible if (1) the declarant is unavailable to testify, and (2) the statement bears adequate indicia of reliability. . . . A statement is presumptively reliable if it falls within a firmly rooted hearsay exception. . . . A hearsay exception is firmly rooted if it rest[s] [on] such solid foundations that admission of virtually any evidence within [it] comports with the substance of constitutional protection. . . . Evidence admitted under such an exception thus is

[19] This court previously has considered other aspects of the tender years exception. See *State* v. *Manuel T.*, 337 Conn. 429, 447–48, 254 A.3d 278 (2020) (discussing relationship between hearsay exception for statements made in furtherance of medical diagnosis or treatment and tender years exception); *State* v. *Maguire*, 310 Conn. 535, 572–76, 78 A.3d 828 (2013) (concluding that hearing is mandatory prior to admission of statements pursuant to tender years exception and that, in light of history of tender years exception, evidence admitted under that exception is admissible for substantive purposes, rather than limited to corroboration).

presumed to be so trustworthy that adversarial testing would add little to its reliability. *Idaho* v. *Wright*, [497 U.S. 805, 821, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)]. Evidence that does not fall within a firmly rooted hearsay exception, however, is inadmissible under the [c]onfrontation [c]lause absent a showing of particularized guarantees of trustworthiness."[20] (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Merriam*, supra, 264 Conn. 634–35.

The tender years exception, which is a relatively new provision under Connecticut law, was codified at § 54-86*l* (a) and as a rule of evidence at § 8-10 of the Connecticut Code of Evidence, in 2007 and 2008, respectively. See Public Acts 2007, No. 07-143, § 11; Conn. Code Evid. § 8-10. It is not a firmly rooted exception to the hearsay rule, and evidence is admissible under the tender years exception only if there is a showing of particularized guarantees of trustworthiness. See *State* v. *Merriam*, supra, 264 Conn. 634–35. Beyond the exception's relatively recent adoption in Connecticut, language in the tender years exception itself supports this conclusion. That is, the tender years exception expressly requires that the proffered statement must have been made

[20] In *State* v. *Aaron L.*, supra, 272 Conn. 813 n.21, we recognized the overruling of *Ohio* v. *Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), by *Crawford* v. *Washington*, supra, 541 U.S. 36. That overruling logically extends to *Idaho* v. *Wright*, supra, 497 U.S. 805, the reasoning of which was predicated on the *Roberts* reliability rule. In *Aaron L.*, however, we observed that the holding of *Crawford* was limited to testimonial statements. See *State* v. *Aaron L.*, supra, 813 n.21. Because the statement at issue in *Aaron L.* did "not fall within any of the classes of testimonial statements discussed by the [United States Supreme] [C]ourt in *Crawford*," we concluded that "application of the *Roberts* test remains appropriate." Id. Likewise, in the present case, because the trial court made a factual finding for purposes of the tender years exception, which is unchallenged on appeal, that N's statements were *not* made in preparation of trial; see General Statutes § 54-86*l* (a) (2); Conn. Code Evid. § 8-10; her statements were nontestimonial for purposes of *Crawford*, and application of *Roberts* and *Wright* to the admissibility of N's statements remains appropriate.

under circumstances that provide "particularized guarantees of its trustworthiness . . . ." General Statutes § 54-86*l* (a) (1); accord Conn. Code Evid. § 8-10. The employment of that phrase, the same one used in *Wright*, indicates that the drafters of the provision viewed the tender years exception as one that is not firmly rooted. Specifically, the minutes of the February 27, 2007 meeting of the Code of Evidence Oversight Committee indicate that the language of the tender years exception was based on a model statute published in the Harvard Journal on Legislation. See Code of Evidence Oversight Committee of the Supreme Court, Meeting Minutes (February 27, 2007) p. 1, available at https://www.jud.ct.gov/committees/code_evidence/code_ev_minutes_022707.pdf (last visited October 31, 2022); see also R. Marks, Note, "Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute," 32 Harv. J. Legis. 207, 253–54 (1995). The model statute published in the article in part reflected the analysis in *Idaho* v. *Wright*, supra, 497 U.S. 805. See R. Marks, supra, 247 and n.210. Consistent with the article's analysis, our sister state courts also have concluded that child hearsay statements admissible under statutory exceptions to the hearsay rule are not firmly rooted exceptions and, therefore, are properly analyzed under *Wright* to determine whether the statements bore particularized guarantees of trustworthiness. See, e.g., *Thomas* v. *State*, 725 A.2d 424, 428 (Del. 1999) (applying *Wright* to determine whether child hearsay statements bore particularized guarantees of trustworthiness); *State* v. *D.G.*, 157 N.J. 112, 125–26, 723 A.2d 588 (1999) (same).

Accordingly, consistent with the analysis in *Idaho* v. *Wright*, supra, 497 U.S. 805, the particularized guarantees of trustworthiness requirement for admissibility under the tender years exception properly is analyzed

under the totality of the circumstances. To identify the circumstances relevant to the analysis, we find instructive this court's decision in *State* v. *Merriam*, supra, 264 Conn. 617, which applied *Wright* in considering whether the trial court properly admitted, under the residual exception to the hearsay rule, the out-of-court statements of a three year old complainant alleging that the defendant in that case had sexually assaulted her. See id., 634–56. This court applied the totality of the circumstances analysis from *Wright* because the residual exception is not a firmly rooted hearsay exception, thus requiring the court to determine whether the statements at issue in *Merriam* bore particularized guarantees of trustworthiness, such that the admission of the statements comported with the requirements of the confrontation clause. See id., 634–35.

In *Merriam*, we noted that "[t]he court [in *Wright* had] identified a number of factors [that] . . . properly relate to whether hearsay statements made by a child witness in [a] child sexual abuse [case] are reliable." (Internal quotation marks omitted.) Id., 639. We looked to the nonexclusive list of factors identified in *Wright*, which included "(1) the degree of spontaneity inherent in the making of the statements; (2) consistent repetition by the declarant; (3) the declarant's mental state; (4) use of terminology not within the average ken of a child of similar age; and (5) the existence of a motive to fabricate or lack thereof." Id., citing *Idaho* v. *Wright*, supra, 497 U.S. 821–22. We further noted that the court in *Wright* "emphasized that the unifying principle underlying the enumerated factors is that they relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." (Internal quotation marks omitted.) *State* v. *Merriam*, supra, 639. Regarding the multifactored nature of the test, we observed that the court in *Wright* stated "that it was not endorsing any particular mechanical test for

determining particularized guarantees of trustworthiness under the [confrontation] [c]lause . . . and that courts have considerable leeway in their consideration of appropriate factors." (Citation omitted; internal quotation marks omitted.) Id., 639–40. In *Wright*, the United States Supreme Court clarified that, in evaluating the trustworthiness of an out-of-court statement, courts must not consider other evidence that corroborates the substance of the statements.[21] The court explained that "the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial . . . ." *Idaho* v. *Wright*, supra, 823.

In *Merriam*, this court applied these factors and concluded that the statements at issue in that case were made under circumstances providing particularized guarantees of trustworthiness. In that case, a social worker at a day care center testified that she noticed the child complainant moving her hips in a sexualized manner. *State* v. *Merriam*, supra, 264 Conn. 623. When the social worker approached the child and asked her what was wrong, she responded: " 'Daddy.' " Id., 624. The complainant's mother testified that, after being informed of the events at the day care center, she asked the complainant what had happened, and the complainant responded that " '[d]addy hurt her in the private area.' " Id., 646. This court concluded that both statements, viewed under the totality of the circumstances, bore particularized guarantees of trustworthiness. We

[21] Accordingly, in evaluating the trustworthiness of N's statements, the trial court in the present case properly did not consider the forensic evidence showing the presence of the defendant's DNA on the interior front panel of N's underpants, and we do not consider that or any other corroborating evidence in our review of the trial court's finding that N's statements were trustworthy. The defendant has not claimed that N's prior statements constitute corroborating evidence.

noted that both statements were consistent with each other and "were made by a very young child with no apparent motive to lie in response to neutral inquiries from different questioners." Id., 648. Moreover, the complainant's behavior was "very unusual for a child her age"; id., 643; indicating that she was "reacting to some highly stressful or disturbing experience." Id., 644.

Turning to the record in the present case, we note that, although the trial court did not expressly rely on *Wright* or *Merriam*, it nevertheless analyzed N's statements under the totality of the circumstances to determine whether the statements bore particular guarantees of trustworthiness. In particular, it considered whether N had a motive to lie and whether she was forced to speak, and it also took into account that the statements were made soon after the incident. Because the court's application of the tender years exception was not, therefore, based on a clear misconception of the law, we review the court's ruling for abuse of discretion. See *State* v. *Aaron L.*, supra, 272 Conn. 811.

Having reviewed the record, we conclude that the trial court did not abuse its discretion in admitting N's bath time statements under the tender years exception to the hearsay rule. We consider the totality of the circumstances, mindful that "the unifying principle" underlying the inquiry "is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Idaho* v. *Wright*, supra, 497 U.S. 822. We conclude that "the circumstances of [N's bath time] statement[s], including [their] timing and content, provide particularized guarantees of [their] trustworthiness." General Statutes § 54-86*l* (a) (1); accord Conn. Code Evid. § 8-10.

N's bath time statements were largely consistent with her prior statements, both to Joselin and to Belia. Specifically, when Belia drove N home from the defendant's

house, N told her that she did not want to go back because the defendant had pulled down her pants. Afterward, Joselin asked N if she had seen the defendant's cat, and N responded "yes" and added that the defendant had seen "[her] behind." When Joselin asked N if the defendant had also touched her behind, N "pointed [to] her front private area."

The only inconsistency, emphasized by the defendant, occurred while Joselin was changing N's clothes. At first, N said the defendant had not pulled down her shorts, but, as Joselin took off her shorts, N said the defendant had done the same. When Joselin asked if the defendant had pulled down her underpants, N was silent at first, but, when Joselin pulled down her underpants, N said the defendant had also done that. Viewed in the context of all four of N's disclosures to Belia and Joselin, these two inconsistencies do not persuade us that the trial court abused its discretion in deeming N's bath time statements trustworthy, particularly given that N provided consistent answers within moments of the inconsistent statements. We also note that the remainder of N's statements while Joselin changed N's clothes were consistent with the other disclosures. That is, after Joselin had removed N's shorts and underpants, she placed her hand over N's private area and asked if the defendant had touched her "like this . . . ." N corrected her, saying, "no, not like that," and then inserted her finger, as Joselin testified, "where you pee," and touched herself. The child demonstrated that she was willing and able to contradict her mother when her own version of events did not coincide with an assertion contained in her mother's questioning.

None of N's bath time statements was purely spontaneous because each followed a question or statement by Joselin. As we noted, however, the bath time statements are consistent with N's initial disclosure to Belia, which was a completely spontaneous, non sequitur

response to a neutral question. There was, moreover, some degree of spontaneity to N's bath time statements. Most important, N's core allegation, namely, that the defendant touched her vaginal area, was nonresponsive to Joselin's neutral, preceding question. Specifically, Joselin asked N, "[d]o you want to see the cat after you bathe?" N responded, "[n]o, because [the defendant] touches my [pola]."

We consider it particularly significant that N's initial disclosure was completely nonresponsive to Joselin's question and, therefore, was spontaneous in nature. Joselin asked N about the cat, and N responded by volunteering that the defendant had sexually assaulted her. We also note that, in *Wright*, the United States Supreme Court cautioned against concluding that the failure to adhere to procedural requirements, such as avoiding leading questions, necessitates the conclusion that the statements are untrustworthy as a matter of law. The court explained that such procedural requirements "may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for [c]onfrontation [c]lause purposes." *Idaho* v. *Wright*, supra, 497 U.S. 818. In the context of child sexual abuse cases, the court cited with approval the proposition that the "use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy . . . ." Id., 819. Accordingly, although it is relevant that Joselin asked some leading questions during the conversation,[22] the fact that N's initial allegation was nonre-

[22] For example, after N's initial disclosure, Joselin asked N an open-ended question—how had the defendant touched her? When N responded that she did not know, however, Joselin followed up with a leading question: "With his hand?" N responded, "Yes, with his hand." Joselin's next question, however, was open-ended. She said, "I want to see. What did his hand do? Show me what his hand did." Joselin asked other leading questions, such as "[d]id he scold you?" N responded that he did not. Joselin also asked N, "[y]ou weren't scared?" N's answer was inaudible. Thus, our review of the bath time conversation reveals that Joselin asked a mix of some leading and some open-ended questions.

sponsive to Joselin's question persuades us that N's statement that the defendant touched her "pola" was sufficiently spontaneous to render it trustworthy.

Evidence in the record of N's mental state at the time she made the bath time statements is ambiguous. The night before, when she first told Joselin that the defendant had pulled down her pants and touched her, Joselin testified that N looked "sad . . . ." The transcript of the audio recording of the bath time conversation, and the recording itself, reveal that, while she was being bathed, N played and made sounds typical of a child her age during bath time. Her repeated and consistent statements, however, both to Belia and Joselin, that she did not want to return to the defendant's house provide at least some evidence that N's attitude toward the defendant had changed in a manner that is consistent with the content of the bath time statements.

Although there is some evidence that N engaged in sexualized behavior, both during the bath time conversation and the night before, when Joselin was changing her clothes, we draw no conclusion regarding her mental state on the basis of that evidence. During the bath time conversation, N demonstrated how the defendant had touched her by licking her finger and touching herself inside her labia with a rotating movement. The night before, when Joselin was changing her, to demonstrate how the defendant touched her, N inserted her finger inside "where you pee," touched herself and said "chupar," which means "to suck," and then made sucking noises with her mouth. It is unclear, however, whether N's behavior sheds light on her mental state. In both instances, it was clear that N was communicating to her mother by showing her what the defendant had done. Her behavior certainly raises questions regarding her mental state. In the absence of any expert testimony on this point, however, beyond looking to her behavior as describing an event that was beyond

the reach of her vocabulary, we cannot draw any conclusions as to what her behavior reveals about her mental state.

The terminology that N used to describe the defendant's behavior was appropriate for her age. Joselin testified that the word "pola" was one that she and N used between themselves to denote N's vaginal area. We also observe that N's physical demonstrations to her mother, both during bath time and the night before, provided the greatest amount of detail regarding what the defendant had done to her. Her demonstrations were much more specific than her verbal descriptions of what had happened, consistent with the fact that a child of her age would be expected to lack the vocabulary to describe acts of digital penetration and cunnilingus.

Finally, the trial court found that N had no motive to fabricate the allegations against the defendant, and the record reveals none. She had little familiarity with the defendant and had never been alone with him before the incident. Accordingly, our review of the totality of the circumstances surrounding N's bath time statements persuades us that the trial court acted within its discretion in concluding that those statements bore particularized guarantees of trustworthiness.[23]

[23] We find unpersuasive the defendant's claims that the bath time statements were unreliable because, according to the defendant, Joselin conducted the equivalent of a cross-examination of N during the bath time conversation, throwing questions at her in rapid fire sequence, and because, according to the defendant, Joselin was poking and prodding N during the conversation in order to induce N to make the statements, as evidenced by the fact that N said "ow" several times during the bath time conversation. Both of these claims are predicated on factual assertions that, if the trial court had credited them, properly could have served as a basis for a determination that the statements lacked particularized guarantees of trustworthiness. Not only is the record devoid of any such factual finding by the trial court in this case, but the court's response to the defendant's reliance on these arguments was that the audio recording would allow the jury to determine whether to credit the defendant's claim that Joselin had poked and prodded N in order to induce her to accuse the defendant of sexual abuse.

II

The defendant next claims that the trial court abused its discretion in admitting a modified, translated transcription, prepared by Joselin, of the audio recording of N's bath time statements. The defendant contends that the modified transcription—which filled in some text that had been marked "inaudible" in Pastor's official transcription, substituted the word "pola" for "cola," and then translated those changes into English—constituted improper lay opinion testimony, in violation of § 7-1 of the Connecticut Code of Evidence.[24] A translated transcript, the defendant contends, constitutes expert opinion testimony, and Joselin had not been proffered or qualified as an expert witness pursuant to § 7-2 of the Connecticut Code of Evidence.[25] The state responds, inter alia, that the defendant's claim is unreviewable because the defendant did not claim before the trial

The defendant also argues that Joselin's Internet research on how to determine whether a child has been abused demonstrates that Joselin did not follow procedural safeguards. In connection with this contention, the defendant highlights that Joselin was not a disinterested questioner—as N's mother, she was biased and likely had preconceived notions of what N would say. Certainly, Joselin's status as a biased interlocutor, a status that hardly can be questioned, is relevant, but the defendant does not make clear how Joselin's status and her research affected the actual nature of her questions, other than suggesting that some of her questions were leading, that her manner of questioning was akin to a cross-examination, and that she poked N to induce her to accuse the defendant. We have already rejected these claims as a basis for concluding that the trial court abused its discretion in finding that N's statements were trustworthy.

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

[25] Section 7-2 of the Connecticut Code of Evidence provides: " A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

court that the modified transcript constituted improper lay opinion testimony. We agree with the state that, because the defense did not object to the modified transcript on the basis that it constituted improper lay opinion testimony, the defendant is foreclosed from doing so on appeal.

The record reveals the following additional relevant facts and procedural history. The audio recording of the bath time conversation, which is in Spanish, was transcribed and translated for the state by Pastor, who, at the time of trial, worked as an independent contractor performing interpretation and translation services for the state and private agencies. Pastor had worked full-time for twenty years as a translator and interpreter of Spanish and English. She was raised in a bilingual household and learned to read Spanish and English at the same time. Pastor's other relevant experience included working for one year as an interpreter and translator at the Official School of Languages in Madrid, Spain, performing English translations for a member of the Senate of the Dominican Republic, and teaching English privately and at a school in the Dominican Republic. Pastor testified regarding the methodology she used to create the translated transcription, explaining that she divided the process into two steps. She first transcribed the audio recording in the original Spanish. Only after completing the Spanish transcript did she translate it into English. She certified that the translated transcription was "true and accurate to the best of [her] ability of the original audio recording in Spanish."

In the transcription, when Pastor was unable to understand what was being said in the audio recording, she wrote "inaudible." Pastor testified that she marked twenty-four segments of the audio recording as "inaudible." She also indicated in the transcription that N had stated that the defendant touched N's "cola," which she translated as "tail."

On the second day of trial, outside the presence of the jury, the state proffered a modified transcription of the audio recording, created by Joselin. The state informed the court and defense counsel that, in the modified transcript, Joselin had filled in sections marked "inaudible" with what Joselin believed was said, where possible, and changed the word "cola" to "pola." Defense counsel objected to the introduction of the modified transcript on two grounds, namely, that the defense had no advance notice of the modified transcript and that Joselin was not a disinterested witness. Because of Joselin's bias, defense counsel argued, the modified transcript was unreliable. Defense counsel stated that, if the court ruled that the modified transcript was admissible, he "would need an opportunity to review [it] and [to] do [his] own investigation . . . ." Specifically, defense counsel said he would "need a continuance to have Spanish translators come in to ensure the reliability" of the modified transcript and an opportunity to review the changes to the sections marked "inaudible."

The court admitted the modified transcript on the ground that Joselin, who had been present at the time of the recorded conversation, was in a better position than Pastor to identify her own voice and statements in the audio recording. The court made no finding regarding Joselin's ability or qualifications to translate from Spanish to English, other than recognizing that Joselin was "not an interpreter and [was] not [t]here to say that this is an authentic interpretation." With respect to Joselin's ability to identify what N was saying in the audio recording, the court found that she was "not in any better position to necessarily give an interpretation [of N's statements in the audio recording] if she doesn't have an independent recollection of what the child is saying. So . . . if she has an independent recollection and remembers that [N] said one thing or

another, then that's her own factual account." Both Pastor's original transcript and the modified transcript, the court ruled, would be provided to the jury. The question of which transcription more accurately represented what was said in the recording, the court ruled, was a factual issue for the jury to decide.

Immediately upon the introduction into evidence of the modified transcript, the court gave the following instruction to the jury: "You are the finders of fact, so it's for you to decide . . . what is being said. So, the reason that the [transcript becomes] significant is because it is in Spanish, and you may not speak Spanish, and so it's really meant to assist you. So, this evidence, the transcript, is not coming in for substantive purposes, it's coming in to aid you in terms of your evaluation of what is being said. But it's for you to decide what's being said. And I'm going to give you an example. You've heard the witness talk about the word 'cola' versus 'pola' versus any other word. It's for you to decide what is being said when you actually listen to it with your own ears. So, this [is] not meant to be a directive as to what is said. It is really meant to aid you while you're listening to the evidence itself."

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . *Once counsel states the authority and ground of* [*the*] *objection, any appeal will be limited to the ground asserted.* . . . We have explained that these requirements are not simply formalities. [A] party cannot present a case to the trial

court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party. . . . Thus, because the essence of preservation is fair notice to the trial court, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 464–65, 174 A.3d 770 (2018).

Our review of the record reveals that the defense did not raise the issue of Joselin's status as a lay witness or object on the basis that the state had failed to proffer Joselin as an expert in the area of creating translated transcriptions. The two objections that defense counsel raised—that Joselin was biased and that the state had not provided sufficient notice of its intent to proffer the modified transcript—were insufficient to alert either opposing counsel or the trial court that the defense intended to rely on Joselin's status as a lay witness pursuant to § 7-1 of the Connecticut Code of Evidence as a basis for objecting to the admission of the modified transcript. Nor do the trial court's ruling and its instruction to the jurors suggest that the court understood the defense to have raised the issue of the limits placed on the proper subjects of lay opinion testimony. See Conn. Code Evid. § 7-1. Although the court's ruling recognized that Joselin was not an interpreter, that statement alone is not sufficient to support the conclusion that the court was on notice that the defense had relied on Joselin's status as a lay witness to object to the modified transcript. The court's instruction to the jury suggests that it viewed defense counsel's concerns to be addressed

by instructing the jury that the alternative transcripts were merely aids to assist the jury in reviewing the audio recording. Accordingly, we conclude that the defendant's claim that the modified transcript constituted improper lay opinion testimony is unpreserved.[26]

III

Finally, we address the defendant's claim that the trial court abused its discretion in denying defense counsel's request for a continuance. The defendant claims that the court's ruling deprived him of his right to a fair trial and his right to present a defense. In response, the state contends that the record reflects that the court did not deny defense counsel's request but, instead, indicated to counsel that he could in fact request one for the purpose of consulting with an interpreter regarding the modified transcript. Because we agree with the state that the record reveals that the trial court did not in fact deny defense counsel's request, we reject the defendant's claim.

[26] Perhaps attributable to the defendant's failure to preserve this specific claim for review, we observe that, in its proffer of the modified transcript, the state made no showing regarding Joselin's qualifications as a translator or the methodology she employed in creating the modified transcript. We also observe that the trial court made no finding that Joselin had sufficient qualifications to create an accurate English translation of a Spanish transcription. Finally, it is unclear from the record whether Joselin "fill[ed] in" some of the portions marked "inaudible" in Pastor's transcription on the basis of Joselin's own transcription of the audio recording or, instead, on the basis of her independent recollection of the bath time conversation. We note that it remains a matter of first impression for this court whether a translated transcript is the proper subject of lay opinion testimony governed by § 7-1 of the Connecticut Code of Evidence, or whether the art of creating a transcription of a recording, and then translating that transcription into another language requires "specialized knowledge" such that the opinion must be given by an expert. Conn. Code Evid. § 7-2. Resolution of that question—and the myriad of legal issues raised by the introduction of translated transcripts into evidence; see generally C. Fishman, "Recordings, Transcripts, and Translations as Evidence," 81 Wash. L. Rev. 473 (2006)—will be aided by a more complete record on these points in future cases.

The record reveals the following additional relevant facts and procedural history. When the state notified the trial court and the defendant that it sought to offer the modified transcript, defense counsel objected on the ground that he lacked notice of the modification and stated that he would "need a continuance to have Spanish translators come in to ensure the reliability" of the modified transcript. In its ruling admitting the modified transcript, the court first noted that defense counsel had "had ample opportunity" during both the first trial and the present one to obtain the defendant's own translator to prepare an alternative transcription. The court continued, however, and stated: "With regard to the very minor modifications that have been made by [Joselin], and we can see what they are because they're in parentheses, *to the extent that counsel is asking for some time to be able to show those to an interpreter or to show the whole document to an interpreter, you certainly have the ability to ask for that time*." (Emphasis added.) Accordingly, the court made it clear that, although it would not grant a continuance for the purpose of allowing the defense to produce an alternative transcript, it would consider granting a continuance for the purpose of allowing defense counsel time to consult with an interpreter regarding the modified transcript—giving the defendant precisely what defense counsel had suggested earlier, namely, a continuance for the purpose of having an interpreter review the modified transcript to ensure that it was reliable.

Put differently, a more reasonable reading of the record is that the court, after clarifying the scope of the continuance it was willing to grant, invited defense counsel to state how long he would need for the continuance. At that point, counsel could have assented to the court's offer of a continuance for the purpose of consulting an interpreter and specified the amount of

time he sought. Instead, counsel elected to proceed. In the absence of any indication from counsel as to the length of time he sought for the continuance, the trial court lacked a proper factual predicate for exercising its discretion to grant the continuance. See, e.g., *State* v. *Hamilton*, 228 Conn. 234, 240, 636 A.2d 760 (1994) (identifying likely length of delay as one factor courts appropriately may consider in exercising discretion to grant continuance). Accordingly, we conclude that the record does not support the defendant's claim that the trial court improperly denied defense counsel's request for a continuance.

The judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 345

IN RE ANAISHALY C. ET AL.

The petition of the respondent father and the respondent mother for certification to appeal from the Appellate Court, 190 Conn. App. 667 (AC 41830/AC 41889), is denied.

David J. Reich and *Joshua Michtom*, assistant public defender, in support of the petition.

Rosemarie T. Weber, assistant attorney general, in opposition.

Decided July 17, 2019

STATE OF CONNECTICUT *v.* RODNEY WATERS

The defendant's petition for certification to appeal from the Appellate Court, 214 Conn. App. 294 (AC 44342), is denied.

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

James B. Streeto, senior assistant public defender, in support of the petition.

Nathan J. Buchok, deputy assistant state's attorney, in opposition.

Decided October 25, 2022

PORTFOLIO RECOVERY ASSOCIATES, LLC *v.* MAREK J. MARYANSKI

The defendant's petition for certification to appeal from the Appellate Court (AC 44526) is denied.

Marek J. Maryanski, self-represented, in support of the petition.

Jeanine M. Dumont, in opposition.

Decided October 25, 2022

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* CHARLES H. FISHER ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 44626) is denied.

Charles H. Fisher, self-represented, in support of the petition.

Kent J. Mancini, in opposition.

Decided October 25, 2022

BANK OF AMERICA, N.A. *v.* MAREK J. MARYANSKI

The defendant's petition for certification to appeal from the Appellate Court (AC 44687) is denied.

Marek J. Maryanski, self-represented, in support of the petition.

Jeanine M. Dumont, in opposition.

Decided October 25, 2022

SAVINGS INSTITUTE BANK AND TRUST COMPANY *v.* MARK E. RABON ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 45379) is denied.

Mark E. Rabon, self-represented, in support of the petition.

Peter J. Royer and *Daniel J. Krisch*, in opposition.

Decided October 25, 2022

ALEXANDER ROSA *v.* COMMISSIONER OF CORRECTION

The petitioner Alexander Rosa's petition for certification to appeal from the Appellate Court (AC 45524) is dismissed.

Alexander Rosa, self-represented, in support of the petition.

Decided October 25, 2022

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* CHRISTINE R. BLACKMAN ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 45580) is denied.

John A. Sodipo, in support of the petition.

Marissa I. Delinks and *Aaron A. Fredericks*, in opposition.

Decided October 25, 2022

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CONNECTICUT APPELLATE REPORTS

Vol. 216

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

KATHLEEN TRACEY ET AL. *v.* MIAMI BEACH ASSOCIATION (AC 43965)

Elgo, Moll and Cradle, Js.

Syllabus

The plaintiffs, residents of a neighborhood that was adjacent to waterfront property owned by the defendant beach association, sought, inter alia, injunctive relief enjoining the defendant from blocking public access to and from charging fees and issuing permits for public use of its property. The defendant acquired the property in 1951 and, shortly thereafter, erected a fence that prevented the public from accessing the property. In 1952, owners of property in the adjacent neighborhood brought an injunctive action against the defendant, alleging violations of their rights to freely access and use the property and specifically alleging that they were acting as members of the general public. The 1952 plaintiffs claimed that H, a prior owner of the property, had, by deed and by his actions over a period of approximately fifty years, designated the property as an open way for public use. In 1953, the trial court rendered judgment in favor of the 1952 plaintiffs. That court found that H had dedicated the property for public use, ordered the defendant to remove the fence, and enjoined the defendant from interfering with the rights of the 1952 plaintiffs and the general public to free entry and egress and to free and unimpeded use and enjoyment of the property in the future. The public enjoyed unimpeded access to and use of the property until 2017, when the defendant erected a fence with an entry gate and created a fee structure and permit plan for the public to access and use the property. In 2018, the plaintiffs commenced the present action to enforce the 1953 judgment. Following a trial, the trial court rendered judgment in favor of the plaintiffs, ordered the defendant to remove the fence, and enjoined the defendant from erecting another fence and from charging fees and issuing permits for the use of the property by the public in the future. On the defendant's appeal to this court, *held*:

1. The trial court's decision to grant injunctive relief to the plaintiffs was an exercise of the court's equitable powers to protect the integrity of

the 1953 judgment, and the preclusive effect of the 1953 judgment was more precisely viewed through the lens of the doctrine of merger, which implicates res judicata only in its general sense.

2. The trial court properly determined that the defendant's conduct was within the scope of the 1953 judgment and, accordingly, that the 1953 judgment precluded the defendant from restricting public access to and use of the property: the 1953 judgment plainly recognized the rights of the general public both to free entry and egress to the property and to free and unimpeded use and enjoyment of the property along its entire length and width; moreover, the defendant's erection of a fence and a gated entrance and imposition of fees and permits in 2017 were restrictions encompassed by and in violation of the 1953 judgment.

3. The trial court properly concluded that the plaintiffs were proper parties in the present case because they were in privity with the 1952 plaintiffs and thus were entitled to the benefits of the 1953 judgment: the present case involved the same legal rights as those that were asserted in the 1952 action and memorialized in the 1953 judgment, as the 1952 plaintiffs specifically alleged that they were acting as members of the general public to vindicate the rights of the general public, and the plaintiffs in the present case asserted illegal interference with their rights as members of the general public to access and use the property in accordance with the mandate of the 1953 judgment; moreover, the same property was at issue in both the 1952 action and the present action, the source of the rights underlying both sets of claims, namely, the conveyance documents executed by H, was the same in both actions, and, in each instance, the defendant instituted measures that restricted the public's ability to freely access and use the property and faced legal challenges from local residents who sought to vindicate their rights as members of the general public; furthermore, the 1953 judgment had a preclusive effect on the defendant with respect to members of the general public because the defendant was a party to the 1952 action and had the opportunity to fully litigate the controversy during that action; additionally, the policies underlying the preclusion doctrines, including achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments, were served by finding the plaintiffs in privity with the 1952 plaintiffs and permitting them to maintain the action to enforce the 1953 judgment.

4. The trial court did not abuse its discretion in exercising its equitable authority to vindicate the 1953 judgment with respect to the plaintiffs' rights to freely access and use the property: the passage of time since the 1953 judgment did not, in itself, make the enforcement of the judgment inequitable, and the defendant failed to offer evidence of any substantive legal change in the terms of the dedication of the property since the 1953 judgment or any other change of circumstances that would make the enforcement of the judgment inequitable; moreover, the public used and enjoyed the property for more than sixty years following the 1953

judgment without obstruction by the defendant, demonstrating that the defendant and the public expected the terms of the 1953 judgment to govern the use of the property in perpetuity; furthermore, the 1953 judgment did not contain any temporal limitations on the relief it provided and there was no applicable statutory limitation period because the action was injunctive in nature.

(*One judge concurring separately*)

Argued January 14, 2021—officially released November 8, 2022

Procedural History

Action for, inter alia, an injunction requiring the defendant to remove a fence along the border of certain waterfront property, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Knox*, *J.*; judgment for the plaintiffs, from which the defendant appealed to this court; thereafter, the court, *Knox*, *J.*, granted in part the defendant's motion to stay the judgment. *Affirmed.*

Daniel J. Krisch, with whom, on the brief, was *Kenneth R. Slater*, *Jr.*, for the appellant (defendant).

William E. McCoy, for the appellees (plaintiffs).

Opinion

ELGO, J. This case involves an action to enforce a judgment that memorialized the rights of the general public to freely access and use a parcel of waterfront property in Old Lyme. Following a bench trial, the trial court concluded that the prior judgment in question precluded the defendant, Miami Beach Association, from restricting public access and use of that property. On appeal, the defendant challenges the propriety of that determination. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. At all relevant times, the plaintiffs,

Kathleen Tracy,[1] Robert Breen, Jerry Vowles, and Dee Vowles, resided in an area of Old Lyme known as Sound View, a neighborhood that is adjacent to the property in question. The defendant is a municipal corporation created by special act of the General Assembly in 1949.[2] This appeal concerns the ability of the defendant to restrict public access and use of a parcel of waterfront property owned by the defendant and known as Miami Beach.[3]

Miami Beach originally was owned by Harry J. Hilliard, who conveyed the property to a devisee through his will. Title thereafter changed hands between private individuals several times until the defendant acquired the property via quitclaim deed on July 12, 1951.

The present action concerns prior litigation that transpired soon after the defendant acquired the property. In November, 1951, the defendant constructed a six foot high iron fence that precluded access to Miami Beach. In response, twenty-six owners of property in the adjacent Sound View neighborhood brought an injunctive action (1952 action), alleging violations of their right to freely access and use Miami Beach.[4]

[1] Although her last name appears as "Tracey" in the case caption, the plaintiff Kathleen Tracy testified at trial that her last name is Tracy.

[2] By the terms of its charter, the defendant is permitted, inter alia, to enact ordinances "to care for the beaches and waterfronts," to "prevent the deposit upon property within the limits of [the] association of refuse, garbage or waste material of any kind," and "to regulate and limit the carrying on within the limits of said association of any business that will, in the opinion of the [association], be prejudicial to public health or dangerous to or constitute an unreasonable annoyance to those living or owning property in the vicinity thereof . . . ."

[3] At the time of both the defendant's acquisition of the property and the 1952 action discussed herein, the parcel was referred to as "Long Island Avenue" and consisted of undeveloped land along the Long Island Sound coast. For clarity, we refer to that waterfront parcel as Miami Beach throughout this opinion.

[4] The plaintiffs named the defendant and Nunzio Corsino as defendants in the 1952 action. Although the record before us indicates that Corsino conveyed Miami Beach to the defendant by quitclaim deed in 1951, the pleadings contain no particular allegations with respect to Corsino.

In the introductory paragraph of their complaint, the plaintiffs specifically alleged that, in bringing that injunction action, they were "also acting as members of the general public . . . ." In the first count of their complaint, the plaintiffs alleged that Hilliard "on or about 1900 laid out [Miami Beach] as an 'open way for foot passengers and bicycles only' " and had, "by deed to purchasers of property . . . abutting [Miami Beach], expressly covenanted for himself, his heirs and assigns, that [Miami Beach] would remain an open way for the use of the public . . . ." The plaintiffs further alleged that Hilliard, "by laying out [Miami Beach] on various maps, through his deeds . . . and by his actions, conduct and speech over a period of approximately fifty years, intended and designated [Miami Beach] as an open way for public use." The plaintiffs thus claimed that the erection of the iron fence wrongfully interfered with the rights memorialized in the respective deeds to their properties.

In count two, the plaintiffs claimed a prescriptive right to use Miami Beach "as an open way and as a beach." In the third and final count, the plaintiffs alleged that Hilliard, "[b]y various deeds subsequent to 1892 . . . reserved [Miami Beach] as an open public way for foot passengers and bicycles," that Hilliard had dedicated Miami Beach "to the public," and that "the plaintiffs and other members of the general public accepted the same as a public way and beach and never abandoned it as such." The plaintiffs further alleged that, by erecting the iron fence, the defendant interfered with their rights as "members of the general public to [the] free and unimpeded use of [Miami Beach and] have prevented their free use and enjoyment thereof . . . ."

As the defendant acknowledged in its posttrial brief in the present case, "[i]t is not clear from the file as to whether trial commenced, but the file does reflect that exhibits were presented to the court," and, on February

18, 1953, the court rendered judgment in favor of the plaintiffs on counts one and three (1953 judgment).[5] *Vitello* v. *Corsino*, Superior Court, judicial district of New London, Docket No. 20902 (February 18, 1953) (*Troland*, *J.*). The court issued a written ruling in which it specifically found that, "prior to the year 1941, [Hilliard] dedicated for public use the strip of land known as [Miami Beach, and] . . . this dedication for such use by [Hilliard] was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of this action."[6] By way of relief, the court ordered in relevant part: "[T]he [defendant is] . . . hereby enjoined . . . from maintaining and establishing after [May 29] 1953, a steel and wire fence across said [Miami Beach] from the intersection of [Miami Beach] with the west line of Hartford Avenue in [Old Lyme]; and it is further adjudged that the [defendant] and [its] servants and agents . . . are hereby ordered . . . to remove from [Miami Beach] the said steel and wire fence which they have erected . . . and it is further adjudged that the [defendant] and [its] servants and agents be, and they are hereby enjoined . . . from interfering with the

[5] In its written ruling, the court stated in relevant part: "The court, *having heard the parties*, finds the issues upon the first count for the plaintiffs . . . and also finds the issues for all of the plaintiffs upon the third count . . . ." (Emphasis added.) The plaintiffs withdrew count two before judgment was rendered. Cf. *Roche* v. *Fairfield*, 186 Conn. 490, 499, 442 A.2d 911 (1982) ("the unorganized public cannot acquire rights by prescription").

[6] As its name implies, the term "unorganized public" refers to "the public at large . . . rather than . . . one person, a limited number of persons, or a restricted group." (Internal quotation marks omitted.) *State* v. *Boucher*, 11 Conn. App. 644, 650, 528 A.2d 1165 (1987) (*Daly*, *J.*, dissenting), rev'd on other grounds, 207 Conn. 612, 541 A.2d 865 (1988); see also *Oxford* v. *Beacon Falls*, 183 Conn. 345, 347, 439 A.2d 348 (1981) ("[a] public beach is one . . . open to the common use of the public, and which the unorganized public and each of its members have a right to use" (internal quotation marks omitted)); *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 15–16, 48 A.3d 107 (using term "unorganized public" synonymously with term "general public"), cert. denied, 307 Conn. 932, 56 A.3d 715 (2012).

rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, from now henceforth . . . .''[7]

It is undisputed that, in the decades following the 1953 judgment, public use of Miami Beach continued without impediment.[8] More than one-half century later, following complaints regarding litter and other inappropriate behavior by beachgoers, the defendant instituted what it termed a ''Clean Beach Program'' in the fall of 2017. That program involved the erection of a fence with an entrance gate, the monitoring of the gate by security personnel, and the creation of a fee structure and permit program to access and use Miami Beach. Residents of Old Lyme were permitted to enter and use the beach at no cost, provided they furnished proof of residency. Residents also were permitted to bring nonresident guests to the beach, so long as they purchased a guest pass from the defendant. Nonresident

[7] Although the defendant argues that the 1953 judgment was a stipulated judgment, it concedes, as it must, that ''[a] valid judgment or decree entered by agreement or consent operates as res judicata to the same extent as a judgment or decree rendered after answer and contest.'' *Gagne* v. *Norton*, 189 Conn. 29, 31, 453 A.2d 1162 (1983); see also *SantaMaria* v. *Manship*, 7 Conn. App. 537, 542, 510 A.2d 194 (''[a] stipulated judgment may operate as res judicata to the same extent as a judgment after a contested trial''), cert. denied, 201 Conn. 807, 515 A.2d 378 (1986). As the Restatement (Second) of Judgments explains, ''[w]hen the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be 'merged' in the judgment. . . . *It is immaterial whether the judgment was rendered upon a verdict . . . or upon consent . . .*.'' (Emphasis added.) 1 Restatement (Second), Judgments § 18, comment (a), p. 152 (1982). For that reason, actions to enforce stipulated judgments properly are brought in the Superior Court. See, e.g., *Garguilo* v. *Moore*, 156 Conn. 359, 242 A.2d 716 (1968); *Ghio* v. *Liberty Ins. Underwriters, Inc.*, 212 Conn. App. 754, 276 A.3d 984, cert. denied, 345 Conn. 909, A.3d (2022); *Haworth* v. *Dieffenbach*, 133 Conn. App. 773, 38 A.3d 1203 (2012); *Nauss* v. *Pinkes*, 2 Conn. App. 400, 480 A.2d 568, cert. denied, 194 Conn. 808, 483 A.2d 612 (1984).

[8] In its principal appellate brief, the defendant concedes that ''[t]he public used [Miami Beach] for decades'' after the 1953 judgment was rendered.

members of the public were obligated to pay a fee to enter and use Miami Beach.

In 2018, the plaintiffs[9] commenced the present action to enforce the 1953 judgment. In the sole count of their complaint, the plaintiffs alleged that the defendant illegally interfered with the public's right to freely access and use Miami Beach "in direct violation" of the 1953 judgment.[10] In so doing, they specifically alleged that the court, in rendering the 1953 judgment, "found that [Miami Beach] . . . is dedicated for public use." They thus sought declaratory and injunctive relief, including an order mandating "the removal of the fence blocking public access to Miami Beach," an order "enjoining the defendant from charging fees and issuing permits for use of Miami Beach," and a declaration that "the [defendant's] actions preventing the plaintiffs' use of Miami Beach . . . are in violation of previous court orders."[11] In its answer, the defendant admitted that the 1953 judgment "was entered" but averred that it "cannot admit or deny the [plaintiffs'] characterization of the judgment in that it speaks for itself." The defendant also summarily denied the allegations of paragraph 10 of the complaint.[12] It did not assert any special defenses or counterclaim.

[9] The plaintiffs were longtime patrons of Miami Beach and, like the plaintiffs in the 1952 action, all owned property in the adjacent Sound View neighborhood.

[10] Unlike the plaintiffs in the 1952 action, the plaintiffs in the present case have raised no claim regarding the rights memorialized in the deeds to their Sound View properties. Rather, this action is predicated solely on their rights as members of the general public to freely access and use Miami Beach.

[11] The plaintiffs also requested "a [d]eclaratory [o]rder that Miami Beach is a public beach." In rendering judgment in favor of the plaintiffs, the trial court did not grant that request. Rather, the court emphasized that "[t]he present case . . . involves a beach dedicated for public use from *private property* rather than a town owned beach . . . ." (Emphasis added.) The propriety of that determination is not at issue in this appeal.

[12] In paragraph 10 of the operative complaint, the plaintiffs specifically alleged: "The [defendant has] hindered and violated the rights of the plaintiffs to freely access [Miami Beach], to wit:

In his opening remarks at trial, the plaintiffs' counsel explained that the plaintiffs brought the present action to compel the defendant to "abide by the rulings of [the Superior Court] in 1953 to enforce the free and unimpeded right of the public to use Miami Beach." On cross-examination, the following colloquy occurred between Tracy and the defendant's counsel:

"[The Defendant's Counsel]: You want [Miami Beach] to be a public beach, correct?

"[Tracy]: I don't want it to be anything. I want the public to have access to that beach; that's what I want.

"[The Defendant's Counsel]: All right. And they do have access, don't they?

"[Tracy]: No. I don't think they have free, unencumbered access; no, I do not believe that they have that."

The defendant's counsel asked Tracy to "describe what rights" the 1953 judgment conferred on the public with respect to Miami Beach; Tracy responded that the 1953 judgment memorialized "the right to unimpeded access—free, unimpeded access to the unorganized public." Tracy also testified that she "read the [1953 judgment as mandating] that there should be no impediment to the public to use" Miami Beach and opined that "access to [Miami Beach] means you have access to the sand, not just to the water."

Breen, whose family had owned property in Sound View since 1895, was born the year after the 1953 judgment issued. In his testimony, Breen indicated that,

"a. They have and continue to restrict public access to Miami Beach without any grant of authority to do so.

"b. They are in direct violation of the 1953 judgment . . . and [its] court orders against the defendant.

"c. They are charging fees to the public for use of a public beach without any grant of legal authority to do so.

"d. They are issuing permits for use of a public beach without any grant of legal authority to do so.

"e. The defendant's actions have a chilling effect on the rights of the public to [Miami Beach]."

with respect to the public's right to use the beach, he never understood it to be limited to "walking purposes only" and testified that the gate and fence erected by the defendant as part of the Clean Beach Program "denies me free and unimpeded access to [Miami Beach] that I had enjoyed the right to use whenever I pleased for most of my life." Breen thus indicated that he sought to have those barriers removed in accordance with the terms of the 1953 judgment. The defendant, by contrast, maintained that it could restrict the use of Miami Beach through the measures implemented as part of its Clean Beach Program.

By memorandum of decision dated January 15, 2020, the trial court ruled in favor of the plaintiffs. After providing a factual overview of both the 1952 action and the present dispute, the court observed: "[F]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . It has long been accepted that a system of laws upon which individuals, governments and organizations rely to resolve disputes is dependent on according finality to judicial decisions. . . . The convention concerning finality of judgments has to be accepted if the idea of law is to be accepted . . . . [A] party should not be able to relitigate a matter which it already has had an opportunity to litigate." (Citations omitted; internal quotation marks omitted.) The court then emphasized that, "[o]nce a final judgment has been issued, it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment, including injunctive relief." (Internal quotation marks omitted.)

After setting forth those principles of finality, the court noted that the plaintiffs were seeking to enforce

the 1953 judgment.[13] The court summarized the dispute between the parties as follows: "[T]he plaintiffs rely on the 1953 judgment of this court that found that [Hilliard] . . . dedicated the beach to public use and the unorganized public accepted this dedication. The defendant claims, notwithstanding the 1953 judgment, that it owns Miami Beach and has the right to restrict access or use thereto."

The court then discussed the doctrines of res judicata and collateral estoppel, finding that the parties were in privity with the parties to the 1952 action, that "[t]here is no evidence that the parties, particularly the defendant, were not presented an opportunity to litigate fully the controversy in 1953," and that the "present controversy is substantially similar to the [1952 action]; the facts and claims for unrestricted use of Miami Beach . . . are identical." The court emphasized that the 1953 judgment "concluded any controversy on the defendant's restriction of the public's access by installation of a fence on the boundary of Miami Beach" and found that, "[t]he defendant, whatever laudable intentions it may have [in enacting the Clean Beach Program], does not have the right to restrict access to Miami Beach to permit holders or paying users in order to remediate such conduct." The court also noted that the defendant had offered "no evidence of any substantive legal change in the terms of the dedication of Miami Beach since the 1953 judgment. The evidence presented in this case fails to convince the court that [it should] exercise [its] discretion . . . in order to reconsider the issues determined in the 1953 judgment. . . . The defendant's installation of the fence, gated entrance, fees, and permits are restrictions on the public dedication of the beach that violate the 1953 judgment."

[13] Indeed, after noting the applicable legal standard, the court titled the next section of its memorandum of decision "Enforcement of 1953 Judgment."

Accordingly, the court rendered judgment in favor of the plaintiffs. In exercising its equitable powers to protect the integrity of the 1953 judgment, the court ordered as follows: "[T]he defendant is ordered to remove the fence installed on the boundary of [Miami Beach] now and hereinafter; the defendant is enjoined from maintaining or establishing any other fence on the boundary of [Miami Beach], now and hereinafter, and the defendant is further enjoined from charging fees and issuing permits for use of [Miami Beach] by the public. The defendant shall comply with the [1953] judgment, which bears repeating as follows: the defendant is further enjoined 'from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, now and hereinafter.' " The defendant subsequently filed a motion for reargument, claiming, inter alia, that the court's decision exceeded the scope of the 1953 judgment. The court denied that motion, and this appeal followed.

I

APPLICABLE LEGAL PRINCIPLES

This case concerns the preclusionary effect of the 1953 judgment. For that reason, both the parties and the trial court discussed the doctrine of res judicata throughout this litigation, culminating in the court's determination that the measures implemented by the defendant as part of the Clean Beach Program were "restrictions on the public dedication of [Miami Beach] that violate the 1953 judgment." To properly determine the applicability of res judicata in the present case, additional context regarding that confounding doctrine is necessary.

Res judicata is a term of art of both general and specific meaning. Its general use stands for the proposition that a valid and final judgment should be accorded

preclusive effect. As Justice Blackmun observed decades ago, "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of 'res judicata.' " *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 892 n.5, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (noting "confusing lexicon" surrounding preclusive effect of prior judgment). As the Supreme Judicial Court of Massachusetts has explained, " '[r]es judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another" and whose fundamental purpose is "assuring that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action." (Citation omitted; internal quotation marks omitted.) *Bagley* v. *Moxley*, 407 Mass. 633, 636, 555 N.E.2d 229 (1990); see also *State* v. *Ellis*, 197 Conn. 436, 464–65, 497 A.2d 974 (1985) (related "concepts" of finality "express no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest"); *Barr* v. *Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992) ("[b]roadly speaking, res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments"). In its generic sense, "[r]es judicata encompasses four preclusive effects, each conceptually distinct, which a final personal judgment may have upon subsequent litigation. These are merger, direct estoppel, bar, and collateral estoppel." (Internal quotation marks omitted.) *Lee* v. *Spoden*, 290 Va. 235, 245, 776 S.E.2d 798 (2015); see also *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 n.6, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (noting that "[t]he

term res judicata is used broadly in the Restatement [(First) of Judgments] to cover merger, bar, collateral estoppel, and direct estoppel").

In its specific sense, res judicata refers particularly to claim preclusion and provides that "a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim."[14] (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019). Under Connecticut law, the doctrine of res judicata is pleaded as a special defense. See, e.g., *Carol Management Corp.* v. *Board of Tax Review*, 228 Conn. 23, 27, 633 A.2d 1368 (1993); *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 667 n.9, 240 A.3d 1056 (2020), aff'd, 341 Conn. 332, 267 A.3d 162 (2021); Practice Book § 10-50. Its primary posture is defensive in nature, in that it bars relitigation of a claim on which "a valid and final personal judgment" has been rendered in favor of a party. 1 Restatement (Second), Judgments §§ 18 and 19 (1982). Indeed, we are aware of no Connecticut appellate authority in which res judicata has been endorsed for offensive use with respect to claim preclusion, and for good reason: "Offensive claim preclusion is nonexistent. A plaintiff cannot reassert a claim that he has already won." *Robbins* v. *MED-1 Solutions, LLC*, 13 F.4th 652, 657 (7th Cir. 2021); see also *St. Paul Mercury Ins. Co.* v. *Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (res judicata "is typically a defensive doctrine"); *Suryan* v. *CSE Mortgage, L.L.C.*, Docket No. 0452, 2017 WL 3667657, *15

[14] For res judicata to apply in the specific sense of claim preclusion, "four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016).

(Md. Spec. App. August 25, 2017) ("Maryland has not recognized the offensive use of res judicata, and in those jurisdictions where its use has been attempted, it generally has been rejected").

In the present case, the plaintiffs did not attempt to wield the doctrine of res judicata offensively but, rather, sought something fundamentally distinct: vindication of the claim asserted in the 1952 action and embodied in the 1953 judgment.[15] As the trial court noted in its memorandum of decision, the present action is one to enforce a prior judgment of the Superior Court.[16]

An action to enforce a prior judgment is the consequence of the doctrine of merger, memorialized in the Restatement (Second) of Judgments and our decisional law, by which a plaintiff's "claim is extinguished and rights upon the judgment are substituted for it" following the rendering of a valid and final judgment.[17] 1

[15] The plaintiffs first invoked the doctrine of res judicata in their posttrial brief to describe the preclusive effect of the 1953 judgment.

[16] In part III A of its memorandum of decision, in which it set forth the applicable legal standard, the trial court observed that "[f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored." (Internal quotation marks omitted.) The court explained that, "[o]nce a final judgment has been issued, it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment, including injunctive relief," and emphasized that "[c]ourts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment." (Citations omitted; internal quotation marks omitted.) The court then proceeded to discuss the doctrine of res judicata in part III B of its decision, which is titled "Enforcement of 1953 Judgment."

[17] In *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 364, 511 A.2d 333 (1986), our Supreme Court's reference to an action to enforce a judgment was discussed in the context of the principle of res judicata and, more specifically, merger: "The principles that govern res judicata are described in Restatement (Second), Judgments (1982). The basic rule is that of § 18, which states in relevant part: 'When a valid and final personal judgment is rendered in favor of the plaintiff: (1) [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof, *although he may be able to maintain an action upon the judgment* . . . .' As comment (a) to § 18 explains, '[w]hen the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon

Restatement (Second), supra, § 18, comment (a), p. 152; *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 348, 15 A.3d 601 (2011); see also *Milwaukee County* v. *M. E. White Co.*, 296 U.S. 268, 275, 56 S. Ct. 229, 80 L. Ed. 220 (1935) ("[a] cause of action on a judgment is different from that upon which the judgment was entered"); *National Union Fire Ins. Co. of Pittsburgh* v. *Owenby*, 42 Fed. Appx. 59, 63 (9th Cir. 2002) (explaining that "[t]he doctrine that a judgment creates its own cause of action is an entirely practical legal device, the purpose of which is to facilitate the goal of securing satisfaction of the original cause of action"), cert. denied, 538 U.S. 950, 123 S. Ct. 1629, 155 L. Ed. 2d 494 (2003); *Fidelity National Financial, Inc.* v. *Friedman*, 225 Ariz. 307, 310, 238 P.3d 118 (2010) ("every judgment continues to give rise to an action to enforce it, called an action upon a judgment" (internal quotation marks omitted)). Accordingly, when a party thereafter seeks to enforce those rights by maintaining "an action upon the judgment"; 1 Restatement (Second), supra, § 18 (1), pp. 151–52; *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 348; it is not seeking to "relitigate a matter [that] it already has had an opportunity to litigate." (Internal quotation marks omitted.) *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 66, 171 A.3d 409 (2017). Rather, it is attempting to enforce a valid judgment and, by extension, vindicate the very claim that gave rise thereto. For that reason, an action to enforce a prior judgment does not implicate res judicata in its specific sense.

Merger is a doctrine of preclusion that falls within res judicata in its generic sense. See *Lawlor* v. *National Screen Service Corp.*, supra, 349 U.S. 326; *Lee* v. *Spoden*,

the judgment are substituted for it. The plaintiff's original claim is said to be "merged" in the judgment.' Our recent case law has uniformly approved and applied the principle of claim preclusion or merger." (Emphasis added.)

supra, 290 Va. 245. Merger has been referred to as a component of res judicata; see *Freedom Mortgage Corp.* v. *Burnham Mortgage, Inc.*, 569 F.3d 667, 672 (7th Cir. 2009); and as "an aspect of res judicata which prevents relitigation of existing judgments . . . ." (Internal quotation marks omitted.) *Allison-Bristow Community School District* v. *Iowa Civil Rights Commission*, 461 N.W.2d 456, 460 (Iowa 1990). Accordingly, the doctrines of merger and res judicata in its generic sense "may be regarded as identical and, in some instances, the terms 'res judicata' and 'merger' have been used interchangeably." (Footnote omitted.) 46 Am. Jur. 2d 799, Judgments § 431 (2017); cf. *Legassey* v. *Shulansky*, 28 Conn. App. 653, 656, 611 A.2d 930 (1992) ("Connecticut's res judicata rules are derived from the theory of merger . . . set out in the Restatement (Second) of Judgments").

That context convinces us that the issue of the preclusive effect of the 1953 judgment is more precisely viewed through the lens of the doctrine of merger and the Superior Court's authority to enforce a prior judgment, which implicates res judicata in its general sense. Although the trial court also discussed both claim preclusion and collateral estoppel in its memorandum of decision, we are mindful that a judicial opinion "must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010); see also *McGaffin* v. *Roberts*, 193 Conn. 393, 408, 479 A.2d 176 (1984) ("[w]e examine the trial court's memorandum of decision to understand better the basis of the court's decision and to determine the reasoning for the conclusion reached by the trial court"), cert. denied, 470 U.S. 1050, 105 S. Ct. 1747, 84 L. Ed. 2d 813 (1985). The court's decision expressly acknowledges the unique context in which the issue of preclusion arises in this case—an attempt by the

plaintiffs to enforce a prior judgment of the Superior Court—and the court's reasoning comports with the principles of finality that underlie the doctrine of merger. Read as a whole, we therefore construe the court's decision to grant injunctive relief to the plaintiffs in this action to enforce a prior judgment as an exercise of its equitable powers to protect the integrity of the 1953 judgment.[18]

II

SCOPE OF 1953 JUDGMENT

In its memorandum of decision, the court held that the measures implemented by the defendant as part of the Clean Beach Program were "restrictions on the public dedication of [Miami Beach] that violate the 1953 judgment." The defendant, by contrast, essentially argues that those measures merely "regulate" access and use of Miami Beach and, thus, are outside the scope of the 1953 judgment.[19] Whether the court properly determined that the defendant's conduct fell within the scope of the 1953 judgment presents a question of law, over which our review is plenary. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 439, 219 A.3d 801 (2019) (affording plenary review "to the extent that we are required to interpret the court's judgment"), cert.

[18] We also note that, to the extent that "our rationale is slightly different than that of the trial court," it is "axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Silano* v. *Cooney*, 189 Conn. App. 235, 241, 207 A.3d 84 (2019); see also *Helvering* v. *Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224 (1937) ("the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground").

[19] To the extent that the defendant has argued that the court improperly "expanded the reach" of the prior judgment and characterizes the scope of the judgment on page 19 of its brief, we acknowledge that the defendant preserved its claim regarding the scope of the 1953 judgment in its February 4, 2020 motion for reargument.

denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020); see also *Garguilo* v. *Moore*, 156 Conn. 359, 365, 242 A.2d 716 (1968) (explaining, in action to enforce prior judgment, that "resolution of the issues raised in this action necessarily required the trial court to interpret the terms of the [prior] judgment").

"The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 355, 133 A.3d 402 (2016).

The court's interpretation of the 1953 judgment arises in the context of an action to enforce that judgment. It is well established that "[t]he Superior Court has the inherent authority to enforce its orders." *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 846, 100 A.3d 909 (2014), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015). As our Supreme Court has explained, "the trial court's continuing jurisdiction to effectuate prior judgments . . . is not separate from, but, rather, *derives* from, its equitable authority to vindicate judgments." (Emphasis in original.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 241, 796 A.2d 1164 (2002). For that reason, "it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Rocque* v. *Light Sources, Inc.*, 275 Conn. 420, 433, 881 A.2d 230 (2005); see also *Connecticut Pharmaceutical*

Assn., Inc. v. *Milano*, 191 Conn. 555, 563–64, 468 A.2d 1230 (1983) ("the court, in the exercise of its equitable powers, necessarily had the authority to fashion whatever orders were required to protect the integrity" of prior judgment); *National Law Center on Homelessness & Poverty* v. *United States Veterans Administration*, 98 F. Supp. 2d 25, 26–27 (D. D.C. 2000) ("[a] court's powers to enforce its own injunction by issuing additional orders is broad . . . particularly where the enjoined party has not fully complied with the court's earlier orders" (citation omitted; internal quotation marks omitted)).

Historically, courts of equity entertained actions to execute a decree, the precursor to actions to enforce a judgment. "A bill to execute a decree, is a bill assuming, as its basis, the principle of the decree, and seeking merely to carry it into effect." *Huddleston* v. *Williams*, 48 Tenn. 579, 581 (1870). As the United States Supreme Court explained: "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments . . . . [W]here a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle . . . ." (Internal quotation marks omitted.) *Root* v. *Woolworth*, 150 U.S. 401, 410–11, 14 S. Ct. 136, 37 L. Ed. 1123 (1893). The "main purpose" of an action to enforce a judgment likewise is to "facilitate the ultimate goal of securing satisfaction of the original cause of action." (Internal quotation marks omitted.) *Salinas* v. *Ramsey*, 234 So. 3d 569, 571 (Fla. 2018).

Under Connecticut law, when a party obtains a valid and final judgment, "[t]he plaintiff's original claim is . . . merged in the judgment." (Internal quotation marks omitted.) *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 364, 511 A.2d 333 (1986). An action to enforce a judgment ordinarily involves no new

claim or cause of action—it merely is an attempt to carry out and effectuate a prior decree. See *Root* v. *Woolworth*, supra, 150 U.S. 411. For that reason, an action to enforce a judgment necessarily involves the same underlying claim as that which animated the prior judgment.

Accordingly, when a party seeks to enforce a prior judgment, the critical question is whether the prior judgment encompasses the conduct of which the plaintiff now complains. See *Garguilo* v. *Moore*, supra, 156 Conn. 361–65 (in "action to enforce the terms of the [prior] judgment," it is "necessary to inquire into the meaning and scope of the provisions contained in that judgment"). Because a valid and final judgment manifests the merger of all claims that were brought in the prior action, conduct that falls within the scope of the prior judgment necessarily involves the same claim as that advanced in the prior action and, thus, is subject to preclusion.[20] Moreover, "[w]hen the plaintiff brings an action upon the judgment, the defendant cannot avail himself of defenses which he might have interposed in the original action" because those defenses would be responsive to the merged claims. 1 Restatement (Second), supra, § 18, comment (c), p. 154.

Because the critical inquiry in considering an action to enforce is whether the conduct in question is within

[20] For that reason, application of the transactional test that governs res judicata claims in the specific sense; see, e.g., *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007); is inapposite in the context of an action to enforce a prior judgment. The transactional test operates as a screening mechanism to prevent a party from obtaining "a second bite at the apple [when] the present claims are ones arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not in the [prior action]." (Internal quotation marks omitted.) *Larry* v. *Powerski*, 148 F. Supp. 3d 584, 597 (E.D. Mich. 2015). When a party brings an action to enforce a prior judgment, the prior claims, while relevant for purposes of considering the scope of the judgment, are not themselves being relitigated because they have been merged into the judgment.

the scope of the prior judgment, it is necessary to compare the complaint in the second action with the claims that were (1) alleged in the pleadings of the prior action and (2) resolved in the judgment rendered by the court. See *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (measuring preclusive effect of prior judgment by comparing "the complaint in the second action with the pleadings and the judgment in the earlier action"); *Dept. of Public Safety* v. *Freedom of Information Commission*, 103 Conn. App. 571, 582 n.10, 930 A.2d 739 (judicial decision "stands only for those issues presented to, and considered by, the court"), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007); cf. *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 14 n.4, 151 A.3d 358 (2016) ("[i]t is fundamental to our law that the right of a [party] to recover is limited to the allegations in his [pleadings]" (internal quotation marks omitted)).

Accordingly, our analysis begins with an examination of the 1952 action. At issue was the defendant's construction of a six foot high iron fence that impaired the ability of the general public to freely access and use Miami Beach. In the third count of their complaint, the plaintiffs alleged that the defendant had "interfered with the rights . . . of the general public to free and unimpeded use of [Miami Beach], [had] prevented their free use and enjoyment thereof, and [had] caused . . . said general public irreparable loss and injury."

In rendering judgment in favor of the plaintiffs, the court first noted that the plaintiffs in the 1952 action sought both "a mandatory injunction requiring [the defendant] to remove from [Miami Beach] all obstructions to free entry and egress thereon," and "an injunction restraining [the defendant] from interfering with the rights of the plaintiffs to free entry and egress, and to free and unimpeded use and enjoyment of [Miami

Beach] along its entire length and width from now henceforth . . . .'' The court specifically found that Hilliard had ''dedicated for public use the strip of land known as [Miami Beach]'' and that ''this dedication for such use by [Hilliard] was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of [the 1952] action.'' The court then ordered in relevant part: ''[The defendant is] hereby enjoined . . . from maintaining and establishing . . . a steel and wire fence across [Miami Beach and must] remove from [Miami Beach] the . . . fence which [it has] erected . . . and it is further adjudged that [the defendant is] hereby enjoined . . . from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, from now henceforth . . . .''

In the present case, the plaintiffs alleged in their complaint that the court, in rendering the 1953 judgment, had ''found that [Miami Beach] . . . is dedicated for public use.'' The plaintiffs further alleged that measures implemented by the defendant as part of the Clean Beach Program illegally interfered with the right of the general public to freely access and use Miami Beach. See footnote 12 of this opinion. The plaintiffs thus requested, inter alia, injunctive relief ''ordering the removal of the fence blocking public access to Miami Beach'' and ''enjoining the defendant from charging fees and issuing permits for use of Miami Beach.''

In its principal appellate brief, the defendant concedes that it ''does not have the right to prevent access'' to Miami Beach in light of the mandate of the 1953 judgment but argues that the Clean Beach Program and fence merely ''regulate'' access and use of Miami Beach. For that reason, the defendant claims that the court improperly concluded that the 1953 judgment precludes

it from "defending" its Clean Beach Program because it is not the same claim, and its motives and the expectations of the parties are different. We do not agree.

In the third count of their complaint, the plaintiffs in the 1952 action alleged in relevant part that the defendant interfered with the rights of the plaintiffs and other members of the general public "to free and unimpeded use" of Miami Beach, and alleged that the defendant had "prevented their free use and enjoyment thereof . . . ." In rendering judgment in favor of the plaintiffs, the court agreed and found that Hilliard had "dedicated for public use the strip of land known as [Miami Beach]," and that "this dedication for such use by [Hilliard] was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of [the 1952] action." The court then ordered in relevant part: "[The defendant is] hereby enjoined . . . from maintaining and establishing . . . a steel and wire fence across [Miami Beach and must] remove from [Miami Beach] the . . . fence which [it has] erected . . . and it is further adjudged that [the defendant is] hereby enjoined . . . from interfering with the rights of the plaintiffs and the unorganized public to *free* entry and egress, and to *free and unimpeded use and enjoyment* of [Miami Beach] along its entire length and width, from now henceforth . . . ." (Emphasis added.)

Under Connecticut law, "judgments are to be construed in the same fashion as other written instruments." (Internal quotation marks omitted.) *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, supra, 320 Conn. 355. It is well established that "[a]n interpretation which gives effect to all provisions of the [written instrument] is preferred to one which renders part of the writing superfluous, useless or inexplicable." 11 R. Lord, Williston on Contracts (4th Ed. 2012) § 32:5, p. 704; see

also *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 298, 685 A.2d 305 (1996) (parties do not insert meaningless provisions in written agreements); *Downs* v. *National Casualty Co.*, 146 Conn. 490, 495, 152 A.2d 316 (1959) ("[e]very provision is to be given effect, if possible, and no word or clause eliminated as meaningless, or disregarded as inoperative"); *Johnson* v. *Allen*, 70 Conn. 738, 744, 40 A. 1056 (1898) ("We cannot . . . regard [certain provisions] as surplusage, nor ignore them. We must take the [written instrument] as a whole as we find it and give effect, if possible to all its terms . . . .").

The 1953 judgment plainly recognized the right of the general public both "to free entry and egress" on Miami Beach and "to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width . . . ."[21] As such, the court properly concluded that the defendant's erection of a fence, a gated entrance, and the imposition of fees and permits are restrictions encompassed by, and thus violative of, the 1953 judgment.

The conduct complained of by the plaintiffs in the present case—the construction of a fence with an entrance gate, and the creation of a fee structure and permit program to use Miami Beach—is within the scope of the 1953 judgment, which enjoined the defendant "from maintaining and establishing" a fence on the property and from interfering with the right of the

[21] Webster's Third New International Dictionary defines the word "unimpeded" as "free from anything that impedes or hampers." Webster's Third New International Dictionary (2002) p. 2499.

Black's Law Dictionary defines the word "enjoyment" as "1. Possession and use, esp. of right of property. 2. The exercise of a right." Black's Law Dictionary (11th Ed. 2019) p. 670. In a more general sense, enjoyment is defined as "the action or state of enjoying something: the deriving of pleasure or satisfaction (as in the possession of anything)." Webster's Third New International Dictionary, supra, p. 754. The word "enjoy," in turn, is defined as "to have in possession for one's use or satisfaction . . . ." Id.

"unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width . . . ." We therefore conclude that the court properly determined that the 1953 judgment precluded the defendant from restricting public access and use of Miami Beach.

III

PRIVITY

The defendant also claims that the court improperly concluded that the plaintiffs were in privity with the plaintiffs in the 1952 action such that they could enforce the 1953 judgment. More specifically, it argues that the plaintiffs, as nonparties to the 1952 action, are not entitled to the benefits of that prior judgment. We do not agree.[22]

[22] We appreciate the sentiments expressed in the concurring opinion and recognize that privity and standing are distinct concepts. As one Connecticut judge has observed, there is a "distinction between standing (having a sufficiently colorable claim to be allowed to pursue a claim) and privity (actual effect of an actual or presumed legal relationship) . . . ." *Claridge Associates, LLC* v. *Pursuit Partners, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-15-6026069-S (November 14, 2018); accord *Ovnik* v. *Podolskey*, 86 N.E.3d 1093, 1100–1101 (Ill. App. 2017) (The court noted "the distinction between standing and privity. Standing refers to whether a litigant is entitled to have the court decide the merits of a dispute or a particular issue and requires some injury in fact to a legally recognized interest. . . . Privity, in turn, exists when parties adequately represent the same legal interests, irrespective of their nominal identities." (Citation omitted; internal quotation marks omitted.)), appeal denied, 94 N.E.3d 676 (Ill. 2018).

While we recognize that the defendant has raised no claim that the plaintiffs lack standing or a colorable claim of aggrievement, we are unaware of any authority that suggests that standing obviates the need to address, when raised by the defendant, a challenge to a plaintiff's claim of privity in an enforcement action where the plaintiffs are not identical to the plaintiffs who secured a favorable judgment in the prior action. Here, the defendant frames its challenge to the court's privity determination as one that operates to "bar the defendant from contesting the current plaintiffs' claims." As we discussed in part I of this opinion, in an action to enforce a valid and final judgment, the doctrine of merger precludes a defendant from relitigating the underlying claims, including the pursuit of any special defenses or counterclaims it could have raised in the prior action. Because the plaintiffs, as

"Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. . . . The statement that a person is bound by or has the benefit of a judgment as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by and entitled to the benefits of all or some of the rules of res judicata by way of merger . . . ." (Citations omitted.) Restatement (First), Judgments § 83, comment (a), pp. 389–90 (1942). As our Supreme Court has explained, "[p]rivity is a difficult concept to define precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that [the doctrines of preclusion] should be applied only when there exists such an identification in interest of one person with another as to

nonparties to the 1952 action, nevertheless claim entitlement to the benefit of that judgment, specifically, those remedies within the scope of the original judgment without having to relitigate the underlying claims via an enforcement action, the defendant's challenge to the court's privity determination is one this court properly must address.

In its principal appellate brief, the defendant argues that nonparties to a prior action generally are not entitled to the benefits of a prior judgment. Our discussion of the issue of privity is confined to the question of whether the plaintiffs in the present case are entitled to the benefits of the 1953 judgment. We are aware of no authority in which a court, in this jurisdiction or elsewhere, has held that privity among parties is a prerequisite to an action to enforce a prior judgment, and we do not so hold in this case. We simply address the claim raised by the defendant regarding the plaintiffs' entitlement to the benefits of the 1953 judgment.

represent the same legal rights so as to justify preclusion." (Citation omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 813–14, 695 A.2d 1010 (1997).

"A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks omitted.) Id., 813. "[O]ne person is in privity with another and is bound by and entitled to the benefits of a judgment as though he was a party when there is such an identification of interest between the two as to represent the same legal right . . . ." (Internal quotation marks omitted.) *Collins* v. *E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 176 (3d Cir. 1994).

The present case involves the same legal rights that were asserted in the 1952 action and memorialized in the 1953 judgment. The plaintiffs in the 1952 action specifically alleged in their complaint that they were "acting as members of the general public" to vindicate "the rights of the plaintiffs and other members of the general public to free and unimpeded use" of Miami Beach. In rendering the 1953 judgment, the court enjoined the defendant "from interfering with the rights of . . . the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, from now henceforth . . . ." The present case is predicated entirely on those same legal rights, as the plaintiffs asserted illegal interference with their rights as members of the general public to access and use Miami Beach; see footnote 10 of this opinion; in accordance with the mandate of the 1953 judgment.[23]

[23] For that reason, the defendant's reliance on *Wheeler* v. *Beachcroft LLC*, supra, 320 Conn. 146, is misplaced. In *Wheeler*, our Supreme Court held that individual lot owners in a neighborhood were not in privity with other lot owners who brought earlier actions "with regard to their prescriptive easement claims . . . ." Id., 168. As the court explained, "[b]ecause parties may share some legal rights and not others, parties may be in privity with respect to some claims, but not others, for res judicata purposes. . . . The trial court . . . held as much, concluding that the plaintiffs are in privity

It also is noteworthy that this action involves a real property dispute. As the United States Supreme Court has observed, "[t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, 463 U.S. 110, 129 n.10, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983). For that reason, "[a] finding of privity [when there is a sufficiently close relationship between the parties] is particularly appropriate in cases involving interests in real property . . . ." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003). Here, the same parcel of property underlies both the 1952 action and the present action. In addition, the source of the right underlying the claims of both sets of plaintiffs is the same—the conveyance instruments executed by Hilliard, the original owner of the property in question.[24] Moreover, both actions originated from

with the other lot owners with regards to their implied easement, express easement, and covenant appurtenant claims but not their prescriptive easement . . . claims." (Citations omitted.) Id., 167. The Supreme Court further noted that "each lot owner's [prescriptive easement] claim is factually distinct and based on their individual uses of the lawn. Because some lot owners may be able to satisfy the elements of a prescriptive easement claim and others may not, depending on each lot owner's use of the lawn over a fifteen year period, all of the lot owners in the subdivision cannot be said to share the same prescriptive rights. Although the lot owners in the previous cases could litigate their *own* prescriptive easement claims, they could not be expected to know the details of and adequately litigate the plaintiffs' claims, such that the application of res judicata to them would not be unfair." (Emphasis in original.) Id., 168.

The present case, by contrast, does not involve any prescriptive easement claim. Here, the plaintiffs seek vindication of their legal rights as members of the general public to free and unimpeded access and use of Miami Beach. Those rights are not factually distinct, do not accompany passage of title, and do not depend on an individual litigant's use of the individual's own property. *Wheeler*, therefore, is inapposite.

[24] At its essence, the right of the general public set forth in those conveyance instruments constitutes a servitude on the Miami Beach property. See *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 25 n.7, 165 A.3d 193 (2017) (servitude is legal device that creates right or obligation that runs with land); 2 Restatement (Third), Property, Servitudes c. 7, intro-

nearly identical circumstances. In each instance, the defendant instituted measures that restricted the public's ability to freely access and use Miami Beach without impediment and faced legal challenges from residents of the abutting Sound View neighborhood who sought to vindicate their rights as members of the general public.

As the Restatement (Second) of Judgments notes, "[a] judgment in an action that determines interests in real . . . property . . . [c]onclusively determines the claims of the parties to the action regarding their interests; and . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself." 2 Restatement (Second), supra, § 43, p. 1. The party facing preclusion here—the defendant—was a party to the 1952 action. Because that action expressly was predicated on the plaintiffs' interests as members of the general public, and because the 1953 judgment, by its plain terms, memorialized the right of "the unorganized public" to freely access and use Miami Beach, that judgment has preclusive effect on the defendant vis-à-vis members of the general public like the plaintiffs here.

We also are mindful that the "crowning consideration [in resolving the privity question is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that [preclusion] is not inequitable." (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 77. The party to be precluded here—the defendant—was a party to the 1952 action, and, thus, the core concern in a privity analysis is not implicated here. As the court found in its memorandum of decision,

ductory note, p. 334 (2000) ("[t]he distinctive character of a servitude is its binding effect for and against successors in interest in the property to which the servitude pertains").

"[t]here is no evidence that . . . [the defendant was] not presented an opportunity to litigate fully the controversy in 1953." The record before us supports that determination and confirms that the defendant participated robustly in the 1952 action.

In light of the foregoing, the trial court properly concluded that the plaintiffs were in privity with the prior plaintiffs and thus entitled to the benefits of the 1953 judgment. As members of the general public, the plaintiffs in the present case share the same legal right as the plaintiffs in the 1952 action; see *Mazziotti* v. *Allstate Ins. Co.*, supra, 240 Conn. 813–14; and the record demonstrates that the defendant was a party to that prior action. Moreover, the policies that underlie our preclusion doctrines—"achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments"; *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 76;—would be served by finding the plaintiffs in privity with the plaintiffs in the 1952 action and permitting them to maintain this action to enforce the 1953 judgment. We therefore conclude that the plaintiffs were proper parties in the present case.

IV

EQUITABLE CONSIDERATIONS

As a final matter, we note that, when an action to enforce involves a judgment that "calls for performance, positive or negative, over a period of time, the question may arise whether circumstances have so changed as to make enforcement inequitable." 1 Restatement (Second), supra, § 18, comment (c), p. 155. On appeal, the defendant argues that it is unfair to bind it to the terms of the 1953 judgment due to the passage of decades. We disagree.

As the court found in its memorandum of decision, the defendant offered "no evidence of any substantive

legal change in the terms of the dedication of Miami Beach since the 1953 judgment." Unlike the stipulated judgment at issue in *Nauss* v. *Pinkes*, 2 Conn. App. 400, 480 A.2d 568, cert. denied, 194 Conn. 808, 483 A.2d 612 (1984), the 1953 judgment here contains no temporal limitations on the relief it provided.[25] Moreover, the public thereafter used and enjoyed Miami Beach for more than sixty years without obstruction by the defendant.[26] That conduct over one-half of a century demonstrates that both the defendant and members of the general public expected the terms of the 1953 judgment to govern the use of Miami Beach in perpetuity and undermines the defendant's claim that it is inequitable to enforce that judgment now.

Furthermore, the fact that the defendant's noncompliance with the 1953 judgment arose decades later has little bearing on the plaintiffs' ability to vindicate the rights memorialized therein. Although the General Assembly has imposed a twenty-five year statute of limitations on an action to enforce a judgment for money damages; see General Statutes § 52-598; no statutory limitation period exists for an action to enforce a judgment that is injunctive in nature. See *Quickpower International Corp.* v. *Danbury*, 69 Conn. App. 756, 759, 796 A.2d 622 (2002) (concluding that limitation period contained in "§ 52-598 (a) does not apply" because plaintiff was "seeking an injunction, not damages"); cf. *Bear* v. *Iowa District Court*, 540 N.W.2d 439,

[25] By its plain terms, the 1953 judgment enjoined the defendant "from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, *from now henceforth* . . . ." (Emphasis added.)

[26] As the court found in its memorandum of decision, "[i]n the intervening years from 1953 to 2017, the general public had free and open access to Miami Beach" and "regularly used the beach for recreation and leisure." In its principal appellate brief, the defendant likewise acknowledges that "[t]he public used [Miami Beach] for decades . . . ."

441 (Iowa 1995) ("[t]he mere passage of time . . . does not invalidate a permanent injunction").

As the court specifically noted in setting forth the applicable legal standard in its memorandum of decision, "it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Rocque* v. *Light Sources, Inc.*, supra, 275 Conn. 433; see also *Connecticut Pharmaceutical Assn., Inc.* v. *Milano*, supra, 191 Conn. 563–64. The appellate courts of this state review "the exercise of a trial court's equitable powers for an abuse of discretion." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 639, 249 A.3d 327 (2020). On the record before us, we conclude that the court did not abuse its discretion in exercising its equitable authority to vindicate the 1953 judgment with respect to the plaintiffs' right to freely access and use Miami Beach.

The judgment is affirmed.

In this opinion CRADLE, J., concurred.

MOLL, J., concurring in the judgment. I agree with parts I, II, and IV of the majority opinion and, on the basis of the analysis set forth therein, concur that the trial court properly concluded that the 1953 judgment precludes the defendant, Miami Beach Association, from restricting public access and use of the property at issue. I disagree with the analysis set forth in part III of the majority opinion, however, because, having agreed with the majority that offensive res judicata, in its specific sense as the majority describes it, is not available under Connecticut law, I do not agree with the majority's implicit endorsement in part III of its opinion that there remains a privity requirement that the plaintiffs must satisfy under the circumstances of

this case, i.e., where the beneficiaries of the 1953 judgment are members of the unorganized public. And although the majority claims to disavow the requirement of a privity showing; see footnote 22 of the majority opinion; the majority nonetheless requires one insofar as it addresses, and rejects on the merits, the defendant's claim in part III of its opinion.

In contrast, I consider the defendant's claim that the plaintiffs are not in privity with the plaintiffs in the 1952 action to be based on the faulty premise that the offensive use of res judicata is available under Connecticut law—a premise that the majority properly rejects in part I of its opinion. In my view, the defendant's challenge, when properly framed, instead implicates the distinct question of whether the plaintiffs have standing to bring this enforcement action. Here, the requirement that a party must have standing is readily satisfied by virtue of the fact that the plaintiffs are members of the unorganized public protected by the 1953 judgment. See *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 469, 28 A.3d 958 (2011) ("[i]t is axiomatic that a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim" (internal quotation marks omitted)). Accordingly, with respect to part III of the majority opinion, I concur in the judgment only.

DOUGLAS JAYNES v. COMMISSIONER OF CORRECTION
(AC 44620)

Elgo, Suarez and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder, sought a writ of habeas corpus. The petitioner had previously filed numerous

habeas petitions that were either withdrawn or dismissed. The respondent Commissioner of Correction filed a motion pursuant to statute (§ 52-470 (d)) for an order to show cause as to why the petitioner's habeas petition should not be dismissed as a result of undue delay. The petitioner did not dispute that the petition was untimely filed but claimed that he suffered from a mental illness that impaired his ability to file a habeas petition in a timely manner. The habeas court dismissed the petition for the petitioner's failure to demonstrate good cause to overcome the statutory presumption of unreasonable delay. On the petitioner's certified appeal to this court, *held*:

1. This court declined to reach the merits of the petitioner's claim that the habeas court erred in dismissing his petition because it included a claim of actual innocence, which, pursuant to § 52-470 (f), cannot be dismissed for failure to meet the statutory deadline of § 52-470 (d), that claim having been asserted for the first time on appeal: the habeas petition did not use the phrase "actual innocence" and, at the show cause hearing, because the petitioner did not assert a claim of actual innocence, the court did not address it, instead, addressing the reason for the delay on which the petitioner expressly relied, namely, claims of mental illness; accordingly, the petitioner's claim plainly reflected a strategic shift by him to raise a new argument on appeal, and it would amount to nothing more than an ambuscade of the habeas court for this court to consider a newly raised argument that was neither raised by the petitioner nor considered by that court at the time that the petitioner attempted to demonstrate that the petition should not be dismissed as untimely.

2. The habeas court did not abuse its discretion by dismissing the habeas petition, the petitioner having failed to demonstrate good cause for an untimely filing pursuant to § 52-470 (e): the court found that the petitioner's testimony explaining his mental illness as the reason for the delay consisted of bare assertions that, without more, did not overcome the statutory presumption of unreasonable delay, and the record contained ample support for the court's conclusions, specifically, that, during the show cause hearing, the petitioner stated that his mental illness did not prevent from filing prior habeas petitions because he received assistance in filing the prior petitions; moreover, the court found that the petitioner's testimony, insofar as he testified that his mental illness or stress level was the reason for the delay in filing the petition, was not credible, and, as a reviewing court, this court must defer to the credibility findings of the habeas court based on its firsthand observation of a witness' conduct, demeanor, and attitude; furthermore, even if the habeas court had found that the petitioner credibly testified that he suffered from mental illness, it did not relieve the petitioner of his burden of demonstrating that his delay in filing the petition was attributable to his mental illness, which the petitioner failed to do.

Argued May 9—officially released November 8, 2022

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Douglas Jaynes, appeals, following the granting of his petition for certification, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claims that the habeas court erred in dismissing the petition pursuant to General Statutes § 52-470 (e) because (1) it includes an allegation of actual innocence which, pursuant to § 52-470 (f), cannot be dismissed for failure to meet the statutory time limit codified in § 52-470 (d), and (2) he demonstrated good cause for the untimely filing of his petition under § 52-470 (d).[1] We affirm the judgment of the habeas court.

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in

The following facts and procedural history, as found by the habeas court or otherwise undisputed in the record, are relevant to the present appeal. On July 6, 1992, the petitioner was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a (a)[2] and sentenced to fifty-five years of incarceration. This court affirmed the petitioner's conviction on his direct appeal. *State* v. *Jaynes*, 36 Conn. App. 417, 432, 650 A.2d 1261 (1994), cert. denied, 233 Conn. 908, 658 A.2d 980 (1995).

Thereafter, the petitioner filed his first habeas petition, which was denied. Subsequently, the petitioner's uncertified appeal to this court was dismissed, and our Supreme Court denied the petitioner's petition for certification to appeal from this court's dismissal. *Jaynes* v. *Commissioner of Correction*, 61 Conn. App. 404, 406, 764 A.2d 215, cert. denied, 255 Conn. 945, 769 A.2d

this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section.

"(f) Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence, (2) a petition filed to challenge the conditions of confinement, or (3) a petition filed to challenge a conviction for a capital felony for which a sentence of death is imposed under section 53a-46a. . . ."

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

58 (2001). The parties agree that the petitioner filed numerous additional habeas petitions that were either withdrawn or dismissed. On August 7, 2019, as a self-represented party, the petitioner filed the habeas petition at issue in this appeal.

On September 28, 2020, the respondent, the Commissioner of Correction, filed a motion pursuant to § 52-470 (d) for an order to show cause as to why the petitioner's habeas petition should not be dismissed as a result of undue delay. Specifically, the respondent asserts that, pursuant to § 52-470 (d), the petitioner had until October 1, 2014, to file a habeas petition subsequent to a judgment rendered on a prior petition challenging the same conviction, and, therefore, the habeas petition had to be dismissed unless the petitioner could demonstrate good cause for the delay. On October 22, 2020, the habeas court, *Oliver*, *J.*, granted the motion for a show cause hearing. On February 4, 2021, the habeas court held a hearing on the respondent's motion. At the hearing, the petitioner did not dispute that his habeas petition was untimely. Instead, he sought to show that there was good cause for the delay in filing the petition because he suffered from a mental illness that impaired his ability to file a habeas petition in a timely manner. At the hearing, the petitioner testified that he had been diagnosed as "paranoid schizophrenic" and had been prescribed antidepressants. He claimed that his mental illness left him "very confused and mixed up about a lot of things . . . ." On cross-examination, however, the petitioner admitted that his mental illness did not prevent him from filing habeas petitions. Rather, he claimed that his mental illness was "[s]ometimes" the reason for withdrawing his prior petitions, but other times it was due to his frustration with the legal system.

Following the hearing, in a memorandum of decision, the habeas court dismissed the habeas petition for the

petitioner's failure to demonstrate good cause to overcome the statutory presumption of unreasonable delay as established in § 52-470 (d) and (e). The habeas court specifically stated that it took judicial notice of the previous habeas filings and their dispositions, considered the evidence adduced at trial, and applied the factors set forth in *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 34–35, 244 A.3d 171 (2020), aff'd, 343 Conn. 424, 274 A.3d 85 (2022). The habeas court found that the testimony of the petitioner was not credible. Additionally, the habeas court found that the petitioner's testimony regarding his mental illness "consisted of bare assertions." Ultimately, the habeas court found that the petitioner's "assertions, without more, rendered the petitioner's evidence too loose and equivocal to overcome the aforementioned statutory presumption." Thereafter, the petitioner sought certification to appeal, which the habeas court granted. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner asserts, for the first time on appeal, that the habeas court erred in dismissing his habeas petition because it includes a claim of actual innocence, which, pursuant to § 52-470 (f), cannot be dismissed for failure to meet the statutory deadline of § 52-470 (d). In response, the respondent avers that "the petitioner never asserted a claim of actual innocence in his petition nor did he do so at the 'show cause' hearing." Therefore, according to the respondent, "the habeas court could not have abused its discretion with respect to a claim that the petitioner never raised below." We agree with the respondent.

Our review of the habeas petition reveals, and the petitioner does not appear to dispute, that in the petition filed by the petitioner as a self-represented party, he

did not use the phrase "actual innocence." In the space provided for question five on the state supplied form for bringing the habeas petition, which was utilized by the petitioner in this case, the petitioner was asked to set forth the reason why his conviction was illegal. The petitioner wrote that "the arrest was unsupervised by [the police]," he had an impaired mental state at the time of trial, and he "was never given the chance at [his] probable cause hearing to do questioning."[3]

The petitioner argues that it was unnecessary for him to have used the phrase "actual innocence" in his habeas petition, and that the habeas court should have recognized a claim of actual innocence based on statements in the habeas petition such as "I did not murder the male" and "life is priceless." The petitioner further alleged that he did not own the clothes a witness claimed the assailant was wearing, and that he was "in a[n] after-hours place drinking around the time of the incident." The petitioner asserts that it is well established that courts should not interpret habeas petitions in a hypertechnical manner but should, instead, construe pleadings broadly, and that "Connecticut courts [are] to be solicitous of [self-represented] litigants . . . when it does not interfere with the rights of other parties." (Internal quotation marks omitted.)

The respondent argues that the present claim is unreviewable because it was raised for the first time on appeal and, therefore, the habeas court could not have abused its discretion. In the alternative, the respondent argues that, even if the petitioner relied on the existence of an actual innocence claim at the show cause hearing, the habeas petition does not contain such a claim. The

[3] The petitioner attached to the completed state supplied form twenty-eight handwritten pages that we have also considered as part of the petition for a writ of habeas corpus. Because we do not reach the merits of the petitioner's claim that the petition, in substance, set forth a claim of actual innocence, it is unnecessary for us to describe these pages in detail.

petitioner does not address the respondent's arguments with any authority, nor are we aware of any, that abrogates his obligation to preserve this claim for appellate review by distinctly raising it before the habeas court.

We carefully have reviewed the transcripts of the show cause hearing. At the hearing, the petitioner, then represented by counsel, did not argue that the habeas petition should not be dismissed because it included a claim of actual innocence. Because the petitioner did not assert an actual innocence claim at the show cause hearing, the court did not address it. Instead, in its order, the court addressed the reason for the delay on which the petitioner expressly relied, namely, his mental illness.

"Our law is well settled that a party may not try its case on one theory and appeal on another. . . . Arguments asserted in support of a claim for the first time on appeal are not preserved. . . . Our Supreme Court has stated that shift[s] in arguments [on appeal are] troubling because, as [the court] previously ha[s] noted, to review . . . claim[s] . . . articulated for the first time on appeal and not [raised] before the trial court, would [be nothing more than] a trial by ambuscade of the trial judge." (Citations omitted; internal quotation marks omitted.) *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 181–82, 143 A.3d 1106, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); see also *Bligh* v. *Travelers Home & Marine Ins. Co.*, 154 Conn. App. 564, 577, 109 A.3d 481 (2015) ("[o]rdinarily appellate review is not available to a party who follows one strategic path at trial and another on appeal, when the original strategy does not produce the desired result" (internal quotation marks omitted)).

We are persuaded that the petitioner's claim, which relies on an allegation of actual innocence, plainly reflects a strategic shift by the petitioner to raise a new

argument on appeal. It would amount to nothing more than an ambuscade of the habeas court for us to consider this newly raised argument that was neither raised by the petitioner nor considered by the court at the time that the petitioner attempted to demonstrate that the petition should not be dismissed as untimely. Accordingly, we decline to reach the merits of this claim.

II

The petitioner next claims that the habeas court erred in dismissing the habeas petition because he demonstrated good cause for the untimely filing of his petition under § 52-470 (e). We are not persuaded.

The petitioner argues that, at the show cause hearing, he presented sufficient evidence with respect to his mental illness to establish good cause for the delay under the four factors set forth in *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 34–35.[4]

[4] In *Kelsey*, this court identified the following nonexhaustive list of factors to aid in determining whether a petitioner has satisfied the issue of good cause: "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition." *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 34–35. In *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441–42, our Supreme Court adopted these factors and, after a consideration of relevant legislative history, added that, "although . . . the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. As with any excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge." (Footnote omitted.) Id., 444–45.

Consistent with *Kelsey*'s analytical approach, the petitioner argues: (1) his "mental health is outside of his control, which causes him confusion [and] stress and that his illness is severe," and he lacked "control over his mental health medication regime"; (2) the record is bare as to whether he or his counsel was the reason for the untimely filing; (3) there was evidence of which the habeas court took judicial notice, such as a decades old diagnosis of mental illness, that supports a finding that his mental illness was the cause of the delay; and (4) although the habeas petition was filed almost five years after the deadline, he has filed and withdrawn numerous habeas petitions during that time period. The petitioner argues further that the habeas court's dismissal of the habeas petition he filed as a self-represented party is contrary to what he characterizes as Connecticut's "historic efforts to preserve the Great Writ."

Additionally, the petitioner contends that the habeas court abused its discretion because, he claims, "[his] . . . significant mental health issues cannot reasonably be disputed." In support of his claim that his mental illness constitutes good cause for the delay in filing the petition, the petitioner asserts that the entirety of his first habeas proceeding was related to his trial attorney's alleged failure to investigate issues related to his mental illness, and he points to his "sprawling and at times rambling [self-represented] petition" in the present case.

The respondent argues that the habeas court did not abuse its discretion in finding a lack of good cause for the delay in filing the habeas petition. The crux of the respondent's argument is that the habeas court found the petitioner's testimony at the show cause hearing, that his mental illness was the cause of delay, not to be credible. This finding of fact, the respondent asserts, cannot be disturbed by this court. Therefore, the

respondent argues that, on the basis of this finding, it was reasonable for the habeas court to conclude that there was no good cause for the delay.

We begin by setting forth the applicable standard of review and legal principles that guide our resolution of this claim. "[A] habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotations marks omitted.) *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 440, 274 A.3d 85 (2022).

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay. . . . [I]n evaluating whether a petitioner has established good cause to overcome the rebuttable presumption of unreasonable delay in filing a late petition under § 52-470, the habeas court does not make a strictly legal determination. Nor is the court simply finding facts. Rather, it is deciding, after weighing a variety of subordinate facts and legal arguments, whether a party has met a statutorily prescribed evidentiary threshold necessary to allow an untimely filed petition to proceed. This process is a classic exercise of discretionary authority, and, as such, we will overturn a habeas court's determination regarding good cause under § 52-470 only if it has abused the considerable discretion afforded to it under the statute.

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and

in a manner to serve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . . [A] habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony. . . .

"It is well settled that this court does not disturb the factual findings of the habeas court unless they are clearly erroneous. . . . [T]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Ortiz* v. *Commissioner of Correction*, 211 Conn. App. 378, 384–87, 272 A.3d 692, cert. denied, 343 Conn. 927, 281 A.3d 1186 (2022).

Bearing in mind our standard of review, we now examine the decision of the habeas court. The habeas court concluded that the petitioner "failed to demonstrate good cause to overcome the statutory presumption of unreasonable delay . . . ." Specifically, the habeas court noted that it did not find the petitioner's testimony regarding his reasons for the delay to be credible. Furthermore, the habeas court found that the petitioner's testimony explaining his mental illness as

the reason for the delay consisted of bare assertions that, without more, did not overcome the statutory presumption.

The record contains ample support for the habeas court's conclusions. During his direct examination at the show cause hearing, the petitioner testified that the underlying petition was untimely because he was "going through a whole lot of different issues . . . mentally wise and physically." The petitioner testified that he was experiencing "stress" from being incarcerated. He also testified that he was experiencing "pain and suffering . . . from what happened to [him] in 2017."[5] He testified that he was diagnosed with paranoid schizophrenia and that he was taking medication. He testified that he had been experiencing mental difficulties, including "racing thoughts, delusions, hearing voices," but that these issues had resolved when he received treatment beginning one month prior to the show cause hearing.

As the respondent points out, during the show cause hearing the petitioner stated that his alleged mental illness did not always explain his litigation history with respect to filing habeas petitions. For example, during his cross-examination by the respondent's counsel, the petitioner testified that his mental illness did not prevent him from filing prior habeas petitions because he received assistance in filing the prior petitions and did not do it by himself. The petitioner testified, "I'm still able to do it, but not without help."

During his redirect examination, the petitioner's counsel asked him whether his "mental health" was the cause of his withdrawal of prior petitions. The petitioner testified: "Sometimes. Sometimes. Not all of the time. Sometimes I get so frustrated, the legal system, and all I've been through that it's best for me to fall

[5] The petitioner did not articulate further what occurred to him in 2017.

back rather than just, you know, just totally just give up, you see. . . . [I]t's just that sometime you got to fall back. You have to fall back, you know. You have to . . . fall back the stress . . . especially the stress level. The stress level is not good. I just talked to the doctor about that the other day."

The habeas court found that the petitioner's testimony, insofar as he testified that his mental illness, or stress level, was the reason for the delay in filing the petition, was not credible. As a reviewing court, we must defer to the credibility findings of the habeas court based on its firsthand observation of a witness' conduct, demeanor, and attitude. See *David P.* v. *Commissioner of Correction*, 167 Conn. App. 455, 470, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016). The court's unassailable assessment of the petitioner's uncorroborated testimony concerning the reason for his late filing supported its finding that the petitioner had not proven good cause for the delay. The petitioner has failed to demonstrate that the finding was not supported by the evidence or that, when considering the evidence as a whole, that a mistake has been committed.

To the extent that the petitioner argues that his mental illness cannot reasonably be disputed, we observe that the court, in its decision, states that his "assertions, without more, rendered [his] evidence too loose and equivocal to overcome the . . . statutory presumption" of unreasonable delay. Even if the habeas court had found that the petitioner credibly testified that he suffered from mental illness, it did not relieve the petitioner of his burden of demonstrating that his delay in filing was attributable to his mental illness. See *Ortiz* v. *Commissioner of Correction*, supra, 211 Conn. App. 388.

The petitioner did not provide the court with credible evidence sufficiently linking the claimed mental illness

to the late filing. The petitioner's reliance on his uncorroborated testimony, which was found not to be credible, is unavailing. Because the record contains ample support for the habeas court's conclusion, the habeas court did not abuse its discretion in finding that the petitioner did not establish good cause sufficient to overcome the statutory presumption of unreasonable delay.

We therefore conclude the habeas court did not err by dismissing the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

ALAN FISCHER ET AL. *v.* PEOPLE'S UNITED BANK, N.A., ET AL.
(AC 44872)

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

Syllabus

The plaintiffs, L Co., a mortgagor, F, its guarantor, and F Co., F's real estate company, sought to recover damages from the defendant bank and two of its officers after the bank rescinded its offer to refinance L Co.'s mortgage and L Co. defaulted on that mortgage. F commenced this action on behalf of all three plaintiffs, filing a five count complaint. Counts one through four were brought by all three plaintiffs and alleged breach of contract, breach of the implied covenant of good faith and fair dealing, violations of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.), and tortious interference with business expectancies, respectively. Count five was brought by F only and alleged negligent infliction of emotional distress. The trial court granted the defendants' motion to dismiss, dismissing for lack of standing all claims brought by L Co. and the claims brought by F and F Co. that were set forth in the first, second, and third counts of the complaint. On the plaintiffs' appeal to this court, *held*:

1. The portion of the appeal that pertained to the claims of F and F Co. was dismissed because they did not appeal from a final judgment: the trial court's ruling with respect to F and F Co. was only a partial judgment because it did not fully dispose of counts four and five of the complaint;

accordingly, this court did not have jurisdiction to review the appeal with respect to their claims.

2. The trial court properly determined that L Co. lacked standing to bring this action and, accordingly, the court properly dismissed the claims brought by L Co. for a lack of jurisdiction: L Co. failed to meet its burden to establish that F, acting alone on behalf of L Co.'s general partner, A Co., was legally authorized to commence the action on behalf of L Co., as L Co.'s partnership agreement granted A Co., a member managed limited liability company, full management and control over L Co., and, although F was one of the three members of A Co., because the decision to commence litigation on behalf of L Co. was not within the scope of A Co.'s ordinary business and was a decision that affected the policy and management of A Co., the authorization of A Co.'s other two members was required to commence litigation, which was not forthcoming; moreover, F's management responsibilities in his role as property manager of the mortgaged property and his statements asserting that he was the sole member of A Co. to carry out operations on behalf of L Co. did not undermine the clear and unambiguous language of L Co.'s partnership agreement, which granted A Co. the exclusive right to bring an action on L Co.'s behalf, or A Co.'s operating agreement, which required the unanimous consent of A Co.'s members for decisions affecting the policy and management of A Co. and those outside the scope of A Co.'s ordinary business; furthermore, L Co.'s partnership agreement and A Co.'s operating agreement prohibited A Co. from removing itself from its role as L Co.'s general partner and from delegating to F its exclusive control and management of L Co., and there was no support in the record that any such delegation had occurred.

Argued September 6—officially released November 8, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Pierson, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Appeal dismissed in part*; *affirmed.*

Laurence V. Parnoff, Jr., and *Laurence V. Parnoff, Sr.*, filed a brief for the appellants (plaintiffs).

James T. Shearin, with whom were *Dana M. Hrelic*, and, on the brief, *Potoula Tournas*, for the appellees (defendants).

Opinion

PRESCOTT, J. This appeal arises out of an action brought by the plaintiffs, Alan Fischer, Fischer Real Estate, Inc., and 1730 State Street Limited Partnership (1730 LP), against the defendants, People's United Bank, N.A. (People's United), and two of its officers, Kenneth Nuzzolo and Virgilio Lopez.[1] The underlying action was brought after People's United, 1730 LP's mortgage lender, rescinded its offer to refinance a mortgage executed by 1730 LP in 2010 (2010 mortgage) on real property located at 1730 Commerce Drive in Bridgeport (property), following which 1730 LP defaulted on the 2010 mortgage.

The plaintiffs appeal from the judgment of the trial court granting the defendants' motion to dismiss. The trial court held that it lacked subject matter jurisdiction over all counts of the operative five count complaint brought by 1730 LP because 1730 LP was not legally authorized to bring the underlying action, thereby depriving it of standing. The court also held that Fischer and Fischer Real Estate, Inc., lacked standing to bring the first, second, and third counts of the complaint because Fischer and Fischer Real Estate, Inc., did not suffer a direct injury from the defendants' actions rescinding the mortgage commitment letter and, thus, did not have standing to bring those counts.

The plaintiffs claim on appeal that the court improperly held that 1730 LP lacked standing because, contrary to the court's determination, Fischer had authority under the relevant corporate governance documents to permit 1730 LP to commence the underlying action. The plaintiffs also claim on appeal that Fischer and

[1] We refer in this opinion to Fischer, Fischer Real Estate, Inc., and 1730 LP collectively as the plaintiffs and to People's United, Nuzzolo, and Lopez collectively as the defendants. Where appropriate, we refer to the parties individually by name.

Fischer Real Estate, Inc., had standing to bring counts one, two, and three because Fischer and Fischer Real Estate, Inc., suffered a direct injury from the defendants' actions separate from the injury suffered by 1730 LP. On appeal, prior to oral argument, this court ordered the parties to file supplemental briefs addressing whether Fischer and Fischer Real Estate, Inc., appealed from a final judgment because two of the counts brought by them were not disposed of in the trial court's judgment of dismissal and thereby remain pending in the trial court.

We conclude that (1) the judgment dismissing some, but not all, counts of the complaint brought by Fischer and Fischer Real Estate, Inc., is not an appealable final judgment, and (2) the court properly dismissed all counts brought by 1730 LP for a lack of subject matter jurisdiction because 1730 LP's general partner did not authorize the commencement of the action against the defendants. Accordingly, we dismiss the appeal as it pertains to Fischer and Fischer Real Estate, Inc., and affirm the court's judgment of dismissal as it relates to the claims brought by 1730 LP.

The following facts, which are either undisputed or are taken from the underlying complaint, and procedural history are relevant to our resolution of the appeal. Fischer is a licensed real estate broker who owns and operates Fischer Real Estate, Inc., and is the guarantor of the 2010 mortgage executed by 1730 LP on the property.

As provided in 1730 LP's partnership agreement, AJC Management, LLC (AJC), a limited liability company, is the general partner of 1730 LP and "ha[s] full, exclusive and complete discretion" to manage and control 1730 LP. This includes the general partner's right to "[c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP]." The agreement

further restricts AJC from removing itself, or being removed, from its role as general partner. Fischer is one of three members of AJC. The other members of AJC are Jefferson Scinto and Christian Scinto.

Under AJC's operating agreement, which controls the rights and obligations of its members, "[a]ll decisions affecting the policy and management of [AJC] shall be made by unanimous consent of the Members." The operating agreement also limits the purpose and scope of AJC's business, stating in relevant part: "The business . . . shall be limited to (i) the sale, acquisition, ownership, development, operation, lease, investment and management of real properties . . . . The business of the Company shall not be extended by implication or otherwise beyond the scope of this Agreement."

On behalf of AJC, Fischer has managed the property owned by 1730 LP since 1998. Fischer's duties on behalf of AJC have included acting as the property's sole property manager and negotiating and securing mortgages for the property.

On or about December, 2019, Fischer began negotiating with People's United, through Lopez, to refinance the 2010 mortgage loan on the property. As a result of the negotiations, People's United offered to refinance the 2010 mortgage under new terms, which would include lower interest rates, and to extend a new loan for environmental remedial costs. People's United confirmed these offers in a mortgage commitment letter dated July 28, 2020. Thereafter, People's United sent Fischer a checklist of the documents it required in order to formalize the new loan and refinance the 2010 mortgage.

The initial checklist of required documents included the 1730 LP partnership agreement. After People's United received and reviewed the 1730 LP partnership

agreement, it requested that Fischer provide a resolution from AJC, 1730 LP's general partner, that was signed by all of AJC's members and stated that AJC authorized the loan and execution of the closing documents. Due to a dispute between the members of AJC, People's United never received a resolution that was signed by all members of AJC.[2] On August 24, 2020, People's United notified Fischer that the July 28, 2020 commitment letter was rescinded due to Fischer's failure to obtain an acceptable resolution from AJC. As a result of the unsuccessful refinancing of the property's loan, the 2010 mortgage was declared to be in default on August 26, 2020.[3]

Following the default on the 2010 mortgage, the plaintiffs initiated the underlying action. The plaintiffs' operative complaint alleged that, as a result of People's United having rescinded its refinancing offer, the plaintiffs suffered financial damages from 1730 LP's resulting mortgage default. The complaint contained five counts. Counts one, two, three, and four were brought by all three plaintiffs and alleged breach of contract, breach

[2] Fischer proposed that the language of the resolution from AJC read: "The undersigned manager/members of [AJC], the General Partner of [1730 LP] (the 'Borrower'), confirm that [Fischer] manager/member, pursuant to an agreement of the undersigned members of [AJC], had, and continues to have, full responsibility for the operation of [AJC] . . . ." Christian Scinto and Jefferson Scinto refused to sign a resolution containing the language proposed by Fischer and instead proposed different language: "The undersigned members of [AJC], the General Partner of [1730 LP] (the 'Borrower'), confirm that [AJC], had, and continues to have, full responsibility for the operation of the Borrower . . . ." Fischer refused to sign the resolution with the language proposed by the Scintos. Thus, no resolution was signed by all members of AJC due to a dispute over Fischer's purported responsibility for the operation of AJC.

[3] As a result of the default, People's United notified Fischer that a heightened default rate would apply until the note was paid in full. Counsel for People's United sent a letter to Fischer, Christian Scinto, and Jefferson Scinto on November 17, 2020, stating that the note had matured and payment was past due and providing the outstanding balance of the note as of November 16, 2020.

of the implied covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and tortious interference with business expectancies. Count five was brought by Fischer only and alleged negligent infliction of emotional distress. Fischer commenced the action on behalf of all three plaintiffs. The remaining members of AJC, however, never authorized AJC to bring an action on behalf of 1730 LP.

On January 19, 2021, the defendants filed a motion to dismiss all counts of the complaint brought on behalf of 1730 LP and counts one, two, and three in their entirety. The defendants argued that the court did not have subject matter jurisdiction over those counts because the plaintiffs lacked standing. In support, the defendants filed a memorandum of law with exhibits, which included an affidavit from Christian Scinto. In response, the plaintiffs filed an objection to the defendants' motion to dismiss, a memorandum of law in opposition to the motion to dismiss with supporting exhibits, and an affidavit from Fischer. Subsequently, the defendants submitted a reply memorandum in support of their motion to dismiss. In addition to the affidavits from Christian Scinto and Fischer, the record before the court included, in relevant part, copies of the 1730 LP partnership agreement and AJC's operating agreement.

On August 3, 2021, the court issued a memorandum of decision granting the defendants' motion to dismiss all counts brought by 1730 LP and counts one, two, and three as to all plaintiffs. The court held that the factual allegations of the complaint, supplemented by the undisputed facts in the record, demonstrated that 1730 LP lacked standing to maintain the claims it brought and that Fischer and Fischer Real Estate, Inc., lacked standing with respect to the first, second, and third counts of the complaint. The fourth and fifth counts of

the complaint were not attacked in the motion to dismiss or addressed by the court in its ruling.

With respect to 1730 LP's standing to bring the action, the court held that AJC, in its role as general partner, had the sole authority to initiate an action by 1730 LP and that AJC, acting through a single member, was not legally authorized to commence the action against the defendants. Specifically, the court noted that AJC's operating agreement required unanimous consent from its members for an individual member to act outside the ordinary course of business or to engage in actions that affect the policy and management of AJC. The court was not persuaded by Fischer's argument that suing the property owner's mortgage lender was a common action for real estate companies and, therefore, he had authority to initiate the action as the property manager and without the unanimous consent of AJC's members. Instead, the court relied on the operating agreement's language that limited the scope and purpose of AJC to matters relating to the sale and management of real property and concluded that Fischer's filing of the action against the defendants did not fall within the ordinary course of business. The court also held that, even though AJC's operating agreement does not specifically address a single member's authority to commence litigation on behalf of AJC, any ambiguity is resolved by the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq., which provides that, at a minimum, the affirmative vote or consent of a majority of a company's members would be required.[4] It is undisputed that Fischer acted without

[4] AJC's operating agreement provides in relevant part: "Except as expressly provided for herein to the contrary, the rights and obligations of the Members and the administration and termination of [AJC] shall be governed by the Connecticut Limited Liability Company Act as the same may be amended from time to time." We note that AJC's operating agreement was executed in 1998; our legislature has since repealed the Connecticut Limited Liability Company Act, effective July 1, 2017, and replaced it with CULLCA.

the consent or affirmative vote of AJC's other two members.[5] The court concluded that Fischer acted alone in bringing the action and that, individually, he lacked authority to act on behalf of AJC to commence litigation on behalf of 1730 LP, pursuant to both the controlling agreements and CULLCA.

The court next addressed Fischer's and Fischer Real Estate, Inc.'s standing to maintain the first, second, and third counts of the amended complaint. The court held that Fischer and Fischer Real Estate, Inc., lacked standing to bring the first count that alleged a breach of the mortgage refinance agreement. The court noted that, regardless of Fischer's status as a guarantor of the 2010 mortgage, Fischer and Fischer Real Estate, Inc., were not parties to the 2010 mortgage and did not suffer any injury unique from the injury allegedly suffered by 1730 LP. In regard to the second and third counts, which asserted a breach of the covenant of good faith and fair dealing and CUTPA violations, the court noted that both counts relied on the first count's breach of contract claim and, because they did not suffer an injury unique from the injury suffered by 1730 LP, Fischer and Fischer Real Estate, Inc., lacked standing. The plaintiffs filed the present appeal.

On August, 17, 2022, this court, sua sponte, ordered the parties to file supplemental briefs "addressing whether this appeal should be dismissed as to the plaintiffs [Fischer] and Fischer Real Estate, Inc., for a lack of a final judgment because counts four and five of the

CULLCA, specifically General Statutes § 34-255f (b), provides in relevant part: "In a member-managed limited liability company . . . (2) Matters in the ordinary course of the activities of the company shall be decided by the affirmative vote or consent of a majority in interest of the members.

"(3) The affirmative vote or consent of two-thirds in interest of the members is required to: (A) Undertake an act outside the ordinary course of the company's activities and affairs . . . ."

[5] This fact was set forth in Christian Scinto's affidavit and was not disputed by Fischer.

[operative complaint] . . . were not disposed of by the August 3, 2021 judgment of dismissal and therefore remain pending in the trial court." Subsequently, the parties filed supplemental briefs. The plaintiffs acknowledged that "the judgment disposed of only the part of the complaint dealing with all the claims of [Fischer and Fischer Real Estate, Inc.]" but, nonetheless, argued that this court should review the trial court's judgment as it pertains to Fischer and Fischer Real Estate, Inc., on its merits.[6] In response, the defendants argued that the appeal should be dismissed as to Fischer and Fischer Real Estate, Inc., because there was no final judgment as to those plaintiffs.

I

Because it implicates the jurisdiction of this court to hear the appeal, we first consider whether the trial court's decision granting the motion to dismiss with respect to Fischer and Fischer Real Estate, Inc., constitutes a final judgment. See *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 755, 48 A.3d 16 (2012) (addressing first issue of whether trial court's order is appealable final judgment because it implicates court's subject matter jurisdiction). We conclude that because the court's decision did not dispose of all counts of the complaint with respect to Fischer and Fischer Real Estate, Inc., those plaintiffs did not appeal from a final judgment. Accordingly, we dismiss that portion of the appeal that pertains to them.

[6] The plaintiffs' supplemental brief failed to properly identify any exception that would allow the partial judgment to be considered a final judgment by this court. Although the plaintiffs quote *Heyward* v. *Judicial Dept.*, 159 Conn. App. 794, 801, 124 A.3d 920 (2015), which quotes Practice Book § 61-4 (a), that rule of practice is not applicable to the present case. Practice Book § 61-4 (a) requires the trial court to make a written determination "that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs. . . ." No such determination was made in the present case.

We begin by setting forth the relevant legal principles. "Unless otherwise provided by law, the jurisdiction of our appellate courts is restricted to appeals from final judgments. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . Accordingly, a final judgment issue is a threshold matter that must always be resolved prior to addressing the merits of an appeal. . . . Whether an appealable final judgment has occurred is a question of law over which our review is plenary. . . .

"It is axiomatic that [a] judgment that disposes of only a part of a complaint is not a final judgment. . . . Accordingly, an appeal challenging an order issued during the pendency of a civil action ordinarily must wait until there has been a final disposition as to all counts of the underlying complaint. Our rules of practice, however, set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties . . . ." (Citations omitted; internal quotation marks omitted.) *Krausman* v. *Liberty Mutual Ins. Co.*, 195 Conn. App. 682, 687–88, 227 A.3d 91 (2020); see also Practice Book § 61-3 ("[a] judgment disposing of only a part of a complaint, counterclaim or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim or cross complaint brought by or against a particular party or parties").

The complaint in the underlying action contains five counts. Counts one, two, three, and four were brought by all three of the plaintiffs. Count five was brought only by Fischer. The trial court dismissed all counts brought by 1730 LP and counts one, two, and three in their entirety. The court's ruling thus disposed of all causes of action involving 1730 LP, rendering it a final

judgment under the rules set forth in Practice Book § 61-3. In contrast, the court's ruling was only a partial judgment with respect to Fischer and Fischer Real Estate, Inc., because it did not fully dispose of counts four and five. Because all causes of action brought by Fischer and Fischer Real Estate, Inc., have not been disposed of, there is no final judgment with respect to those parties.[7] This court is deprived of jurisdiction to review this appeal with respect to the claims brought by Fischer and Fischer Real Estate, Inc. Accordingly, that portion of this appeal is dismissed.

II

We now turn to 1730 LP's claim that the court improperly granted the motion to dismiss on the basis that 1730 LP lacked standing to bring the action. Specifically, 1730 LP argues that "[t]he misinterpretation of the [AJC operating agreement] and [the 1730 LP partnership agreement]" led to an improper determination that 1730 LP lacked standing to bring this action. We are not persuaded and agree with the trial court that 1730 LP did not have standing because Fischer was not legally authorized to commence the action on behalf of AJC without the unanimous consent of AJC's members. Accordingly, we conclude that the court was deprived of jurisdiction over all counts brought by 1730 LP and that the court properly dismissed those counts as they pertained to 1730 LP.

[7] We recognize that a court's disposition of one count that is legally inconsistent or mutually exclusive of another count may be deemed to implicitly dispose of the legally inconsistent count. See *Clinton* v. *Aspinwall*, 344 Conn. 696, 704, 281 A.3d 1174 (2022). On the other hand, if an undisposed count is based on a legally consistent alternative theory, such an implicit disposition cannot be presumed. Id., 705. In the present case, there is no legal inconsistency between the plaintiffs' first three counts, which are allegations of breach of contract, breach of the covenant of good faith and fair dealing, and CUTPA violations, and the fourth and fifth counts, which are allegations of tortious interference with a business expectancy and negligent infliction of emotional distress.

We begin our analysis by setting forth the applicable standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Citation omitted; internal quotation marks omitted.) *Hayes Family Ltd. Partnership* v. *Glastonbury*, 132 Conn. App. 218, 221, 31 A.3d 429 (2011).

To the extent that we are called on to interpret the partnership or operating agreements, our standard of review is also well established. "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary] . . . and we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 403, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

In the present case, 1730 LP challenges the court's interpretation of the relevant partnership and operating agreements as it relates to the court's ultimate conclusion that Fischer lacked authority to commence litigation on behalf of AJC and, in turn, 1730 LP. Thus, our review is plenary. See id. The following legal principles are relevant to our resolution of this claim.

"[L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed. When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a 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. . . . In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial

court may dismiss the action without further proceedings." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009).

"As we also have held, [i]t is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has . . . some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . The standing requirement is designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . To fulfill these goals, the standing doctrine requires a plaintiff to demonstrate two facts. First, the complaining party must be a proper party to request adjudication of the issues. . . . Second, the person or persons who prosecute the claim on behalf of the complaining party *must have authority to represent the party*. . . .

"A complaining party ordinarily can show that it is a proper party when it makes a colorable claim of [a] direct injury [it] has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . To demonstrate authority to sue, however, it is not enough for a party merely to show a colorable claim to such authority. Rather, the party whose authority is challenged has the burden of convincing the court that the authority exists. . . . The burden of proof for questions of authority is higher than that for questions of propriety because the former

questions are more important. Lawsuits must be authorized not only to ensure that the litigants fairly and vigorously represent the party's views . . . but also because, *if unauthorized lawsuits were allowed to proceed, future rights of the named parties might be severely impaired*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 552–54, 698 A.2d 245 (1997).

In the present case, it is not disputed that 1730 LP is the proper party to request adjudication of the causes of action alleged in the complaint. Therefore, the only question before this court is whether Fischer, acting alone on behalf of AJC, had authority to commence the action by 1730 LP.

The defendants' motion to dismiss was supplemented by undisputed facts, and the plaintiffs supplied a counteraffidavit in opposition to the motion to dismiss. Thus, the operative complaint, the undisputed facts that were put forth as evidence in support of the defendants' motion to dismiss, and Fischer's counteraffidavit must all be considered to determine whether a lack of jurisdiction has been conclusively established. See *Conboy* v. *State*, supra, 292 Conn. 651–52. Because 1730 LP's authority to bring the action is challenged, it bears the burden of establishing that authority exists. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, supra, 241 Conn. 554. The 1730 LP partnership agreement and the AJC operating agreement conclusively establish that 1730 LP lacked authority to commence the action; Fischer's counteraffidavit fails to undermine this conclusion. We conclude that 1730 LP did not meet its burden in establishing that Fischer, acting alone on behalf of AJC, was legally authorized to commence litigation against 1730 LP's mortgage lender.

To resolve this claim, we first consider the operative complaint. We need not conclusively presume the validity of the allegations in the complaint and, instead, must consider them in light of the undisputed facts in the record. See *Conboy* v. *State*, supra, 292 Conn. 651–52. The operative complaint alleges that "AJC delegated its management responsibility for the operation of AJC and the property to [Fischer] pursuant to the agreement between the members of AJC." The complaint also states that Fischer continually has managed operations of 1730 LP's property since 1998 as its sole property manager. We next consider these allegations in light of the undisputed facts in the record, particularly 1730 LP's partnership agreement and AJC's operating agreement.

The 1730 LP partnership agreement sets forth who has the rights and powers to control 1730 LP. See General Statutes § 34-9 (10) (general partner is "a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement"); General Statutes § 34-10 (3) (partnership agreement shall set forth name and address of each general partner); see also General Statutes § 34-17 (a) ("[e]xcept as provided in this chapter or in the partnership agreement, a general partner of a limited partnership shall have all the rights and powers . . . of a partner in a partnership"). The partnership agreement names AJC as its "[g]eneral [p]artner." The partnership agreement further grants AJC the "full, exclusive and complete discretion in the management and control of [1730 LP] . . . . Such discretion shall include, without limitation, the right to . . . [c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP]." More so, the agreement restricts AJC from withdrawing from its position of general partner, stating: "[AJC] may not voluntarily withdraw from [1730 LP]. The Limited Partners shall have no right to remove [AJC]." According to the agreement, AJC is the proper,

and only, entity with the power to authorize the commencement of an action by 1730 LP.

AJC is a limited liability company consisting of three members: Fischer, Jefferson Scinto, and Christian Scinto. Accordingly, we turn to AJC's operating agreement to determine whether an individual member may act on behalf of AJC to commence this particular action. See General Statutes § 34-243d (a) (1) (operating agreement governs "[r]elations among the members as members and between the members and the limited liability company"). The AJC operating agreement provides in relevant part: "All decisions affecting the policy and management of the Company shall be made by unanimous consent of the Members. No change shall be made in the nature or scope of the Company business . . . ." It also provides in relevant part: "The Members may delegate to . . . an individual Member . . . any management responsibility or authority except as set forth in this Agreement to the contrary." Though the agreement does not define "decisions affecting the policy and management," it specifies a number of actions that require unanimous consent of its members, stating that a member shall not "borrow or lend money, make, deliver, accept or endorse any commercial paper, execute any mortgage, security instrument, bond or lease, or purchase or contract to purchase any property . . . or sell or contract to sell any assets of the Company, all other than in the ordinary course of the Company business, nor shall any authorization be given to any member or other Person to do any act on behalf of the Company in contravention of this Agreement, without the unanimous consent of the Members." The agreement also sets forth the purpose and scope of the company, stating in relevant part: "The business to be conducted by the Company shall be limited to (i) the sale, acquisition, ownership, development, operation, lease, investment and management of real properties . . . .

The business of the Company shall not be extended by implication or otherwise beyond the scope of this Agreement." Thus, the commencement of litigation on behalf of 1730 LP against its mortgage lender is not an act that is within the scope of AJC's ordinary course of business and is, instead, a decision that affects the policy and management of AJC.

Finally, the affidavit of Christan Scinto also sets forth undisputed facts. The affidavit states that neither he nor Jefferson Scinto authorized or agreed to commence the action on behalf of AJC or, in turn, 1730 LP.

We next turn to Fischer's counteraffidavit to determine whether it effectively refuted the alleged lack of authority found in the complaint and the undisputed facts in the record. Fischer's affidavit does not challenge the applicability of 1730 LP's partnership agreement or AJC's operating agreement. It also does not assert that the other members of AJC authorized the action. Instead, the affidavit, sounding much like the operative complaint, asserts that Fischer has been the sole management authority for the property by unanimous agreement of AJC's members and has also been the sole member of AJC that has carried out operations on behalf of 1730 LP. The affidavit also asserts that People's United has recognized Fischer as the sole member of AJC authorized to act on behalf of AJC for many years and that "[i]t is not uncommon in the management of and investment in real estate for litigation to be a part of the business activities . . . most commonly in, but not limited to, eviction and collection actions." These statements do not undermine the clear and unambiguous language of the controlling 1730 LP partnership agreement and AJC operating agreement.

The record conclusively establishes that 1730 LP's partnership agreement gave AJC, not Fischer, the exclusive role of general partner. Fischer, acting alone and

purportedly on behalf of AJC, brought the action on behalf of 1730 LP. The Scintos did not affirmatively vote for or consent to the commencement of the action; thus, Fischer would need to be authorized to act individually on behalf of AJC for the action to be legally authorized. As demonstrated by the language of AJC's operating agreement, Fischer's management responsibilities for AJC in his role as the property manager fall within the scope and purpose of AJC and Fischer's authority is not disputed in this regard. In contrast, bringing an action against 1730 LP's mortgage lender is outside the ordinary course of AJC's business and is a decision that affects the management and policy of AJC. AJC's operating agreement clearly requires that such actions must be made with the unanimous consent of all of AJC's members.[8]

Viewing the operative complaint in light of the undisputed facts put forth by the defendants and Fischer's counteraffidavit, it is clear that 1730 LP has not met its burden of proving that it had the requisite authority to bring the underlying action. Unanimous consent from AJC's members was required. 1730 LP provided no evidence that an action against 1730 LP's mortgage lender

[8] The trial court also considered the language of CULLCA to determine whether AJC bringing an action on behalf of 1730 LP was made with proper authority. AJC's operating agreement provides in relevant part: "Except as expressly provided for herein to the contrary, the rights and obligations of the Members and the administration and termination of [AJC] shall be governed by the Connecticut Limited Liability Company Act . . . ." CULLCA provides in relevant part that "[t]he affirmative vote or consent of two-thirds in interest of the members is required to: (A) Undertake an act outside the ordinary course of the company's activities and affairs . . . ." General Statutes § 34-255f (b) (3). Thus, even if the AJC operating agreement did not provide for the authority of a member to commence an action, Fischer alone could not authorize this action on behalf of AJC regardless of whether the action fell within or outside the ordinary course of business. On appeal, however, neither party argues that 1730 LP's partnership agreement and AJC's operating agreement are ambiguous as to the present issue. Thus, we need not consider the language of CULLCA.

falls within AJC's ordinary course of business or that such an action would not affect AJC's policy and management. Fischer's mere assertion that litigation is not uncommon in the management of real estate does not effectively refute the language of the AJC operating agreement or the 1730 LP partnership agreement or speak to the unique litigation at issue. This assertion alone thus fails to satisfy the burden of establishing that Fischer had authority to bring this action. 1730 LP had the burden of establishing that its action was brought with proper authority, and it failed to satisfy this burden.

1730 LP makes two primary arguments on appeal.[9] First, it argues that Fischer was delegated AJC's management authority and that this delegation effectively made him the "general partner" of 1730 LP. 1730 LP further argues that the trial court had before it undisputed "party admissions" that delegated Fischer the " 'General Partner' management responsibility and authority . . . ." We do not find 1730 LP's statement to be an accurate representation of the record and are not persuaded by its argument.

[9] 1730 LP also argues on appeal that the trial court improperly applied the law and deprived it of its "due process and equal protection rights." Specifically, 1730 LP argues that "[the court] failed to take the facts alleged in the complaint, including facts necessarily implied therefrom and to construe the allegations in the complaint in a manner most favorable to the pleader as it is mandated . . . in deciding a motion to dismiss." 1730 LP incorrectly states the law under *Conboy* v. *State*, supra, 292 Conn. 651. As previously stated in this opinion, the court is required to construe allegations in the complaint in a manner most favorable to the pleader when the facts in the complaint are not supplemented by undisputed facts on the record. See id. In the present case, the complaint was supplemented by undisputed facts that were brought before the trial court in support of the defendants' motion to dismiss. Under these circumstances, the court "need not conclusively presume the validity of the allegations of the complaint." (Internal quotation marks omitted.) Id., 652. Additionally, as discussed further in this opinion, because 1730 LP's authority to bring the action was challenged, the burden was on 1730 LP to establish that it had authority to commence the litigation. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, supra, 241 Conn. 554.

The "party admissions" that 1730 LP refers to are the assertions in the complaint that "AJC delegated its management responsibility for the operation of AJC and the property . . . ." Nowhere in the complaint or in Fischer's affidavit does it state that Fischer was delegated the role of 1730 LP's "general partner." Rather, the language of the complaint and Fischer's affidavit support that Fischer was delegated responsibility to act as property manager for the property on behalf of AJC. The role of general partner carries legal significance under 1730 LP's partnership agreement and § 34-17 and is not synonymous with the role of property manager.

Even assuming arguendo that Fischer was delegated the role of general partner, 1730 LP's partnership agreement and AJC's operating agreement clearly prohibit such a delegation. 1730 LP's partnership agreement names AJC as the "[g]eneral [p]artner" and grants AJC the exclusive right to bring an action by 1730 LP. Furthermore, the agreement states that the general partner may not voluntarily withdraw. If AJC did attempt to delegate its role as general partner to Fischer, this delegation would violate the agreement's restriction on AJC's right to withdraw from its position as general partner. See *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 322, 12 A.3d 995 (2011) (" 'in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous' ").

AJC's operating agreement also prohibits the delegation of AJC's general partner authority over 1730 LP. AJC's operating agreement states that "[t]he Members may delegate to . . . an individual Member . . . any management responsibility or authority *except as set forth in this Agreement* to the contrary." (Emphasis added.) A complete delegation of AJC's authority to act as the general partner of 1730 LP is precisely the type

of delegation prohibited by AJC's operating agreement, which requires the members' unanimous consent for actions outside the ordinary course of business and actions affecting AJC's policy and management.

1730 LP next argues that the trial court failed to distinguish between 1730 LP's partnership agreement and AJC's operating agreement and that this improperly led the trial court to determine that 1730 LP lacked standing. Specifically, 1730 LP argues that AJC's operating agreement is only relevant to the extent that it allows AJC to delegate authority and that, because AJC's authority as general partner was delegated, the court should have looked to the agreement that controls 1730 LP in determining what constituted proper authority. This argument relies on the same logical foundation of 1730 LP's first argument—that AJC was divested of its management authority because its authority as general partner was delegated to Fischer. Thus, it fails for the same reasons. Because of the language in both the 1730 LP partnership agreement and the AJC operating agreement, AJC could not delegate its exclusive control and management of 1730 LP or remove itself from its role as general partner. Furthermore, there was no support in the record that such a delegation was made. Accordingly, we affirm the trial court's motion to dismiss all counts brought by 1730 LP.

The appeal is dismissed as to the claims of Alan Fischer and Fischer Real Estate, Inc., challenging the dismissal of counts one, two, and three of the complaint; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GREGORY E. MCLAURIN (AC 44523)

Alvord, Seeley and DiPentima, Js.

Syllabus

Convicted of several crimes in connection with his role in the robbery of a restaurant, the defendant appealed to this court, claiming that the trial court improperly denied his motion to suppress evidence of his identification by B, an employee of the restaurant, during a one-on-one showup procedure arranged by the police. The defendant and an accomplice, F, had forced the restaurant's employees at gunpoint to give them money from the restaurant's safe and cash registers before fleeing on foot across a heavily trafficked road. Within ten minutes after receiving the call regarding the armed robbery, the police apprehended F and detained him in the parking lot of a car dealership about 800 feet from the crime scene, where they had set up a staging area. While the police continued to search for the defendant, an officer drove B from the restaurant to the car dealership, which was well lighted, for a one-on-one showup identification during which she promptly identified F as one of the robbers. After the police apprehended the defendant a short time later, they drove B from the restaurant back to the staging area where, without hesitation, she identified the defendant less than ninety minutes after the robbery. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to suppress the evidence of B's identification of him, as the one-on-one showup identification procedure the police conducted was not unnecessarily suggestive in light of the exigencies of the situation: the police, who had found a gun in the restaurant, had no way of knowing whether other weapons were involved in the robbery, it was reasonable for the police to believe that the suspects remained armed and dangerous, which justified the need to act quickly, and the officers' belief that the safety of the public was at risk was confirmed when they apprehended F with an eight to nine inch knife on his person while the defendant was still at large; moreover, the showup identification was justified by the need to quickly confirm whether the defendant was the second perpetrator or whether the police needed to continue their search, and, even though there did not appear to be a risk that B would later become unavailable, the immediacy of her identification of the defendant ensured that she viewed him while her recollection was still fresh, and it was particularly important because the defendant wore a mask during the robbery and B had been able to see only his clothing, eyes, mouth and portions of his skin; furthermore, the police did not, as the defendant contended, conduct the showup in a suggestive place or stage it in a suggestive manner by returning B to

the parking lot where she had identified F about thirty minutes earlier but, rather, took significant steps to minimize the inherent suggestiveness of a showup identification by transporting B to a neutral location, the car dealership, where the defendant was seated in an ambulance, rather than in a police car, during the identification procedure, the police did not indicate to B that the person she would be viewing was the person responsible for the crime, and the fact that the defendant was handcuffed during the showup did not render the identification procedure unnecessarily suggestive.

Argued September 15—officially released November 8, 2022

Procedural History

Substitute information charging the defendant with four counts of the crime of unlawful restraint in the first degree and with one count each of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit, larceny in the fourth degree and conspiracy to commit larceny in the fourth degree, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Brown*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Brown*, *J.*; verdict and judgment of guilty of four counts of unlawful restraint in the first degree, and of robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit and conspiracy to commit larceny in the fourth degree; subsequently, the court, *Dennis*, *J.*, rendered judgment revoking the defendant's probation, and the defendant appealed to this court. *Affirmed.*

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Nathan J. Buchok, deputy assistant state's attorney, with whom, on the brief, was *Margaret E. Kelley*, state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Gregory E. McLaurin, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree with a deadly weapon in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), criminal possession of a firearm in violation of General Statutes § 53a-217, carrying a pistol without a permit in violation of General Statutes § 29-35 (a), four counts of unlawful restraint in the first degree in violation of General Statutes § 53a-95, and conspiracy to commit larceny in the fourth degree in violation of General Statutes §§ 53a-48 and 53a-125. On appeal, the defendant claims that the trial court improperly denied his motion to suppress a one-on-one showup identification. 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 January 19, 2018, at approximately 8:30 p.m., the defendant and another individual, Royshon Ferguson, entered a Smashburger restaurant on Boston Post Road in Milford. Both men were wearing ski masks, but their eyes, mouths, and the skin around their eyes and mouths were visible. The defendant was carrying a silver-colored, semiautomatic gun in his hand.

There were three employees working at the restaurant that night. Jada Brinkley and Jamal McNeil were working in the front of the restaurant, and Casey Deloma, the shift lead, was in the back room, which was brightly lit and contained a small safe. There were four customers dining in the front of the restaurant. When the defendant and Ferguson entered Smashburger, two of the customers attempted to flee. The defendant pointed the gun at them and told them, "don't

run." The defendant then gathered the customers and employees at gunpoint and directed them to the back of the restaurant, where Deloma was located.

Once in the back room of the restaurant, the defendant handed the gun to Ferguson, who pointed it at Deloma and told her to unlock the safe. Deloma attempted to unlock the safe twice using a code, but it did not unlock. Ferguson told her, "I'm going to give you ten seconds or I'm going to shoot you." Deloma entered the code again and opened the safe. Ferguson took the money out of the safe and put it in his pockets. During this time, the defendant was standing in the back room, next to Brinkley.

After taking money out of the safe, Ferguson took Deloma to the front of the restaurant at gunpoint and directed her to open the cash registers. She opened the first register, and Ferguson began to take money from it while she opened the second register.[1] The defendant remained in the back room of the restaurant with the other victims. The defendant demanded that the victims give him their cell phones. At that point, one of the customers, Garfield Stewart, who was lawfully carrying a concealed firearm, drew his weapon on the defendant, who immediately took off running. As Stewart gave chase, the defendant ran into the front of the restaurant, past Ferguson, and out the front door. Stewart then pointed his gun at Ferguson, who was bent over a cash register, and started banging Ferguson's hand until he released the gun. Ferguson ran out of the restaurant, exiting within seconds of the defendant. The defendant and Ferguson fled in the same direction, turning right out of the front door and running down Boston Post Road.

At approximately 8:40 p.m., the Milford Police Department received a high priority call that an armed robbery

[1] The restaurant manager testified that, upon running sales reports for the day, $1456 was missing after the robbery.

was in progress at Smashburger on Boston Post Road. Three minutes later, Officer Matthew Joy arrived to a chaotic scene and immediately turned on his body camera. As the first responding officer on scene, Officer Joy secured the scene, ensured that no suspects remained on the premises, and determined that the employees and customers were uninjured. Additionally, he located a gun on the floor behind the front counter of the restaurant. After speaking with the employees and customers, Officer Joy learned that two suspects had fled the restaurant on foot, turning right out of the front door. One suspect, later identified as Ferguson, was described as "a black male, about five feet, six inches, heavyset, wearing jeans and a dark colored . . . hooded sweatshirt . . . ." The other suspect, later identified as the defendant, was described as "a black male, approximately six feet, six foot one, a thinner build wearing jeans, a red hooded sweatshirt with a dark colored top coat layer." Officer Joy did not receive descriptions of the suspects' faces because he was told that they were wearing dark-colored ski masks, one black and one green.

Officer Joy promptly relayed a description of the suspects to his fellow officers over his portable police radio. A passing motorist flagged down police officers responding to the scene and reported that he had just seen two black males run into a wooded area, behind a car dealership and storage facility, that was located approximately 800 feet across the street from Smashburger. At that time of night, there was limited pedestrian activity on Boston Post Road, but there was significant vehicular traffic.

Officer Sean Owens, a canine handler, and his partner, Canine Officer Czar, responded to the wooded area behind the car dealership. It was a cold night, there was some ice on the ground, and the wooded area was

dimly lit. Officer Owens casted[2] Czar into the general area where the subjects were last seen, and Czar immediately alerted to an apocrine odor, a particular odor that humans emit when they are emotionally charged or fearful. Czar began pulling south along the overgrown grass and wood line that ran between the storage facility and wooded area. Upon reaching the car dealership parking lot, Czar displayed a proximity alert[3] and then pulled deeper into the wooded area, toward a marsh, for approximately twenty-five to thirty yards, when Officer Owens saw the first suspect, later identified as Ferguson. Officer Owens, and his fellow officers who were providing backup, gave several verbal commands for Ferguson to get down on the ground and show his hands. Ferguson ignored the officers' commands and reached for his waistband, which prompted Officer Owens to give Czar a command to apprehend Ferguson. Czar subdued Ferguson with a bite to the leg. Once Ferguson complied with Officer Owens' commands, Czar was removed, and Officer Christopher Deida detained Ferguson.

Officer Deida searched Ferguson, who told him that he had a knife on his person. Officer Deida located an eight to nine inch kitchen knife in the front pocket of Ferguson's sweatshirt. Additionally, officers found $868 in cash on Ferguson, with many of the bills "hanging out of his pockets." Ferguson told Officer Deida that his friend "jumped the fence" and pointed to a nearby chain-link fence with barbed wire that ran along the

[2] Officer Owens testified that "casting is basically letting the dog engulf the immediate area in front of you and seeing if he picks up anything, as opposed to targeting him on say this cup right here where someone touched and this would be the evidence of I want you to smell this cup and then start your track. So, casting is more of a general, open, free of getting the odor that's right in front of you."

[3] Officer Owens testified that a proximity alert is a "change in a dog's behavior" that signifies to his handler "that someone is close, that this main pool of odor is getting stronger for the dog."

wooded area. Officer Deida and another officer moved Ferguson from the wooded area to the parking lot of the car dealership, where the officers had set up a staging area. The officers had called an ambulance to the car dealership, and Ferguson was treated for his dog bite.

At 8:50 p.m., ten minutes after the police received the call regarding the armed robbery, Officer Joy, who had remained on scene at Smashburger, received a radio transmission informing him that a suspect had been apprehended. Sergeant Christopher Dunn,[4] Officer Joy's commanding officer, instructed him to conduct an eyewitness showup,[5] at the car dealership, with a victim. Officer Joy selected Brinkley because he determined that she had the best view of the robbers. Shortly thereafter, Officer Joy brought Brinkley to the car dealership where she identified Ferguson as one of the robbers, without hesitation and within less than one minute.

Meanwhile, Officer Owens and Czar continued to search for the second suspect. Officer Owens attempted to get Czar back on task, which was difficult because of the excitement surrounding Ferguson's apprehension and the additional personnel in the area whose odor began to contaminate the scene. For twenty to thirty minutes, Officer Owens and Czar continuously tracked within the wooded area, even rechecking certain areas. Czar continued to return and show interest in the marsh area, near where Ferguson was found, and Officer Owens "felt confident that there was somebody

[4] We note that, at the time of trial, Sergeant Dunn had been promoted to lieutenant.

[5] Officer Joy testified that "[a] showup is when you transport a victim or witness to the area of where the suspect is detained to conduct an eyewitness showup where they would identify whether or not that suspect is the one who, in fact, committed the crime."

else in this area." However, Officer Owens became concerned that Czar was getting tired, and that the scene was overwhelmingly contaminated, so he decided to end the track and return Czar to his vehicle to regroup. As they began to walk back to the vehicle along the back of the storage building, Czar changed his behavior, hooked his head,[6] and pulled Officer Owens toward the marsh, deep within the wooded area.

Officer Owens found the second suspect about fifty to sixty yards from where Ferguson was apprehended and in a location "where the dog . . . twenty minutes earlier, wanted to kind of get into . . . ." The second suspect, who was later identified as the defendant, was "hunkered down in head high thickets . . . well hidden . . . in close proximity to all the noise and everything else going on for the first subject." Officer Owens told the defendant to show him his hands, but the defendant attempted to flee deeper into the woods and marsh. At that point, Officer Owens gave Czar the command to apprehend the defendant, which Czar did with a bite to the lower leg. As the only officer in the woods at that time, Officer Owens handcuffed the defendant, removed Czar, and radioed for backup. Officers took the defendant to the car dealership parking lot where medical personnel attended to his dog bite injury.

At 9:42 p.m., Officer Joy received information that a second suspect had been detained at the car dealership. Officer Joy was instructed to bring Brinkley back to the car dealership to conduct the second showup identification. After arriving at the car dealership, Brinkley identified, without hesitation, the defendant as one of the robbers.

On January 20, 2018, the day after the robbery, officers returned to the area where the defendant and Ferguson were apprehended to search for additional evidence. Officers recovered one black, knit ski mask, a

[6] Officer Owens testified that "[Czar] hooked his head to a direction, meaning he's interested in something that's going on in there . . . ."

black knit glove, and a ten dollar bill Additionally, officers recovered a camouflage jacket, which was located over the top of a tall chain-link fence with barbed wire along the top. The jacket was spread out, as though someone had used it as protection when trying to climb over the fence.

The defendant was subsequently arrested and charged with robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit, four counts of unlawful restraint in the first degree, larceny in the fourth degree, and conspiracy to commit larceny in the fourth degree.

On June 11, 2019, the defendant filed a motion to suppress the identification evidence of him as improper, unreliable, and unnecessarily suggestive. The court held a hearing on the motion to suppress on July 15, 2019, prior to the start of trial. During the hearing, the state presented evidence from Officer Joy and Brinkley. The defendant cross-examined the state's witnesses but did not call any witnesses in support of his motion to suppress.

During the hearing, Officer Joy testified that, seven minutes after he had arrived at Smashburger, he received a radio transmission informing him that fellow officers had detained a suspect, later identified as Ferguson, at a car dealership across the road. Officer Joy was instructed to bring one witness to conduct a showup identification. He chose Brinkley because "[s]he was the employee near the front register closest to the front of the store [and she had] encountered the suspects first." Officer Joy testified that he had turned his body camera on upon arriving at Smashburger at 8:43 p.m. and that he had it recording the entire time he was on scene.

Officer Joy transported Brinkley to the car dealership in his patrol cruiser. Brinkley was seated in the rear driver's side seat, separated from Officer Joy by a metal and glass divider. Prior to showing Brinkley the suspect, Officer Joy read Brinkley the preprinted rules and instructions form for identification procedures, which had been provided to him by the supervisory sergeant on duty that evening. Officer Joy did not communicate to Brinkley that the police had the person in custody who was responsible for the robbery. After reading her the instructions, Officer Joy provided Brinkley with the opportunity to ask questions. Brinkley did not have any questions and appeared to understand the instructions.

At the dealership, Officer Joy rolled down Brinkley's window. The car dealership was well lit by the lights from the ambulance and streetlamps. Officer Joy's cruiser lights were on but did not face toward the suspect. At 9:12 p.m., Brinkley identified Ferguson as the first suspect, promptly and without hesitation. Following the identification, Officer Joy transported Brinkley back to Smashburger. He testified that, upon returning to the restaurant, he obtained written statements from the employees and customers who were present at the time of the robbery.

At 9:42 p.m., Officer Joy received a radio transmission informing him that a second suspect had been detained at the car dealership. Officer Joy was instructed to bring Brinkley back to conduct a showup identification. Officer Joy read Brinkley an identification instructions and advisement form, which Brinkley signed. He did not, in any way, indicate to Brinkley that the suspect she was going to view was responsible for the crime.

Upon arriving at the car dealership, Officer Joy proceeded to the same location where Brinkley previously had identified Ferguson. As with the prior identification, Brinkley was seated in the rear driver's seat and viewed

the defendant out of the rolled down window. The area remained well lit. The defendant was seated in the back of an ambulance, approximately two to three car lengths from Officer Joy's cruiser. Officer Joy did not recall whether the defendant was handcuffed at the time or whether there were officers standing near the defendant. Officer Joy testified that Brinkley identified the defendant as the second suspect at 9:56 p.m. and that she did not hesitate in making the identification.

Officer Joy testified that the exigent circumstances necessitating a showup identification of the defendant were "that an armed robbery had just occurred with a firearm and the suspects who had left the scene of the crime on foot, after having one suspect detained, possibly could still have other weapons on their person." He explained that it was "exigent to either clear or positively identify the suspect to make sure that they aren't further armed or clear the person who is being [identified]." Additionally, Officer Joy testified that it was important to eliminate the defendant as a suspect in the event that the perpetrator remained in the community. Moreover, he testified that, during the course of the investigation, he learned that Ferguson had been apprehended with a knife and that he did not know how many weapons were involved in the incident.

During cross-examination of Officer Joy, defense counsel introduced a document titled "Milford Police Department General Orders—Eyewitness Identification" over the objection of the state. Defense counsel highlighted a portion of the document, which stated that "[s]howup identification procedures are employed soon after a crime has been committed, when a suspect is detained at or near the crime, or under exigent circumstances such as the near death of the eyewitness or victim." Officer Joy confirmed that the contents of

the paragraph were accurate and answered in the negative when asked whether anyone was in a near death state at the time of identification.

Brinkley testified during the hearing that, in January, 2018, she was working as a cashier at Smashburger. When asked about a night in January, 2018, when two people came into the restaurant, she testified that she had no memory of the event or the night in question. She testified, "I just got into a car accident. I was unconscious, don't remember. I smoke weed. . . . I do not remember this night . . . ." The prosecutor showed Brinkley four clips of footage from Officer Joy's body camera wherein Brinkley can be seen and heard identifying Ferguson, identifying the defendant, and discussing the suspects' physical features and clothing. Brinkley confirmed that it was her voice and image in the clips but testified that she had no recollection or memory of the captured events.

The prosecutor also introduced Brinkley's written statement to the police in which she described the appearance of the robbers. Brinkley confirmed that the statement was handwritten and signed by her but testified that she had no recollection of writing the statement or the contents of the statement. Additionally, when shown the eyewitness instructions for identification procedures, which Officer Joy testified that he had read to Brinkley prior to her identification of the defendant, Brinkley confirmed that she had signed and dated the document. On cross-examination, Brinkley testified that she "[m]ost likely" smoked "weed" on the day of the robbery but ultimately stated that she did not know if she had done so.

Following the presentation of evidence at the hearing, defense counsel argued that Brinkley's identification should be suppressed on three grounds: (1) law enforcement did not comply with General Statutes § 54-1p,

which requires the use of fillers in lineups and photographic arrays, but that here, the defendant was the only person presented;[7] (2) Milford Police Department procedure allows for the use of showup identifications under certain circumstances, which were not present in this case;[8] and (3) Brinkley had no recollection of making the identification. In concluding his argument, defense counsel stated, "the prejudicial effect of this procedure in identifying the defendant as the person who perpetrated the crime far outweighs the probative value."

In response, the prosecutor argued that the relevant standard was the two-pronged due process standard, which required the defendant to prove that the showup identification was both unnecessarily suggestive and unreliable, not a probative-prejudicial balancing test. The prosecutor argued that the defendant had not met his burden of proof. As to the first prong, the prosecutor argued that the showup procedure was not unnecessarily suggestive under the circumstances at issue, in which the two perpetrators had committed an armed robbery and fled the scene on foot, the police had an

[7] In response to defense counsel's argument on the first ground, the court stated: "Well, this was meant as a showup and it wasn't meant as a lineup, right? I mean, this was not meant as a lineup, it's pretty clear. So, is your argument that showups are impermissible?" Defense counsel responded that no, that was not his argument and moved onto his second point. The prosecutor addressed defense counsel's argument, premised on § 54-1p, and argued that § 54-1p has no applicability to this case because the statute applies to lineup and photographic array identifications, not showup identifications.

[8] Defense counsel pointed specifically to language in the Milford Police Department General Orders, which states: "Showup identification procedures are employed soon after a crime has been committed when a suspect is detained at or near the crime or under exigent circumstances such as the near death of the eyewitness or a victim." In response to defense counsel's argument on the second ground, the court asked: "Was this not at or near the crime?" Defense counsel responded that it was but asserted that "there were no exigent circumstances with regard to why it needed to be done that way . . . ."

available eyewitness with a fresh memory of the perpetrators and needed to determine whether the defendant was the perpetrator or whether to continue searching for the perpetrator to safeguard the public. The prosecutor argued further that, even if the court concluded that the showup identification procedure was unnecessarily suggestive, it was nevertheless reliable because of "the detail of the description, the accuracy, [and] the quick identification . . . ."

The court stated that it had reviewed relevant case law and then orally denied the defendant's motion to suppress the identification evidence. In issuing its ruling, the court stated: "The court has had an opportunity to consider the motion to suppress identification, consider the testimony of Officer Joy and the testimony of Ms. Brinkley as well, and argument by counsel. The court finds that the identification, given all the facts and circumstances, was not unduly suggestive."[9]

At trial, Officer Joy testified in a manner consistent with the testimony he provided at the suppression hearing. He reiterated that, given the nature of the crime and the fact that a firearm was found on scene, it was "a priority, probably the main priority, to get out information regarding the suspects' location, direction of travel, description . . . as quick as possible, because you don't know if they're still armed. You don't know what they could be armed with, how many weapons. You know, there's already one weapon found on the scene prior to them leaving and it's a public safety issue

[9] Prior to filing his brief in the present appeal, the defendant filed a motion for articulation pursuant to Practice Book § 66-5. The defendant presented several questions for articulation, including, "[w]hat subordinate findings, if any, did the trial court make to support its determination that Brinkley's identification 'was not unduly suggestive?' " The state did not oppose this particular request for articulation. The court denied the defendant's motion for articulation. This court granted the defendant's motion for review of the denial of his motion for articulation but denied the relief requested therein.

as well as a time sensitive issue on, you know, capturing the subjects." Similarly, Officer Christopher Lennon, who was flagged down by the passing motorist that evening, testified that he and his fellow officers "didn't stop to take [the motorist's] name or information because we heard that there was a firearm involved in the robbery so we figured it was more important that we try to apprehend the suspects."

During cross-examination of Sergeant Dunn, who, at the time of the robbery, was supervising Officer Joy at Smashburger, defense counsel asked whether there was an emergency that necessitated a showup identification. Sergeant Dunn responded: "No, there was a request from the captain." During cross-examination of Detective Michael Cruz, who was in charge of the investigation, defense counsel inquired whether "there [was] anything that prevented [the officers] from doing a photo lineup of [the defendant] with the witnesses and the employees of Smashburger?" Detective Cruz responded that, "for this case and my training and experience the showup was appropriate. I believe there is enough probabl[e] cause on that night to arrest the two defendants for the robbery." When defense counsel again asked whether there was anything that prevented the officers from "doing a photo lineup" with the other witnesses and restaurant employees, Detective Cruz responded, "[n]o." Defense counsel then asked whether there was anything that prevented the officers from doing a "live lineup" with the defendant and the other restaurant employees, and Detective Cruz responded, "[n]o."

Brinkley also testified in a manner consistent with her testimony at the suppression hearing. She testified that, as a result of a recent car accident and regular marijuana use, she has a "short memory" and has no recollection of what happened on the night of the robbery. On cross-examination, Brinkley testified that she

"most likely" smoked weed on the day of the robbery because she "get[s] high almost every day . . . ." When asked how she was feeling on the day of the robbery, however, she stated, "I don't remember too much . . . ." Detective Cruz, who spoke with Brinkley on the night of the robbery, testified that she did not appear to be under the influence of any drugs that evening and that he did not have any concern about her participating in the showup identification on that night.

Due to Brinkley's lack of recollection, the court admitted into evidence, under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986),[10] the signed witness statement Brinkley gave to the police on the night of the robbery. Brinkley read the statement aloud in its entirety.[11] Additionally, the prosecutor showed the jury

[10] "In *State* v. *Whelan*, supra, 200 Conn. 753, our Supreme Court adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." (Internal quotation marks omitted.) *State* v. *Russaw*, 213 Conn. App. 311, 316–17 n.5, 278 A.3d 1, cert. denied, 345 Conn. 902, 282 A.3d 466 (2022). "Inconsistencies can be found in omissions, changes of position, denials of recollection or evasive answers. [*State* v. *Whelan*, supra], 748–49 n.4." Conn. Code Evid. § 6-10 (a), commentary.

[11] Brinkley's recitation of her statement was as follows: "On this day, January 19, 2018, at approximately 8:30 I was cleaning tables in the restaurant. As I was getting ready to walk in the back to grab a rag, I saw the door swing open and then came two black men, heavy set . . . with a dark blue hoodie, dark skin on and a mask; the other male was skinny, lighter skin, with a dark green mask, red camouflage coat on. I saw the gun in the skinny one's hand and I immediately went to the back to let my coworkers know what was behind me. I showed him where the safe was, he grabbed my arm, walked me, me and Casey, Jamal, further to the back where the safe was located. Then he pulled out the gun again and demanded someone to open the safe. It was silence. He started pointing the gun at everyone. Casey asked, do you want me to open it and went to put the code in. She put it in a couple of times but it didn't open. The heavy male then said she had 10 seconds to open it or he was going to shoot her. She put the code in again and the safe opened. He grabbed the drawer and started taking the money. Then along came the skinny individual with the four customers. The heavy set male took Casey back to the front to empty out the registers,

four video clips that were recorded from Officer Joy's body camera on the night of the robbery.[12] In the first two clips, Brinkley can be heard identifying Ferguson. In the third clip, Brinkley can be heard discussing the mask color of the "skinny" perpetrator. In the fourth clip, Brinkley can be heard identifying the defendant at the staging area. When asked if she recognized the individual's clothing, she stated: "Yep, I see. Can you put some light on his jeans?" Once the perpetrator stands up, Brinkley can be heard saying: "Yep, that's him." When asked how sure she is, she can be heard saying: "Yup, I'm sure."

The jury found the defendant guilty of all counts, except for larceny in the fourth degree. The defendant was sentenced to twenty-five years of incarceration, execution suspended after eighteen years, and five years of probation.[13]

meanwhile the skinny one was taking more money, he noticed one of the customers moving and before you know it the customer pulled out his gun and started to chase the robber. Jamal told me to call the police. I stayed in the back until Jamal came there again, I know it was clear that the robbers were gone."

[12] In his appellate brief, the defendant asserts that the court admitted the clips over defense counsel's objection. The record reflects, however, that, prior to the prosecutor publishing the exhibit to the jury, defense counsel stated, "[t]here's no objection. We've agreed to the exhibit coming in."

[13] The court, *Dennis*, *J.*, subsequently found that the defendant had violated a term of probation, which he was then serving in connection with a prior conviction under a separate docket number, CR-14-149028-T, as a result of his having committed the restaurant robbery and sentenced him to forty months to serve concurrently with the sentence on his conviction of the criminal charges for the restaurant robbery in docket number CR-18-0095601-T. Although the defendant also listed the judgment finding him in violation of his probation on his appeal form, he has failed to brief any claim relating to that judgment, nor did he list any claim related to that judgment on his statement of issues on appeal. We, therefore, dismiss the appeal to the extent that it purports to challenge the judgment finding him in violation of his probation. See *State* v. *Bletsch*, 86 Conn. App. 186, 188 n.3, 860 A.2d 299 (2004), aff'd, 281 Conn. 5, 912 A.2d 992 (2007); *State* v. *Gardner*, 85 Conn. App. 786, 787 n.1, 859 A.2d 41 (2004); *State* v. *Hannon*, 56 Conn. App. 581, 583 n.2, 745 A.2d 194 (2000), cert. denied, 274 Conn. 911, 876 A.2d 1203 (2005); see also *Casiraghi* v. *Casiraghi*, 200 Conn. App.

The defendant's sole claim on appeal is that the court improperly denied his motion to suppress the showup identification on the ground that it was unnecessarily suggestive and unreliable. In response, the state argues, inter alia, that the court properly concluded that the showup identification of the defendant was not unnecessarily suggestive given the exigent circumstances. We agree with the state.

"The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances . . . .

"With respect to the first prong of this analysis, [b]ecause, [g]enerally, [t]he exclusion of evidence from the jury is . . . a drastic sanction, [it] . . . is limited to identification testimony [that] is manifestly suspect . . . . [Consequently] [a]n identification procedure is unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification.

771, 772 n.1, 241 A.3d 717 (2020) (deeming abandoned those aspects of appeal raised on appeal form and in statement of issues on appeal but not briefed). Accordingly, our decision in this appeal relates only to the judgment of conviction in docket number CR-18-0095601-T.

. . . We have recognized that [ordinarily] a one-to-one confrontation between a [witness] and the suspect presented . . . for identification is inherently and significantly suggestive because it conveys the message to the [witness] that the police believe the suspect is guilty . . . . For this reason, when not necessary, the presentation of a single suspect to a witness by the police (as opposed to a lineup, in which several individuals are presented [by] the police, only one of whom is the suspect) . . . has . . . been widely condemned . . . .

"It is well established, however, that the use of a one-on-one showup identification procedure does not invariably constitute a denial of due process, as it may be justified by exigent circumstances. . . . Thus, a showup identification procedure conducted in close temporal and geographic proximity to the offense may be deemed reasonable, and, therefore, permissible for federal due process purposes, when it was prudent for the police to provide the victim with the opportunity to identify [her] assailant while [her] memory of the incident was still fresh . . . and . . . [the procedure] was necessary to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay, if the victim excluded the defendant as a suspect or was unable to identify him." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Ruiz*, 337 Conn. 612, 621–23, 254 A.3d 905 (2020).

Additionally, "the *entire* procedure, viewed in light of the factual circumstances of the individual case . . . must be examined to determine if a particular identification [procedure] is tainted by unnecessary suggestiveness. The individual components of a procedure cannot be examined piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to con-

sider the reliability of the identification itself in order to determine whether it ultimately should be suppressed." (Emphasis in original.) *State* v. *Aviles*, 154 Conn. App. 470, 477, 106 A.3d 309 (2014), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015).

"To prevail in his claim, the defendant must demonstrate that the trial court erred in *both* of its determinations regarding suggestiveness and reliability of identifications in the totality of the circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Wooten*, 227 Conn. 677, 685, 631 A.2d 271 (1993). "Furthermore, [w]e will reverse the trial court's ruling [on evidence] only where there is an abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of factbound determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Internal quotation marks omitted.) *State* v. *Bouteiller*, 112 Conn. App. 40, 46, 961 A.2d 995 (2009).

After setting forth his general contention that showup identifications are "widely condemned" because they are inherently and significantly suggestive and that exigency is a "narrow exception,"[14] the defendant argues that the procedure by which Brinkley identified the

[14] Included in his arguments against the use of showup identification procedures in general, the defendant contends that "Connecticut courts view them with a jaundiced eye" and cites to ten decisions of our appellate courts. In parentheticals, the defendant asserts that the ten cases support the position that the court "assum[es] procedure unnecessarily suggestive" or "hold[s] procedure unnecessarily suggestive." In its brief, the state responds to the defendant's contention and asserts that "[i]n all but one of the cases cited by the defendant, however, the court ultimately held that the showup identification evidence at issue was *properly admitted* and there was no violation of the defendant's due process rights." (Emphasis in original.)

defendant was unnecessarily suggestive for three reasons: "First and foremost, the police admitted that they did not need to use a showup"; "[s]econd, Brinkley identified the defendant nearly ninety minutes after the crime, which belies any exigency"; and "[t]hird, the police conducted the showup in a suggestive place and staged it in a suggestive manner." In sum, the defendant contends that "the unnecessary use of a showup tempted [Brinkley] to presume that [the defendant] was the person police suspect."[15] (Internal quotation marks omitted.) The state argues, inter alia, that "the facts and circumstances of this case fit squarely within the well established jurisprudence in this state holding that, where police are engaged in a search for a possibly armed suspect fleeing from a crime scene, and detain an individual nearby who matches the description of the suspect, they are justified in using a showup to

In several of the cases, decided over the past few decades and relied on by the defendant, the court "assum[ed]" the procedure was unnecessarily suggestive as a means to reach the second prong of the analysis, reliability. See, e.g., *State* v. *Ruiz*, supra, 337 Conn. 624 ("even if we were to assume . . . that it was unnecessarily suggestive," the witness' identification was reliable). In one of the cases cited by the defendant, the court concluded that the identification procedure was not unnecessarily suggestive because it was justified by exigencies, as in *State* v. *Wooten*, supra, 277 Conn. 677. See *State* v. *Watson*, 50 Conn. App. 591, 603–604, 718 A.2d 497, cert. denied, 247 Conn. 939, 723 A.2d 319 (1998), cert. denied, 526 U.S. 1058, 119 S. Ct. 1373, 143 L. Ed. 2d 532 (1999), cert. dismissed, 255 Conn. 953, 772 A.2d 153 (2001). The sole case, cited by the defendant, in which the court found that the identification was improperly admitted, is distinguishable on its facts. See *State* v. *Mitchell*, 204 Conn. 187, 202, 527 A.2d 1168 (showup identification procedure was conducted at nonneutral setting, hospital; victim was wheeled past defendants twice; and defendants were viewed as pair, not individually), cert. denied, 484 U.S. 927, 108 S. Ct. 293, 98 L. Ed. 2d 252 (1987). In the remainder of the cases cited by the defendant, the court ultimately found that, although the circumstances did not necessitate a showup identification procedure, the identification was sufficiently reliable, and therefore, properly admitted. See, e.g., *State* v. *Brown*, 187 Conn. 602, 617, 447 A.2d 734 (1982).

[15] In support of his argument, the defendant relies on precedent from several federal circuit courts of appeals and the courts of other states. Given the availability of controlling appellate authority in our state, we decline the defendant's invitation to consider precedent from those courts.

quickly determine if they have the perpetrator or need to continue searching." We agree with the state and conclude that the showup identification procedure was not unnecessarily suggestive because it was justified by exigent circumstances. We are guided by our Supreme Court's decisions in *State* v. *Wooten*, supra, 227 Conn. 677, and *State* v. *Revels*, 313 Conn. 762, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

In *Wooten*, two passersby witnessed the defendant drag the victim across a street to a parking lot, where he forcibly disrobed the victim and compelled her to engage in sexual acts. *State* v. *Wooten*, supra, 227 Conn. 681. While the victim was being assaulted, another passerby, Jose Hernandez, witnessed the defendant lying on top of the victim. Id. When the defendant saw Hernandez, he quickly pulled up his pants, approached Hernandez, and told him that he had paid ten dollars to have sex with the victim. Id. The defendant abruptly left the scene and ran down the street. Id. Upon being led to the scene by the two passersby, the police obtained a description of the assailant from Hernandez, who "then got into a police car with [the officer] to reconnoiter the area in an attempt to locate the assailant" and successfully did so. Id., 682. Approximately one-half hour after the attack, the police brought the victim to where the defendant, the person Hernandez had identified as the assailant, was being detained. Id., 684. There, after being asked "to try to identify her assailant and told not to be frightened," the victim exited the police car, walked over to a distance of approximately eight to ten feet from the rear of the lit police car in which the defendant was seated, and positively identified the defendant as the person who had assaulted her. Id., 684–85. During a hearing on the defendant's motion to suppress the identification, the victim testified that, despite being reluctant to attempt the identification, "she was absolutely certain that the

person in the police car was her assailant" and stated she had not been coached. Id., 685. "At the close of the hearing, the trial court concluded that the victim's identification of the defendant, although suggestive, was not unnecessarily so." Id.

Our Supreme Court agreed that, although the showup identification was obviously suggestive, it was not unnecessarily so because "the exigencies of the situation justified the procedure." (Internal quotation marks omitted.) Id., 686. The court concluded that "[t]he confrontation was not unnecessary because it was prudent for the police to provide the victim with the opportunity to identify her assailant while her memory of the incident was still fresh . . . and because it was necessary to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay." (Citations omitted; internal quotation marks omitted.) Id. The defendant contended that, because the victim was emotionally distraught and Hernandez had already made an identification of the defendant, the exigencies of the situation did not warrant a one-on-one identification procedure with the victim. Id., 687. The court disagreed and concluded that "[t]he immediate viewing enabled the police to focus their investigation and gave them greater assurance that innocent parties were not unjustly detained." (Internal quotation marks omitted.) Id.

Our Supreme Court's decision in *State* v. *Revels*, supra, 313 Conn. 762, is also instructive. In *Revels*, the police responded to a shooting, at about 11 p.m., and discovered the victim lying on the ground, unable to communicate, with a semiautomatic pistol near his right hand. Id., 766. While canvassing the area for suspects, the police were approached by a witness who claimed to have seen the shooting from her apartment window, approximately 265 feet away. Id., 767. The police subsequently apprehended a suspect who matched the description that the witness had provided. Id. Officers drove the witness to the location where the defendant

was "standing in the middle of the road, handcuffed and surrounded by uniformed police officers." Id. When the officer directed his cruiser's spotlight toward the defendant, the witness immediately identified the defendant, whose clothing matched the description the witness had previously provided. Id.

Our Supreme Court held that the showup identification procedure was not unnecessarily suggestive in light of the exigencies of the situation. Id., 773–74. The court recognized that it was unclear whether the gun found near the victim's body was the murder weapon but that its location made it reasonable for the police to conclude that it likely belonged to the victim. Id., 773. "It was reasonable for the police to believe, therefore, that the shooter was likely to be on the run, in the area, and armed. Safeguarding the public from a possibly armed and dangerous fugitive was an immediate and pressing need." Id. Additionally, the court concluded that "it was necessary to conduct a showup procedure in order to eliminate [the defendant] as a suspect as soon as possible so that the police could continue to search for the shooter and recover the murder weapon." Id., 773–74. Moreover, the court noted that, although there was no risk that the witness would become unavailable, the immediate identification ensured that "she viewed the suspect while her recollection was still fresh." Id., 774.

Here, as in *Wooten* and *Revels*, exigent circumstances justified the use of a showup identification of the defendant. The officers responded quickly to a high priority call concerning an armed robbery and learned that the two suspects had abruptly fled the crime scene on foot down and across a heavily trafficked road. Although the officers found one weapon at the scene,[16] the officers had no way of knowing whether other weapons were involved, and it was reasonable for them to believe

[16] The defendant contends that, "[i]f the perpetrators had more than one gun, then they would not have had to share a gun during the robbery";

that the suspects remained armed and dangerous, which justified the officers' need to act quickly. See *State* v. *Revels*, supra, 313 Conn. 775 ("[s]afeguarding the public from a possibly armed and dangerous fugitive was an immediate and pressing need"). In fact, the officers' belief that the public's safety was at risk was confirmed when they apprehended Ferguson and discovered that he was carrying an eight to nine inch kitchen knife on his person. Therefore, it was reasonable for the police to assume that the defendant was "on the run, in the area, and armed." Id., 773.

The officers were justified in conducting a showup identification, approximately 800 feet from the scene of the crime and seventy-six minutes after they arrived on scene, to quickly confirm whether the defendant,[17] who matched the description of one of the suspects, was the second perpetrator or whether they needed to

however, requiring the officers to make an assumption that the perpetrators were no longer armed due to this speculation would run contrary to the police "duty to protect the public." *State* v. *Revels*, supra, 313 Conn. 775; id. ("[T]he defendant's argument suggests that the police should have assumed that no further criminal activity would occur in the immediate future, and therefore, that quick action was not necessary to protect the public. Nothing in our case law supports this conclusion, which would require the police to make assumptions inconsistent with their duty to protect the public.").

[17] The defendant contends that the fact that "Brinkley identified the defendant nearly ninety minutes after the crime . . . belies any exigency" and cites to cases in support of his position that showup identifications are permissible "less than an hour" after the crime was committed. The state responds that the one hour "guideline" is one of "the defendant's own creation" and notes that the defendant has not "cited a single case where a court found a showup identification was inadmissible simply because it occurred more than an hour after the crime." Additionally, the state argues that "both this court and our Supreme Court, as well as courts from other jurisdictions cited by the defendant, have all concluded that showup identifications occurring well over an hour after the crime were not unnecessarily suggestive due to exigent circumstances." We agree with the state. See *State* v. *Hamele*, 188 Conn. 372, 377–78, 49 A.2d 1020 (1982) (showup conducted no more than two hours after incident not impermissibly or unnecessarily suggestive); *State* v. *Bell*, 13 Conn. App. 420, 425, 537 A.2d 496 (1988) (showup conducted less than two hours after crime was found to be reasonably necessary).

continue their search. See *State* v. *Ruiz*, supra, 337 Conn. 623 ("showup identification procedure conducted in close temporal and geographic proximity to the offense may be deemed reasonable"); see also *State* v. *Wooten*, supra, 227 Conn. 686–87 ("[a]n immediate viewing of the suspect may be justified where it [is] important for the police to separate the prime suspect gold from the suspicious glitter, so as to enable them . . . to continue their investigation with a minimum of delay" (internal quotation marks omitted)). Moreover, although there did not appear to be a risk that Brinkley would become unavailable, "the immediate identification ensured that [Brinkley] viewed the suspect while her recollection was still fresh." *State* v. *Revels*, supra, 313 Conn. 774. The immediacy of the identification was particularly important because the defendant was wearing a mask during the commission of the robbery; therefore, Brinkley could only see his eyes, mouth, the skin around his eyes and mouth, and his clothing. See *State* v. *St. John*, 282 Conn. 260, 279, 919 A.2d 452 (2007) (given that witnesses observed unmasked robber only from side and back, "it was important for the witnesses to be able to view the defendant as soon as possible while their memories remained fresh").

The defendant contends that there was no" 'necessity or urgency' " for conducting a showup identification because the "police admitted that they did not need to use a showup,"[18] "Brinkley was unhurt,"[19] and

[18] In making his assertion, the defendant appears to rely on the trial testimony from Sergeant Dunn and Detective Cruz during cross-examination by defense counsel. In response to defense counsel's question of whether there was an emergency that required a showup identification, Sergeant Dunn replied, "No, there was a request from the captain." In response to defense counsel's question regarding whether there was anything preventing them from doing a photographic lineup with the other witnesses, Detective Cruz initially responded that, "I think for this case and my training and experience the showup was appropriate. I believe there is enough probabl[e] cause on that night to arrest the two defendants for the robbery." When asked again, seconds later, however, Detective Cruz responded, "[n]o."

[19] In asserting that "Brinkley was unhurt," the defendant cites to Sergeant Dunn's testimony on cross-examination in which he testified that Brinkley

"the defendant was in custody." Additionally, the defendant cites to three Connecticut cases in which the court held that a showup identification procedure was unnecessarily suggestive due to the lack of exigent circumstances. See *State* v. *Gordon*, 185 Conn. 402, 414–15, 441 A.2d 119 (1981) (no exigent circumstances existed where defendant was in custody, defendant made incriminating statements, arresting officer testified he "had no doubt that he had found the assailant," showup identification did not take place at scene or at earliest opportunity, and state made no claim lineup was impractical) (overruled in part on other grounds by *State* v. *Artis*, 314 Conn. 131, 101 A.3d 915 (2014)), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982); *State* v. *Theriault*, 182 Conn. 366, 373, 438 A.2d 432 (1980) (showup was unnecessarily suggestive where police informed witness someone had been arrested, showed witness gun used in crime, took witness to identify handcuffed defendant through one-way mirror, and there was no claim lineup procedure was impractical); *State* v. *Anderson*, 6 Conn. App. 15, 22–23, 502 A.2d 446 (1986) (officers did not testify that "there was a special need to have an immediate identification made"; therefore, "case presented no danger that the opportunity for an identification would be lost unless a speedy showup was held").

was not in a near death state, nor in physical distress. Although the defendant does not elaborate on this point further, he appears to be relying on the Milford Police Department General Orders, which the defendant introduced during the motion to suppress hearing, that state "[s]howup identification procedures are employed soon after a crime has been committed, when a suspect is detained at or near the crime, or under exigent circumstances such as the near death of the eyewitness or a victim." We note that during argument on the motion to suppress, the court addressed the defendant's argument on this point, and stated, "[w]as this not at or near the crime?" Moreover, our Supreme Court has found exigent circumstances exist, even where an eyewitness is "unhurt." See *State* v. *Revels*, supra, 313 Conn. 767, 770, 773–74 (eyewitness saw murder suspect from window of her apartment building more than 200 feet away; court found exigent circumstances to necessitate showup identification).

There was extensive evidence regarding the exigency that necessitated using the showup procedure; thus, we disagree with the defendant's contention that the testimony of Sergeant Dunn and Detective Cruz rendered the showup identification procedure unnecessarily suggestive. As set forth previously, Officer Joy testified in detail regarding the exigency of the situation at the suppression hearing and during trial. Additionally, his testimony was supported by that of Officer Lennon, who testified that, due to the severity of the crime—an armed robbery in a restaurant—the police did not gather information from the passing motorist because it was "more important that we try to apprehend the suspects." See *State* v. *Ledbetter*, 275 Conn. 534, 552, 881 A.2d 290 (2005) (focus of police investigation was to apprehend perpetrators; therefore, witness' "identification provided additional assurance that the police had done so") (overruled in part by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Moreover, even if police officers testify, after the fact, that they possibly could have used an alternative procedure, that is not compelling because our Supreme Court has upheld the use of a showup identification under circumstances in which it may have been possible to conduct a lineup, i.e., when the suspect was in custody. See *State* v. *Revels*, supra, 313 Conn. 773–74 (although defendant was in custody, police had not recovered weapon from him; therefore, showup identification was necessary to eliminate him as suspect as soon as possible); see also *State* v. *Ledbetter*, supra, 275 Conn. 552 (police were not required to place investigation on hold, and not conduct showup identification, "as soon as they had sufficient evidence to arrest the suspects"). The cases that the defendant cites to the contrary are factually inapplicable to the present case. Here, officers testified that the severe nature of the

crime necessitated the use of a showup identification to quickly determine whether the suspects were in fact the robbers in order to protect the public. Cf. *State* v. *Anderson*, supra, 6 Conn. App. 21 (defendant extensively questioned three officers during motion to suppress hearing, which resulted in "no indication that there was a special need to have an immediate identification made").

Furthermore, the defendant contends that "the police conducted the showup in a suggestive place and staged it in a suggestive manner" because they returned Brinkley to the parking lot where she had identified Ferguson thirty minutes previously, and she viewed both suspects in the same manner, "handcuffed and by the back of an ambulance," and from the same vantage point.[20] We disagree. The police, far from staging the showup suggestively, took significant steps to minimize its inherent suggestiveness. First, Brinkley was transported to a neutral location where the defendant had been taken after he was apprehended, rather than transporting the defendant back to the crime scene or conducting the showup at the police station. See *State* v. *Brown*, 113 Conn. App. 699, 704–705, 967 A.2d 127 (2009) (one-on-one showup at crime scene was not unnecessarily suggestive because it was justified by exigencies); see also *State* v. *Gordon*, supra, 185 Conn. 414 ("circumstances of the station house showup unnecessarily suggested to the victim that she should positively identify the defendant"). Second, the defendant was seated in the back of an ambulance, not in a police car. See *State* v. *Wooten*, supra, 227 Conn. 686 (confrontation obviously suggestive where "[t]he victim must have

[20] When asked during oral argument before this court whether defense counsel had found any cases with a similar factual background, i.e., where the witness was brought to a location to identify a second suspect after already having identified a first suspect in the same location, defense counsel stated that he had not.

realized that the defendant, seated alone in the rear of a police car, was a person whom the police at least believed to have had something to do with the crime"). Third, Officer Joy testified that, at no point did he indicate to Brinkley that the person she would be viewing was the person responsible for the crime. See *State* v. *St. John*, supra, 282 Conn. 278–79 (significant factors in determining showup identification procedure was not unnecessarily suggestive were that there was "no evidence that the police had suggested to the witnesses that they had to identify the defendant, that the defendant was indeed the person who had committed the crime or that the police had coerced the witnesses in any way"); cf. *State* v. *Ruiz*, supra, 337 Conn. 623 n.9 (The "procedure likely will be considered unnecessarily suggestive . . . if the police engage in conduct that is needlessly or gratuitously prejudicial. See, e.g., *Velez* v. *Schmer*, 724 F.2d 249, 250 (1st Cir. 1984) (during one-on-one showup identification procedure, police said to witnesses, [t]his is him, isn't it?") (Internal quotation marks omitted.)). Finally, as to whether the defendant was handcuffed,[21] our Supreme Court has recognized that the use of handcuffs and illumination does not render an identification procedure unnecessarily suggestive. See *State* v. *Ruiz*, supra, 337 Conn. 623; *State* v. *Revels*, supra, 313 Conn. 774. "A consideration of the entire identification procedure in light of the factual circumstances of the case"[22] reveals that the trial court

[21] Officer Joy testified that he could not recall whether the defendant was handcuffed during the showup identification. Officer Lennon testified that he "would assume" that the defendant was handcuffed at the time that he was identified by Brinkley "because he was apprehended in the woods as a suspect in an armed robbery, [and] it would be our policy to handcuff that individual." After further questioning, however, Officer Lennon testified that he did not recall whether the defendant was handcuffed.

[22] The factors discussed previously comport with the eyewitness identification instructions from the Milford Police Department General Orders, which the defendant introduced during the motion to suppress hearing. These instructions include: (1) "[s]uspects should not be transported back to the scene of the crime if avoidable . . . [and] [t]hey should never be transported

did not abuse its discretion in determining that the showup identification of the defendant was not unnecessarily suggestive.[23] *State* v. *Foote*, 122 Conn. App. 258, 268, 998 A.2d 240, cert. denied, 298 Conn. 913, 4 A.3d 834 (2010).

The judgment is affirmed.

In this opinion the other judges concurred.

CRISTINA GONZALEZ *v.* CITY OF NEW BRITAIN ET AL.
(AC 44749)

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

Syllabus

The plaintiff sought to recover damages from the defendant city of New Britain and its animal control officer, D, for injuries she allegedly sustained as a result of the defendants' negligence. D had responded to reported dog attacks in January and June, 2016, involving two pit bulls that occurred at certain real property in New Britain. The plaintiff sustained injuries during a 2018 attack by the same pit bulls and, at the time, was a tenant at the property. The plaintiff alleged that D was negligent for, inter alia, failing to remove the pit bulls from the property, and alleged claims for indemnification and statutory negligence against the city. The plaintiff filed an amended complaint alleging that, based on the 2016 attacks, D knew or should have known that, as a tenant on the property, the plaintiff would have been attacked by the pit bulls. The court granted the defendants' motion to strike the plaintiff's amended complaint on the basis of governmental immunity, and the plaintiff appealed to this court. On appeal, the plaintiff did not dispute that governmental immunity applied to her claims against the defendants in light of the discretionary nature of D's alleged conduct but, instead,

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to police station absent probable cause to arrest," (2) "the suspect should not be viewed when [he] is inside a police cruiser," (3) "[o]fficers must not say nor do anything that would convey to the eyewitness that they have evidence of the suspect's guilt," and (4) "[i]f the suspect is handcuffed, [he] should be positioned so that the handcuffs are not visible to the eyewitness."

[23] In light of our conclusion that the showup identification procedure was not unnecessarily suggestive, we need not address the defendant's claim that the identification was unreliable. See *State* v. *Revels*, supra, 313 Conn. 769 n.5.

alleged that the identifiable person-imminent harm exception to governmental immunity applied. *Held* that the trial court correctly concluded that the plaintiff's amended complaint was legally insufficient because she did not plead facts demonstrating that she was an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity: that complaint did not contain allegations demonstrating that she was legally compelled to be at the property when the pit bulls attacked her or that her tenancy was required by law, rather, the only logical reading of the amended complaint was that her residence at the property was purely voluntary; moreover, the only identifiable class of foreseeable victims that our case law has recognized in connection with this exception to governmental immunity has been that of schoolchildren attending public schools during school hours, the plaintiff did not fall within that class, and this court declined to recognize any additional classes of individuals who may be identifiable victims beyond that demarcated limit.

Argued October 3—officially released November 8, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the plaintiff filed an amended complaint; thereafter, the court, *Wiese, J.*, granted the defendants' motion to strike the amended complaint; subsequently, the court, *Wiese, J.*, granted the defendants' motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Lucas M. Watson, for the appellant (plaintiff).

John F. Diakun, corporation counsel, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Cristina Gonzalez, appeals from the judgment of the trial court rendered in favor of the defendants, the city of New Britain (city) and James Davis, following the granting of the defendants' motion to strike the plaintiff's amended complaint on the basis of governmental immunity. On appeal, the plaintiff asserts that the court incorrectly concluded

that her amended complaint was legally insufficient because she did not plead facts demonstrating that she was an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's amended complaint, and procedural history are relevant to our resolution of this appeal. On or before January 9, 2016, Davis was employed by the city as an animal control officer. Davis' responsibilities "included, but [were] not limited to, identifying dangerous dogs in the city . . . and removing them and/or quarantining them . . . ." Between January 9, 2016, and March 17, 2018, Davis responded to three separate reported dog attacks by two pit bulls that had occurred at 167 Oak Street in New Britain (property). On January 9, 2016, the pit bulls attacked a Chihuahua on the property. In response to the January 9, 2016 incident, Davis ordered the pit bulls' owner, who was the landlord of the property, to quarantine the pit bulls on the property for fourteen days. On June 21, 2016, the pit bulls attacked a tenant on the property, which resulted in the transport of the tenant to a hospital with severe bodily injuries. During his investigation of the June 21, 2016 incident, Davis learned that, on several prior occasions, the pit bulls had chased the tenant and the tenant's friends on the property. Following the June 21, 2016 incident, the pit bulls' owners[1] informed Davis that they intended to euthanize one of the pit bulls because of its "aggressive temperament . . . ." On March 17, 2018, the pit bulls attacked the plaintiff on the property, where she lived as

[1] The plaintiff's amended complaint refers to a single owner of the pit bulls when discussing the incident of January 9, 2016, as well as the subsequent incident of March 17, 2018, and to multiple owners of the pit bulls vis-à-vis the June 21, 2016 incident.

a tenant. The plaintiff sustained severe and permanent injuries as a result of the March 17, 2018 incident.[2]

On March 16, 2020, the plaintiff commenced the present action against the defendants. The plaintiff's original complaint set forth three counts. Count one alleged a common-law negligence claim against Davis. Count two alleged a claim for indemnification against the city pursuant to General Statutes § 7-465. Count three alleged a statutory negligence claim against the city pursuant to General Statutes § 52-557n. The crux of the plaintiff's claims was that Davis "knew or should have known of the dangerous propensity of the pit bulls . . . and [he should have] removed them from the [property] after the second dog attack, [which occurred on June 21, 2016]." On May 1, 2020, the defendants filed a motion to strike the original complaint in its entirety on the basis of governmental immunity. On October 13, 2020, the trial court, *Wiese*, *J.*, over the plaintiff's objection, granted the motion to strike the original complaint, concluding that (1) the parties did not dispute that governmental immunity applied to the plaintiff's claims, and (2) the plaintiff failed to allege facts satisfying the identifiable person element of the identifiable person-imminent harm exception to governmental immunity, such that the exception was inapplicable.

On November 16, 2020, the plaintiff requested permission to file an amended complaint, which the court granted, over the defendants' objection, on December 7, 2020. The plaintiff's amended three count complaint substantively tracked her original complaint, except that she added an allegation that, "[b]ased on the previous attacks that occurred on January 9, 2016 and June 21, 2016 . . . Davis knew or should have known that, as a tenant on the [property], the plaintiff would have been attacked by the pit bulls . . . ."

[2] The plaintiff's amended complaint is silent as to whether Davis took any actions in response to the incidents of June 21, 2016, and March 17, 2018.

On January 6, 2021, the defendants filed a motion to strike the plaintiff's amended complaint in toto on the basis of governmental immunity. First, the defendants asserted that the plaintiff failed to allege that Davis had violated a duty, arising from a statute, an ordinance, a rule, or a procedure, requiring him to seize the pit bulls following the June 21, 2016 incident. Even if Davis had such a duty, the defendants posited, that duty was discretionary in nature and, therefore, subject to governmental immunity. Second, the defendants contended that none of the three recognized exceptions to governmental immunity was implicated under the facts pleaded by the plaintiff. With respect to the identifiable person-imminent harm exception, the defendants claimed that the plaintiff failed to plead facts qualifying her as an identifiable person because she did not allege that she was legally compelled to be on the property at the time of the March 17, 2018 incident.

On February 22, 2021, the plaintiff filed an objection to the defendants' motion to strike her amended complaint. The plaintiff conceded that governmental immunity applied to her claims against the defendants, but she argued that she had pleaded facts establishing that she was an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity. The plaintiff contended that Davis "could have foreseen imminent injury" to her, as anyone who came onto the property and who did not own, care for, or have a relationship with the pit bulls was "highly likely" to be attacked by them. The plaintiff further argued that, as a tenant of the property, she was legally compelled to be on the property at the time of the March 17, 2018 incident. On February 24, 2021, the defendants filed a reply brief, inter alia, iterating that the plaintiff was not legally compelled to be on the property at the time of the March 17, 2018 incident

and, therefore, the identifiable person-imminent harm exception did not apply.

On April 9, 2021, following a hearing, the court issued a memorandum of decision granting the defendants' motion to strike the plaintiff's amended complaint. Citing *Borelli* v. *Renaldi*, 336 Conn. 1, 243 A.3d 1064 (2020), and *Kusy* v. *Norwich*, 192 Conn. App. 171, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019), the court stated that, to determine whether the plaintiff had pleaded facts satisfying the identifiable victim element of the identifiable person-imminent harm exception to governmental immunity, it had to consider whether the plaintiff was legally compelled to be present on the property when the pit bulls attacked her.[3] The court determined that the plaintiff was not legally compelled to be on the property, notwithstanding her status as a tenant of the property. Accordingly, the court concluded that the plaintiff had failed to allege facts demonstrating the applicability of the identifiable person-imminent harm exception and, therefore, her amended complaint was legally insufficient. Thereafter, pursuant to Practice Book § 10-44, the defendants filed a motion for judgment on the stricken amended complaint, which the court granted on May 10, 2021. This appeal followed.

On appeal, the plaintiff does not dispute that the claims in her amended complaint directed to the defendants were subject to governmental immunity in light

[3] The court did not expressly address whether the plaintiff's claims in her amended complaint were subject to governmental immunity. In granting the defendants' motion to strike the plaintiff's amended complaint, however, the court indicated that it was incorporating by reference its October 13, 2020 decision granting the defendants' motion to strike the plaintiff's original complaint. In its October 13, 2020 decision, the court stated that the plaintiff had conceded that governmental immunity applied to her claims. Moreover, the record reflects that the parties did not dispute that the plaintiff's claims were subject to governmental immunity.

of the discretionary nature of Davis' alleged conduct.[4] See General Statutes § 52-557n (a) (2) (B).[5] The plaintiff maintains, however, that the court incorrectly concluded that her amended complaint was legally insufficient on the basis that she failed to plead facts satisfying the identifiable victim element of the identifiable person-imminent harm exception to governmental immunity. The plaintiff argues that, contrary to the court's

[4] In her amended complaint, the plaintiff alleged that, as an animal control officer employed by the city, Davis' responsibilities "included, but [were] not limited to, identifying dangerous dogs in the city . . . and removing them and/or quarantining them," and that, following the June 21, 2016 incident, Davis should have removed the pit bulls from the property. The parties do not address in their respective appellate briefs whether the plaintiff sufficiently alleged that Davis owed her a duty of care vis-à-vis the pit bulls. For purposes of our analysis, we assume that the plaintiff adequately alleged that a duty of care existed.

[5] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

"[Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . Accordingly, a municipality is entitled to immunity for discretionary acts performed by municipal officers or employees . . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (Citations omitted; internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 481–82, 262 A.3d 170 (2021).

determination, she was legally compelled to be on the property at the time of the March 17, 2018 incident because she was a tenant of the property. We disagree.

We begin by setting forth the following standard of review and legal principles governing our review of the plaintiff's claim. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [defendants' motion] is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe 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, we note that [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.) *Wine* v. *Mulligan*, 213 Conn. App. 298, 302–303, 277 A.3d 912 (2022).

The plaintiff's claim implicates the identifiable person-imminent harm exception to governmental immunity, which is one of three recognized exceptions to that doctrine.[6] *Borelli* v. *Renaldi*, supra, 336 Conn. 28. "Our Supreme Court has recognized an exception to discretionary act immunity that allows for liability when

[6] "The other two exceptions are: where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; and . . . where the alleged acts involve malice, wantonness or intent to injure, rather than negligence." (Internal quotation marks omitted.) *Borelli* v. *Renaldi*, supra, 336 Conn. 28 n.14. Only the identifiable person-imminent harm exception is germane to this appeal.

the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply. . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. . . . The exception is applicable only in the clearest of cases. . . .

"An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. . . . Although the identifiable person contemplated by the exception need not be a specific individual, the plaintiff must fall within a narrowly defined identified [class] of foreseeable victims. . . . [T]he question of whether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this exception to qualified immunity is ultimately a question of policy for the courts, in that it is in effect a question of duty. . . . This involves a mixture of policy considerations and evolving expectations of a maturing society . . . . [T]his exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims. . . . Our [Supreme Court's] decisions underscore, however, that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims. . . .

"Our courts have construed the compulsion to be somewhere requirement narrowly. . . . [T]his court

[has previously] concluded that a plaintiff did not satisfy the requirement because [t]he plaintiff [did] not [cite] any statute, regulation or municipal ordinance that compelled her to drive her car on the stretch of [the] [s]treet where [an] accident occurred . . . [and] [did] not [show] that her decision to take [the] particular route was anything but a voluntary decision that was made as a matter of convenience. [See *DeConti* v. *McGlone*, 88 Conn. App. 270, 275, 869 A.2d 271, cert. denied, 273 Conn. 940, 875 A.2d 42 (2005).] . . . [O]ur Supreme Court [has] determined that a person is not an identifiable victim if he is not legally required to be somewhere and could have assigned someone else to go to the location to complete the task in his place. . . . In *Grady* [v. *Somers*, 294 Conn. 324, 355–56, 984 A.2d 684 (2009)], the municipality did not provide refuse pickup service, and residents could either obtain a transfer station permit and discard their own refuse, or hire private trash haulers to come to their home. . . . Because the plaintiff . . . had the option of hiring an independent contractor to dispose of his refuse, the court did not classify him as an identifiable victim for injuries he sustained when he slipped on an ice patch at the transfer station." (Citations omitted; internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 482–84, 262 A.3d 170 (2021); see *Borelli* v. *Renaldi*, supra, 336 Conn. 29 (no legal compulsion for decedent to be passenger in motor vehicle); *Buehler* v. *Newtown*, supra, 487 (no legal compulsion for plaintiff to officiate volleyball match at school); *Kusy* v. *Norwich*, supra, 192 Conn. App. 185 (no legal compulsion for plaintiff to be at school when carrying out contractual duty to deliver milk); see also *St. Pierre* v. *Plainfield*, 326 Conn. 420, 424, 438, 165 A.3d 148 (2017) (plaintiff "was in no way compelled to attend" aqua therapy sessions at municipal pool).

"Our Supreme Court has noted that [t]he only identifiable class of foreseeable victims that [the court has]

recognized . . . is that of schoolchildren attending public schools during school hours . . . . Students attending public school during school hours are afforded this special designation as identifiable victims because they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions. . . . Accordingly, this court has consistently held that students who are injured outside of school hours do not fall within the class of identifiable victims under the identifiable victim-imminent harm exception." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Buehler* v. *Newtown*, supra, 206 Conn. App. 484–85.

Applying the aforementioned binding legal principles, we conclude that the plaintiff did not plead facts in her amended complaint demonstrating that she was an identifiable victim or a member of an identifiable class of foreseeable victims for purposes of the identifiable person-imminent harm exception to governmental immunity.[7] The plaintiff's amended complaint did not contain allegations demonstrating that she was legally compelled to be at the property when the pit bulls attacked her. The plaintiff did not allege that her tenancy was required by law; indeed, the only logical reading of the amended complaint is that the plaintiff's residence at the property as a tenant was purely voluntary.

[7] As this court noted in a recent decision, "[a]t least three members of our Supreme Court recently have observed that the court's application of the identifiable person-imminent harm exception, particularly with respect to the identifiable person prong of the exception, may be doctrinally flawed, unduly restrictive, and/or ripe for revisiting in an appropriate future case. See *Borelli* v. *Renaldi*, supra, 336 Conn. 34, 59–60 n.20 (*Robinson*, *C. J.*, concurring); id., 67 (*D'Auria*, *J.*, concurring); id., 67–113, 146–54 (*Ecker*, *J.*, dissenting). Nevertheless, this court is required to follow binding Supreme

In addition, the only identifiable class of foreseeable victims that our case law has recognized in connection with this exception is that of schoolchildren attending public schools during school hours. See id. The plaintiff does not fall within that class, and we decline to recognize any additional classes of individuals who may be identifiable victims beyond that demarcated limit. See *Kusy* v. *Norwich*, supra, 192 Conn. App. 187 (declining "to extend the classes of individuals who may be identifiable victims beyond the narrow confines of children who are statutorily compelled to be on school grounds during regular school hours"). For these reasons, we conclude that the court did not commit error in striking the plaintiff's amended complaint as legally insufficient.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

Court precedent unless and until our Supreme Court sees fit to alter it." *Buehler* v. *Newtown*, supra, 206 Conn. App. 488 n.14.

[8] As an alternative ground for affirmance, the defendants argue that the plaintiff failed to allege that she was subject to imminent harm for purposes of the identifiable person-imminent harm exception to governmental immunity. It is not necessary for us to address this issue in light of our conclusion that the plaintiff failed to plead facts satisfying the identifiable victim element of the exception. See *Kusy* v. *Norwich*, supra, 192 Conn. App. 187 n.9 (declining to address whether plaintiff was subject to imminent harm after concluding that plaintiff was not identifiable victim, as "[a]ll three [elements] must be proven in order for the exception to apply" (internal quotation marks omitted)). Nevertheless, we note that, following the June 21, 2016 incident, there were no reported dog attacks by the pit bulls on the property until nearly two years later, on March 17, 2018, when the pit bulls allegedly attacked the plaintiff. Thus, the facts pleaded by the plaintiff did not establish that there was a sufficiently high probability that she would be harmed by the two pit bulls on the property. See *Williams* v. *Housing Authority*, 159 Conn. App. 679, 705–706, 124 A.3d 537 (2015) (setting forth four part test to satisfy imminent harm element of identifiable person-imminent harm exception, including that (1) "the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition" and (2) "the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm" (citation omitted; emphasis omitted; internal quotation marks omitted)), aff'd, 327 Conn. 338, 174 A.3d 137 (2017).

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U.S. Bank National Assn. *v.* Rago 200

Foreclosure; claim that trial court improperly exceeded scope of remand order in opening judgment of strict foreclosure to make updated findings regarding fair market value of property and amount of debt at issue; whether defendant was afforded due process when trial court made updated findings sua sponte and without adequate notice to parties or opportunity to be heard.

Wahba *v.* JPMorgan Chase Bank, N.A. 236

Foreclosure; proceedings on remand; claim that trial court erred in interpreting Appellate Court's remand order as prohibiting it from changing nature of judgment from judgment of strict foreclosure to foreclosure by sale.

SUPREME COURT PENDING CASES

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

AARON LYNCH et al. *v.* STATE OF CONNECTICUT et al., SC 20646
Judicial District of Hartford

Medical Malpractice; Sovereign Immunity; Whether Claims Commissioner's Authorization to Sue the State Covered Plaintiffs' Claims; Whether "Wrongful Life" Claim Should Be Recognized in Connecticut. After obtaining permission from the Claims Commissioner to sue the state of Connecticut (state) for medical malpractice pursuant to General Statutes § 4-160, Jean-Marie Monroe-Lynch and Aaron Lynch brought this action against the state on their own behalf and on behalf of their son, Joshua, and the estate of their deceased daughter, Shay. They alleged that Jean-Marie became pregnant with Joshua and Shay, who were twins, after the state's hospital performed an intra-uterine insemination (IUI) procedure using sperm from a donor positive for cytomegalovirus (CMV) antibodies. They further alleged that Shay died in utero and Joshua was born with debilitating, life-long medical conditions due to the resulting CMV infection. They claimed, inter alia, that the state committed medical malpractice based upon (1) negligent fertility treatment in that the state did not obtain Jean-Marie's informed consent where it failed to inform her of the risks associated with infection by CMV in the IUI procedure and (2) negligent prenatal treatment in that the state should have been alerted to the possibility of CMV infections in the fetuses based on an ultrasound examination. The trial court struck Joshua's negligent prenatal treatment claim, stating that it was a "wrongful life" claim that it declined to recognize. The court, however, refused to strike the negligent fertility treatment claims brought on behalf of Joshua and Shay's estate, concluding that they were medical malpractice claims and not "wrongful life" claims. After trial, the court found in favor of the plaintiffs and awarded damages in excess of $36 million. The state appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. On appeal, the state claims that the plaintiffs' action is barred by the doctrine of sovereign immunity. Specifically, it argues that the fertility treatment claims predicated on a lack of informed consent were outside the scope of the Claims Commissioner's permission to sue the state, which was limited to medical malpractice claims. It also asserts that the plaintiffs never received permission to sue on their prenatal medical malpractice claims, as they failed to submit to the Claims Commissioner a good

faith certificate and an opinion letter from a similar health care provider for those claims as required by § 4-160 (b). In addition, the state claims that the negligent fertility treatment claims brought on behalf of Joshua and Shay's estate are, in fact, "wrongful life" claims and that a "wrongful life" claim should not be recognized in Connecticut because it does not allege any legally cognizable injury to the child and "demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence" that the law is not equipped to make, quoting *Becker* v. *Schwartz*, 46 N.Y.2d 401, 412 (1978). Finally, the state claims that the trial court improperly relied on the testimony of Dr. McMeeking, the plaintiff's expert, in concluding that the donor sperm used in the IUI procedure caused the CMV infections to Jean-Marie, Joshua and Shay. It asserts that Dr. McMeeking's causation testimony should not have been admitted because it was unsupported by a valid scientific methodology and was based on unproven, speculative factual assumptions.

STATE *v.* DANIEL VELASQUEZ-MATTOS, SC 20683
Judicial District of New Haven

Criminal; Sexual Assault in First Degree; Constancy of Accusation Witnesses; Whether Constancy of Accusation Witnesses' Testimony Was Inconsistent with Victim's Testimony or Too Detailed; Whether Trial Court Properly Precluded Defendant from Impeaching Witness with Pending Criminal Charge. The eight-year-old victim and his family moved into the second floor apartment of a multifamily home, living above the apartment of the thirty seven-year-old defendant. The defendant befriended the victim and bought gifts for him, including a videogame system that he did not allow the victim to use in the victim's apartment, claiming he might break it. Instead, the defendant insisted that the victim play videogames in the defendant's bedroom, and, while doing so, the defendant locked his bedroom door and sexually assaulted the victim. Brandishing a knife, the defendant threatened that he would kill the victim's family if he disclosed the abuse. After a series of incidents that made clear to the victim's parents that this relationship was inappropriate, the victim disclosed the abuse to family members while the defendant was hospitalized. The police later arrested the defendant, charging him with sexual assault and risk of injury to a child. At trial, the defendant impeached the victim's credibility on cross-examination by claiming that he had fabricated the allegations. The state therefore sought to admit testimony from the victim's family about the victim's

disclosure of the abuse under " 6-11 (c) (1) of the Connecticut Code of Evidence, which provides that, if the defendant impeaches the credibility of a sexual assault complainant, then the state may respond with constancy of accusation witnesses to offer testimony corroborating that the victim made an allegation of sexual assault and the timing thereof. Such testimony may not be admitted for substantive purposes and can contain only "those details [of the alleged assault] necessary to associate the complainant's allegations with the pending charge." The court overruled the defendant's hearsay objection and admitted the testimony. Following his conviction, the defendant appealed directly to the Supreme Court pursuant to General Statutes § 51-199 (b) (3), claiming that the the constancy of accusation testimony was improperly admitted because the victim did not testify about certain aspects of the sexual abuse to which the family had testified. He also argues that their testimony contained unnecessary details of the assault that were not needed to associate the victim's allegations with the pending charges. The defendant further claims that the trial court erred in precluding him from impeaching the victim's father with his pending criminal charge. He argues that the pending charge was relevant to show the father's motive to testify favorably for the state and that the court improperly applied the rule of evidence for impeaching a witness with a prior felony conviction. While the defendant claims that these errors were harmful, the state contends that they were harmless and, moreover, that the defendant did not preserve his claim regarding the father's testimony. The state further argues that the constancy of accusation testimony was also properly admitted to rebut the recent suggestion of fabrication and that inconsistencies in that testimony and the victim's are subjects for cross-examination.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* ANDRES C., SC 20692
Judicial District of New Haven

Criminal; Whether Defendant Waived Claim That He Was Entitled to Disclosure of Victim's Journals As Discoverable Statements of a Witness; Whether *Brady* Review of Victim's Journals by Nonlawyer Member of Prosecutor's Office Was Constitutionally Adequate. The defendant was charged with various crimes based on allegations that he sexually abused a minor child on numerous occasions. During the victim's testimony at trial, the parties

learned for the first time that she maintained journals relating to her abuse. The defendant requested access to the journals "as discovery." The trial court conducted an in chambers discussion with the parties, after which it ordered the state to review the journals to determine if they contained any statements by the victim concerning the incidents in question or any exculpatory material that must be disclosed to the defendant. The trial court stated that, if there were any question as to what must be disclosed, it would conduct an in camera review. The defendant raised no objection to the procedure. The prosecutors assigned the task of reviewing the journals, which were handwritten in Spanish, to a bilingual investigator in their office. After trial, the defendant was convicted of sexual assault in the third degree and risk of injury to a child. The defendant appealed, claiming that the trial court improperly denied him access to the victim's journals because they constituted discoverable statements of a witness under Practice Book § 40-13A. Section 40-13A provides that, upon written request by a defendant and without an order of the judicial authority, the prosecuting authority shall provide photocopies of all statements within its possession that were prepared concerning the offense charged. The Appellate Court (208 Conn. App. 825) held that the defendant waived the claim because he agreed to the procedure to be used for the review, and potential disclosure, of the contents of the journals and, having agreed to this procedure before the trial court, he could not challenge that procedure on appeal. The defendant also claimed that his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), were violated by the procedure employed by the prosecutors with respect to review of the victim's journals. Specifically, the defendant argued that the prosecutors were required to personally review the victim's journals for exculpatory information and could not delegate the task to a nonlawyer member of their office. The Appellate Court held that the defendant could not prevail on the claim because, although the ultimate obligation for complying with *Brady* rests with the prosecutor, it did not follow that the personal review of items such as the victim's journals by a prosecutor is constitutionally required. The Appellate Court affirmed the conviction, and the defendant filed a petition for certification to appeal from the decision. The Supreme Court granted the petition as to the questions of whether the Appellate Court incorrectly concluded that (1) the defendant waived his claim that he was entitled to disclosure of the contents of the victim's journals as the discoverable statements of a witness and (2) the *Brady* review of the victim's journals by a nonlawyer member of the prosecutor's office was constitutionally adequate.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

DAVID O'SULLIVAN *v.* ALAN F. HAUGHT, SC 20722
Judicial District of Hartford

Appellate Jurisdiction; Whether Appeal From Denial of Motion for Summary Judgment Based on Collateral Estoppel Properly Dismissed for Lack of Subject Matter Jurisdiction. The plaintiff, David O'Sullivan, was the sole beneficiary of a will executed by his mother, Stephanie Haught, in 2012. In 2013, Stephanie Haught married the defendant, Alan F. Haught, and executed a will that revoked the prior will and named the defendant as her sole beneficiary. Stephanie Haught died in 2017, and the defendant applied to have the 2013 will admitted to probate. The plaintiff contested the will on the grounds that the decedent lacked testamentary capacity and that the will was the product of undue influence by the defendant. The Probate Court found that the plaintiff failed to prove his claims and admitted the will to probate. The plaintiff appealed from the decision to the Superior Court. The plaintiff also filed a civil action in which he alleged a claim of tortious interference with expected inheritance based on his claim that the defendant exercised undue influence over the decedent in connection with the execution of the will. The trial court consolidated the probate appeal and the civil action for trial. The defendant filed a motion for summary judgment on the tort claim on the ground that it is barred by the doctrine of collateral estoppel because the issue of undue influence was fully litigated in, and decided by, the Probate Court. The trial court denied the motion based on its finding that, due to the Probate Court's limited statutory authority, it could not properly have adjudicated the tort claim. The defendant appealed from the trial court's ruling denying his motion for summary judgment. The plaintiff filed a motion to dismiss the appeal, claiming that the Appellate Court lacked subject matter jurisdiction because the denial of a motion for summary judgment is not an appealable final judgment. While there is an exception allowing an immediate appeal from a trial court's denial of a motion for summary judgment based on a colorable claim of collateral estoppel, the plaintiff claimed that it is patently obvious that collateral estoppel does not apply because the Probate Court had no statutory authority to adjudicate the tort claim. The defendant argued that the plaintiff's claim is directly contradicted by *Solon* v. *Slater*, 204 Conn. App. 647, cert. granted, 337 Conn. 908 (2021). In *Solon*, the Appellate Court held that the plaintiff

was collaterally estopped from litigating her tortious interference claims in the Superior Court because the issue of whether the decedent had been subject to undue influence by the defendants had been finally determined by the Probate Court by virtue of a prior decree admitting the decedent's will, which was not challenged on appeal. The Appellate Court granted the motion to dismiss in the present case without a written decision. The defendant filed a petition for certification to appeal, which the Supreme Court granted as to the question of whether the Appellate Court properly dismissed, for lack of subject matter jurisdiction, the defendant's appeal from the trial court's denial of his motion for summary judgment based on collateral estoppel.

IN RE COLE, SC 20746

United States District Court for the District of Connecticut

Bankruptcy; Homestead Exemption; Whether Public Act 21-161, Which Increased Amount of Homestead Exemption From $75,000 to $250,000, Applies Retroactively to Debts Incurred by Debtor Before Public Act 21-161 Took Effect or Prospectively. In 1993, the legislature enacted Public Act 93-301 ("1993 Act"), then codified at General Statutes § 52-352b (t), which exempted from the claims of creditors the value of the debtor's homestead up to the amount of $75,000 ("homestead exemption"). Section 3 of the 1993 Act provided: "This act shall take effect October 1, 1993, and shall be applicable to any lien for any obligation or claim arising on or after said date." Subsequently, courts in the United States Court of Appeals for the Second Circuit determined that § 52-325b (t) applied only to debts incurred on or after October 1, 1993, because the newly created homestead exemption was a substantive change in the law. In 2021, the legislature enacted Public Act 21-161 ("2021 Act"), now codified at General Statutes § 52-352b (21), which increased the amount of the homestead exemption from $75,000 to $250,000. Section 1 of the 2021 Act provides in part: "Section 52-352b of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2021) . . . ." Unlike the 1993 Act, the 2021 Act makes no reference to its applicability. On November 22, 2021, Elaine M. Cole (debtor) filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut ("Bankruptcy Court"). At that time, she owned a home in Mystic, Connecticut, which was then under contract for sale to a third party. The debtor claimed a homestead exemption in her home in the amount of $250,000 pursuant to § 52-352b (21). Anthony S. Novak (trustee), the Chapter 7 trustee of the bankruptcy

estate of the debtor, objected to the debtor's claimed homestead exemption, arguing that the debtor could not use the increased homestead amount set forth in the 2021 Act, as her debts were incurred before October 1, 2021, the effective date of the 2021 Act. The Bankruptcy Court rejected the trustee's argument, concluding that the 2021 Act applied to the debtor and all bankruptcy debtors claiming homestead exemptions pursuant to § 52-352b (21) on or after October 1, 2021. In support of its interpretation of the 2021 Act, the Bankruptcy Court stated: "Absent a clear expression of legislative intent to the contrary, and based upon the legislature's presumptively intentional elimination of limiting language and its explicit repeal of the [o]riginal [h]omestead [e]xemption, the Court finds that the [new homestead exemption set forth in the 2021 Act] shall be applied retroactively." The trustee appealed from the Bankruptcy Court's decision to the United States District Court for the District of Connecticut (District Court), claiming that the Bankruptcy Court improperly concluded that the 2021 Act applied retroactively to debts incurred by the debtor prior to that act's effective date. Finding no binding Connecticut authority on the question of the retroactivity of the 2021 Act, the District Court certified the following question, which the Supreme Court accepted pursuant to General Statutes § 51-199b: "Whether Public Act 21-161 applies retroactively to debts incurred by the debtor before Public Act 2l-161 took effect or prospectively."

MARLINE ADESOKAN et al. *v.* TOWN OF BLOOMFIELD et al.,
SC 20753
Judicial District of Hartford

Governmental Immunity; Identifiable Person-Imminent Harm Exception; General Statutes § 14-283; Whether Trial Court Properly Concluded that Defendant Entitled to Governmental Immunity for Accident Involving Police Cruiser Responding to an Emergency. The plaintiff was driving her two children to daycare and summer camp in August, 2017, when she stopped at an intersection in a construction zone before making a left turn at the direction of a construction worker. At the same time, the defendant officer from the defendant town's police department was responding to a report of a kidnapping with his emergency lights and sirens activated. When the plaintiff attempted to make the left turn, her vehicle was struck by the police cruiser as it tried to pass. The plaintiff, on behalf of herself and her children, brought this action against the town and the officer, alleging that the officer had been

negligent by, inter alia, traveling at an excessive speed in violation of General Statutes § 14-283 (d), which requires those who operate emergency vehicles "to drive with due regard for the safety of all persons and property." The defendants moved for summary judgment on the ground of governmental immunity for the officer's discretionary acts and omissions, citing the Supreme Court's recent decision in *Borelli* v. *Renaldi* (336 Conn. 1). The court in *Borelli* reasoned that § 14-283 (d) "imposes a discretionary duty to act" but limited its decision to "an officer's decision to initiate a pursuit." The trial court here, relying on *Borelli*, concluded that the officer's manner of operating the emergency vehicle was discretionary, and, therefore, the town was entitled to immunity. The court also rejected the plaintiffs' claim that they fit an exception to governmental immunity for identifiable victims who are subject to imminent harm, finding that the plaintiffs were not exposed to imminent harm and had not presented evidence that they were within a class of identifiable victims. The plaintiffs appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself pursuant to General Statutes § 51-199 (c). The plaintiffs claim that there are issues of material fact and that the trial court misapplied *Borelli*, as the Supreme Court's holding was limited to an officer's initial decision to engage in a pursuit, which does not apply here to a negligence claim based on the manner in which the officer drove his emergency vehicle. The plaintiffs also claim that the court erred in rejecting their argument that the identifiable victim-imminent harm exception applied, and they argue that the court exceeded its authority because it should have allowed the jury to determine whether the officer was engaged in ministerial or discretionary acts as a question of fact. The defendants counter that the trial court correctly applied *Borelli* and that there were no underlying factual disputes that needed to be resolved under the identifiable person-imminent harm exception, which the court properly rejected. Furthermore, they argue that the plaintiffs cannot rely on the fact that the construction worker directed the plaintiff mother to turn, as they failed to plead any such allegations in the complaint. The Supreme Court will also consider the effect, if any, of its decision in *Daley* v. *Kashmanian* (344 Conn. 464), which was released during the pendency of this appeal. In *Daley*, the Supreme Court reasoned that the operation of a nonemergency vehicle "is a highly regulated activity that constitutes a ministerial function," but the court left open the question of whether responding to an emergency call under § 14-283 "changes driving from a ministerial to a discretionary task."

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

CONNECTICUT PORT AUTHORITY

Notice of Intent to amend Rates of Pilotage procedures

In accordance with Section 1-121 of the General Statutes of Connecticut, the Connecticut Port Authority (the ''Authority'') proposes to amend the Rates of Pilotage procedures of the Authority (the ''Procedures'').

Statement of the substance and purpose of the proposed amendments:

To amend the Procedures for conformity to the regulations of the Authority and to establish increased Rates of Pilotage.

Proposed amendments to the Procedures address the following:

- Establishment of increased Rates of Pilotage to be implemented over a five-year period; and
- Technical changes necessary to conform the regulations transferred from the Connecticut Department of Transportation to the Authority, including name/title and section references.

A copy of the above proposed revisions to the Authority's Procedures is available on the Port Authority's website (https://ctportauthority.com/rfqs-rfps-3/) under ''Public Notices.''

Manner of presenting views:

All interested persons are invited to present their views in writing no later than December 8, 2022. Comments are to be submitted to the Connecticut Port Authority, Joseph Salvatore either by e-mail to Joseph.Salvatore@ct.gov (please put ''Public Comment re: Pilotage Procedures'' in the subject line) or by postal mail addressed to him at:

Connecticut Port Authority
ATTN: Joseph Salvatore
455 Boston Post Road, Suite 204
Old Saybrook, CT, 06475

NOTICES

THE OFFICE OF CHIEF PUBLIC DEFENDER

IS NOW ACCEPTING APPLICATIONS FOR HANDLING CASE ASSIGNMENTS FOR THE NEXT FISCAL YEAR BEGINNING July 1, 2023 THROUGH June 30th, 2024 IN THE FOLLOWING LOCATIONS ONLY:

CRIMINAL JUDICIAL DISTRICT COURTS:

Stamford JD

CRIMINAL GEOGRAPHICAL AREA PART B COURTS:

GA 01 — Stamford (now includes Norwalk)
GA 05 — Derby
GA 09 — Middletown
GA 10 — New London
GA 11 — Danielson
GA 12 — Manchester
GA 21 — Norwich

JUVENILE DELINQUENCY COURTS:

New Haven

HABEAS CORPUS:

Rockville Civil

CHILD PROTECTION COURTS:

Statewide.
Please note: By advertising statewide we are not indicating there are openings in general, or in any particular court. *Applicants should submit their **top 3 choices** of court locations.*

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM:

Statewide — locations not needed

FAMILY CHILD SUPPORT CONTEMPT PROCEEDINGS AND PATERNITY:

Statewide — indicate preferred location and weekdays

Annual agreements will cover the period of July 1, 2023 through June 30, 2024. Compensation will be as follows:

FLAT RATE COMPENSATION *hourly billing only as approved*

JUDICIAL DISTRICT CASES	$1000 per case
CRIMINAL GEOGRAPHICAL AREA CASES	$400 per case
JUVENILE DELINQUENCY	$400 per case
CHILD PROTECTION CASES	$500 per case

ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM	$500 per case

HOURLY COMPENSATION

$75 per hour for Felony cases
$65 per hour for Misdemeanor cases
$65 per hour for Child Protection
$65 per hour for AMC/GAL cases

QUALIFICATIONS FOR PRACTICE AREAS

JUDICIAL DISTRICT APPLICANTS:

Attorneys approved to represent clients in JD courts must have at least 2 years of criminal litigation experience and at least 2 felony trials to verdict as lead or sole counsel.

GEOGRAPHICAL AREA APPLICANTS:

Attorneys approved to represent clients in GA courts will handle misdemeanor cases and felony cases. Applicants should possess a working knowledge of the criminal statutes, practice book, diversionary programs, and alternatives to incarceration.

JUVENILE DELIQUENCY APPLICANTS

Attorneys approved to represent client in Juvenile Delinquency courts will handle delinquency matters in closed proceedings. Applicants should have a working knowledge of the statutes that apply to delinquency proceedings, delinquency procedures, practice book, and alternatives to detention.

CHILD PROTECTION APPLICANTS:

Attorneys approved as Assigned Counsel for assignments in child protection matters will represent children and indigent parents in juvenile court matters dealing with abuse, neglect and termination of parental rights. Attorneys may also be appointed as guardian ad litem. The cases may also involve matters transferred from Probate Court and adoptions. Applicants will be required to participate in pre-service training and should possess general knowledge of the child protection statues, the administration and policies of the Department of Children and Families.

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM:

Attorneys approved as Assigned Counsel in state-rate attorney for minor child / guardian ad litem cases in family court will represent children from indigent families in family matters as appointed by the court.

IF INTERESTED: please download the application form from the Connecticut Office of Chief Public Defender website, Assigned Counsel page, at the very top (click on the link and you will get the application and instructions):

https://portal.ct.gov/OCPD/Assigned-Counsel/Assigned-Counsel

APPLICATIONS ARE ACCEPTED FROM: November 8, 2022, 9:00 a.m. through November 24th, 2022 at 5:00 p.m.

Send the application, cover letter and resume only via email (***USPS mail or fax not accepted***) to:

OCPD.AC.APPLICATIONS@PDS.CT.GOV

Notice of Suspension of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on October 11, 2022, in Docket Number HHD-CV-22-6157101-S, Michael A. Peck, Juris No. 045776 of Hartford, CT is suspended from the practice of law in Connecticut for a period of nine months, effective 30 days from the date of this decision.

The Office of Chief Disciplinary Counsel shall immediately notify the chief clerks of all judicial districts and Probate Court administration of the respondent's suspension.

The respondent shall not deposit to, disburse any funds from, withdraw any funds from, or transfer any funds from, any clients' funds, IOLTA, or fiduciary accounts.

During his suspension, the respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The respondent's failure to comply with this order shall be considered misconduct and may subject the respondent to additional discipline.

So ordered.

Susan Quinn Cobb
Presiding Judge