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law raised here." Id., 939. The court noted that the attorney's "contrary conclusion was based only on a cursory examination of the annotations to [the statute of limitations]. Even if we were to believe the respondent, given the time available and the urgings of his clients to proceed, legal research [that] was so obviously inadequate on a question of such magnitude would constitute gross negligence . . . ." Id., 940.

Here, Zeppieri acknowledged before the trial court that it was a mistake not to have been aware of controlling case law before commencing *Riccio I* but otherwise provided no explanation for his actions. The twenty page transcript that contains the entire evidentiary record on this issue indicates only that Zeppieri had not read *Lucisano* or *Bell* until it became an issue in this case. The record also contains no information explaining why the plaintiff's other attorney, Kevin Ferry, failed to comply with *Lucisano* and *Bell*. On cross-examination, Zeppieri explained: "I had not read [*Lucisano*], which had attached a new requirement to the statute that is not in the text of the statute. There's no requirement in [§ 52-190a] that the letter include that material. The requirement came only as a result of the Appellate Court's . . . decision in *Lucisano* . . . ." There is no testimony regarding whether Zeppieri had conducted any research or otherwise explaining why he was unaware of the two Appellate Court decisions. As a result, we agree with the trial court that Zeppieri failed to meet his burden of proving that the dismissal of *Riccio I* was the result of mistake, inadvertence, or excusable neglect. See *Ruddock* v. *Burrowes*, supra, 243 Conn. 576–77. In the absence of further explanation—such as the failure to uncover *Lucisano* and *Bell* despite diligent research—we agree with the trial court's determination that Zeppieri's admitted failure to know of controlling Appellate Court case law, decided six years before he initiated the action, constituted gross negligence. As in *Santorso*, in which the plaintiff's

counsel failed to explain his noncompliance with § 52-190a (a); see *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 358; Zeppieri failed to explain his noncompliance with *Lucisano* and *Bell*. Accordingly, there is no evidence in the record from which to conclude that Zeppieri's failure to know of the controlling Appellate Court case law was an accident, inadvertence, or excusable neglect.

The plaintiff nevertheless contends that the trial court improperly applied the legal maxims " 'that everyone is presumed to know the law, and that ignorance of the law excuses no one . . . .' " We agree with the plaintiff that application of such legal maxims would violate the requirement in *Plante* that a court place an attorney's actions on the continuum of mistake, inadvertence, or excusable neglect, on the one hand, and dismissal for egregious conduct or gross negligence, on the other.[9] *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 50–51, 56. We disagree, however, that the trial court failed to place Zeppieri's conduct on the continuum. As the trial court found: (1) Zeppieri has practiced in the "complex, vigorously contested area of medical malpractice law" since his admission to the bar in 2006; (2) "[t]he adequacy of a 'similar health care provider' opinion letter is one of the most frequently litigated pretrial issues in medical malpractice actions"; (3) *Lucisano* and *Bell* were decided more than six years before *Riccio I* was commenced; (4) after *Lucisano*, there could be no doubt that the plaintiff was required to include "sufficient qualifications of the author in the opinion letter to demonstrate compliance with § 52-190a"; (5) in the six year period after *Lucisano* and *Bell* were decided, Zeppieri testified that he filed five

[9] We note that the plaintiff herself appears to advocate for a per se rule that the failure to know the law would never constitute egregious conduct or gross negligence. As with the legal maxims that "everyone is presumed to know the law" and "ignorance of the law excuses no one," we reject such an absolute rule, which is antithetical to the fact intensive inquiry § 52-592 demands.

CONNECTICUT REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MARGARET E. DAY, COCONSERVATOR (ESTATE OF SUSAN D. ELIA) *v.* RENEE F. SEBLATNIGG ET AL. (SC 20280)

Robinson, C. J., and Palmer, McDonald, Mullins, Kahn, Ecker and Vertefeuille, Js.*

Syllabus

Pursuant to statute ((Rev. to 2011) § 45a-655 (a)), "[a] conservator of the estate appointed under section 45a-646 . . . shall manage all the estate and . . . shall use the least restrictive means of intervention in the exercise of the conservator's duties and authority."

Pursuant further to statute ((Rev. to 2011) § 45a-655 (e)), "[u]pon application of a conservator of the estate . . . the court may authorize the conservator to make gifts or other transfers of income and principal from the estate of the conserved person in such amounts and in such form, outright or in trust, whether to an existing trust or a court-approved trust created by the conservator, as the court orders . . . ."

The plaintiff, the coconservator of the estate of E, sought a judgment declaring that a certain irrevocable trust was void ab initio and unenforceable, and that any and all assets transferred from E's estate to the trust be returned to the estate. The Probate Court previously had granted the application of E, who suffered from Parkinson's disease, for the voluntary appointment of a conservator of her person and her estate pursuant to the voluntary conservatorship statute ((Rev. to 2011) § 45a-646). The Probate Court appointed the named defendant, S, as the conservator of E's estate and issued a decree providing that S had the power to manage the estate, to apply estate funds to support E, to pay her debts, and to collect debts due to her. Thereafter, S met with representatives of the defendant F Co. At their recommendation, S, in her capacity as conservator of E's estate, entered into an asset protection services agreement on E's behalf with F Co.'s corporate affiliate and established a self-settled irrevocable asset protection trust. S supervised E's execution of the instrument creating the irrevocable trust but did not seek or obtain the Probate Court's approval. The irrevocable trust named S as a trustee and F Co. as the protector of the trust. Thereafter, S directed the transfer of more than $6 million in assets to the irrevocable trust from E's estate, nearly all of which came from a revocable trust, of which S was a trustee, that E previously had established. After S resigned as conservator of E's estate, the Probate Court appointed the plaintiff to serve as the coconservator of E's estate for the limited purpose of

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

any matters relating to E's interest in the irrevocable trust. After the plaintiff commenced the present declaratory judgment action in the trial court, she filed a motion for summary judgment, claiming that there was no genuine issue of material fact as to whether the irrevocable trust was void. The trial court granted the plaintiff's motion, agreeing that the irrevocable trust was void ab initio and unenforceable, and ordered that the transferred assets be returned to E's estate. The court concluded that a conservator retains the exclusive authority to manage a voluntarily conserved person's affairs and rejected F Co.'s argument that § 45a-655 (e) did not apply because E, and not S, had created the irrevocable trust. The court further reasoned that the revocable trust was part of E's estate, subject to the conservator's authority, and, in turn, subject to the requirements of § 45a-655 (e), because E had an equitable interest in the revocable trust, and S had failed to comply with § 45a-655 (e) insofar as she did not obtain the Probate Court's approval prior to the creation or funding of the irrevocable trust. From the judgment rendered in favor of the plaintiff, F Co. appealed to the Appellate Court, claiming, inter alia, that the trial court had incorrectly determined that E lacked authority to execute the irrevocable trust while under a voluntary conservatorship. The Appellate Court affirmed the trial court's judgment, and F Co., on the granting of certification, appealed to this court. *Held* that the Appellate Court properly upheld the trial court's determination that S, as conservator, had exclusive control over E's estate and that E therefore lacked the legal authority to create or to fund the irrevocable trust, rendering the irrevocable trust null and void ab initio: although the language of the relevant statues did not expressly resolve whether a voluntarily conserved person and a conservator share joint authority over the management of the voluntarily conserved person's estate, the text and the history of the statutory scheme governing conservatorships demonstrated that the legislature did not intend to allow a voluntarily conserved person to retain joint control over matters delegated to the conservator's authority, as this court has long construed the language prescribing the conservator's duty to "manage all the estate," as used in § 45a-655 (a), as conferring exclusive control on the conservator; moreover, the various amendments to the conservatorship statutory scheme did not change the conservator's exclusive authority over "all the estate" assigned to him or her by the Probate Court but, rather, indicated a legislative intent that conservatorships be limited in scope, that they not unnecessarily restrict the independence of the conserved person, and that conservators have exclusive control over those affairs assigned to them, subject to the condition that they use the least restrictive means of intervention in the exercise of their assigned duties, and nothing in the statutory scheme suggests that the exclusive nature of the authority conferred on the conservator of the estate differs when the conservatorship is voluntary rather than involuntary in nature; furthermore, under F Co.'s construction of the relevant

statutory provisions, conservators of voluntarily conserved persons would be placed in an untenable position if the conserved person retained the same legal authority that he or she had before being conserved, because, if the voluntarily conserved person could freely dispose of his or her estate without the knowledge of the conservator, the conservator would be unable to fulfill his or her statutory duty to "manage all the estate," and few would be willing to assume the risk of becoming a conservator pursuant to a voluntary application under such a construction; in addition, although F Co. cited cases for the proposition that a conserved person with the requisite mental capacity may retain the authority to engage in acts that are outside of the sphere of the conservatorship as a matter of law or under the facts of a particular case, F Co. cited no case for the proposition that a conservator and a voluntarily conserved person may exercise concurrent authority over matters assigned to the conservator, and this court's conclusion that a voluntary conservatorship deprives the conserved person of the legal authority to manage his or her own financial affairs was consistent with the decisions of the other jurisdictions that have considered the issue.

(*Five justices concurring separately in one opinion*)

Argued February 20, 2020—officially released January 21, 2022**

Procedural History

Action for a judgment declaring, inter alia, a certain trust void ab initio and unenforceable, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Heller*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant First State Fiduciaries, LLC, appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Prescott* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant First State Fiduciaries, LLC, on the granting of certification, appealed to this court. *Affirmed.*

James G. Green, *Jr.*, with whom was *Laura W. Ray*, for the appellant (defendant First State Fiduciaries, LLC).

Glenn W. Dowd, with whom, on the brief, was *Howard Fetner*, for the appellee (substitute plaintiff Marc W. Elia).

** January 21, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. The issue that we must decide in this certified appeal, broadly stated, is whether a person who has voluntarily obtained the appointment of a conservator, and thus has not been found by a court to be incapable of managing her affairs, shares joint authority with the conservator of her estate. This issue arises in the specific context of the question of whether an inter vivos trust created by a person under a voluntary conservatorship was void ab initio because the authority to create such a trust rested exclusively with the conservator of the estate under General Statutes (Rev. to 2011) § 45a-655.[1]

[1] General Statutes (Rev. to 2011) § 45a-655 provides in relevant part: "(a) A conservator of the estate appointed under section 45a-646 [voluntary conservatorship], 45a-650 [involuntary conservatorship] or 45a-654 [temporary conservatorship] shall, within two months after the date of the conservator's appointment, make and file in the Court of Probate, an inventory, under penalty of false statement, of the estate of the conserved person, with the properties thereof appraised or caused to be appraised, by such conservator, at fair market value as of the date of the conservator's appointment. Such inventory shall include the value of the conserved person's interest in all property in which the conserved person has a legal or equitable present interest, including, but not limited to, the conserved person's interest in any joint bank accounts or other jointly held property. The conservator shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the conserved person and those members of the conserved person's family whom the conserved person has the legal duty to support and to pay the conserved person's debts, and may sue for and collect all debts due the conserved person. The conservator shall use the least restrictive means of intervention in the exercise of the conservator's duties and authority.

* * *

"(e) Upon application of a conservator of the estate . . . the court may authorize the conservator to make gifts or other transfers of income and principal from the estate of the conserved person in such amounts and in such form, outright or in trust, whether to an existing trust or a court-approved trust created by the conservator, as the court orders to or for the benefit of individuals, including the conserved person, and to or for the benefit of charities, trusts or other institutions described in [the relevant provisions of the Internal Revenue Code of the United States]. . . ."

Unless otherwise indicated, all references to § 45a-655 in this opinion are to the 2011 revision of the statute.

In 2011, Susan D. Elia submitted an application to the Probate Court for voluntary representation by the named defendant, Renee F. Seblatnigg,[2] as the conservator of her estate. The Probate Court granted the application. Thereafter, Elia created an irrevocable trust and arranged for the transfer of certain assets to it. In 2014, the plaintiff, Margaret E. Day,[3] acting in her capacity as coconservator of Elia's estate for the limited purpose of matters related to the irrevocable trust, brought this action, seeking a judgment declaring that the trust was void ab initio because Seblatnigg, as Elia's conservator, did not create and fund the trust with the approval of the Probate Court pursuant to § 45a-655 (e). Thereafter, the trial court granted the plaintiff's motion for summary judgment and rendered judgment for the plaintiff. The defendant, First State Fiduciaries, LLC,[4] a Delaware limited liability company that was designated as "the protector of the . . . irrevocable trust," appealed from the judgment to the Appellate Court, claiming, among other things, that the trial court had incorrectly determined that Elia could not create an irrevocable trust on her own behalf while she was under a voluntary conservatorship. The Appellate Court affirmed the judgment of the trial court. *Day* v. *Seblatnigg*, 186 Conn. App. 482, 506, 199 A.3d 1103 (2018). This certified

[2] The complaint also named the following defendants: Edward E. Pratesi; Harry D. Lewis; Susan D. Elia; Marc W. Elia and Christine E. Elia, as guardians of certain minor children who were beneficiaries of the Susan D. Elia Irrevocable Trust; then Attorney General George Jepsen; and Sarah Wilbur Day, Matthew Lewis Striplin, Samuel Bowden Striplin and Suzanne Palazzi Day, remainder beneficiaries of the Susan D. Elia Irrevocable Trust. The claims against Seblatnigg, Lewis and Pratesi were ultimately withdrawn. The trial court granted motions of default as to Marc W. Elia, Matthew Lewis Striplin, Samuel Bowden Striplin, Sarah Wilbur Day and Suzanne Palazzi Day. See *Day* v. *Seblatnigg*, 186 Conn. App. 482, 485 n.1, 199 A.3d 1103 (2018).

[3] Elia died during the pendency of this appeal, and Marc W. Elia, in his capacity as executor of Elia's estate, was substituted as a plaintiff.

[4] Hereinafter, all references to the defendant in this opinion are to First State Fiduciaries, LLC.

appeal followed.[5] We affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts, as found by the trial court, and procedural history. "In June, 2011, Elia applied to the . . . Probate Court for the voluntary appointment of a conservator of her person and her estate [because she had Parkinson's disease, a progressively degenerative condition].[6] Following a June 28, 2011 hearing in the . . . Probate Court, at which the court, *Hopper*, *J.*, saw Elia in person, heard her reason for seeking voluntary representation, and explained to her that appointing a conservator as requested would subject her and her property to the authority of the conservator, the court . . .

[5] We granted the defendant's petition for certification to appeal on the following issue: "Did the Appellate Court properly uphold the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under . . . § 45a-655 (e), regardless of whether the conserved person at the time of the transfer had unimpaired testamentary capacity?" *Day* v. *Seblatnigg*, 331 Conn. 913, 204 A.3d 702 (2019). Neither the fact that Elia may have had unimpaired testamentary capacity nor the application of § 45a-655 (e) is, however, relevant to the issue on appeal, as framed by the parties. Indeed, the issue of Elia's testamentary capacity was not raised in the proceedings below, and the Appellate Court never addressed the application of § 45a-655 (e). Rather, the question that the parties and the courts below have addressed is whether a voluntarily conserved person who has not been found "*incapable of managing . . . her affairs*," as that phrase is defined in General Statutes (Rev. to 2011) § 45a-644 (d), may create an irrevocable trust. Accordingly, we reframe the certified question as follows: "Did the Appellate Court properly uphold the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under § 45a-655 (e), regardless of the fact that the conserved person at the time of the transfer has not been found 'incapable of managing . . . her affairs,' as that phrase is defined in General Statutes (Rev. to 2011) § 45a-644 (d)?" See, e.g., *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191–92, 884 A.2d 981 (2005) (court may reframe certified question to more accurately reflect issue presented).

[6] Elia submitted letters to the court from a physician opining that she had a mild cognitive impairment, consistent with her Parkinson's disease, which rendered complex learning or activities requiring concentration, such as balancing a checkbook, difficult, but that she was nonetheless "clearly . . . competent and capable of making her own decisions."

granted Elia's application for voluntary representation [by the persons she had designated]. By decree issued on June 28, 2011 . . . the court appointed Seblatnigg the conservator of Elia's estate and Richard DiPaola . . . the conservator of Elia's person.

"The June 28, 2011 decree provided that Seblatnigg, as the conservator of Elia's estate, had the power to manage the estate, to apply estate funds to support Elia, to pay her debts, and to collect debts due to her. At the time of Seblatnigg's appointment as conservator of Elia's estate, Elia owned or held an equitable interest in cash and securities valued in excess of $6,000,000, including those held in the Susan D. Elia Revocable Trust, a 2007 revocable trust governed by Connecticut law (the Connecticut revocable trust). [Seblatnigg was a trustee of that trust.]

"In September, 2011, Seblatnigg consulted with the [defendant's] managers . . . [Attorney] Robert Mauceri . . . and [Attorney] James Holder . . . regarding the creation of an asset protection plan for Elia. They recommended to Seblatnigg that Elia establish and fund a self-settled irrevocable Delaware asset protection trust and a limited liability company, to be owned by the trust, to hold her assets.

"Seblatnigg, [in her capacity] as conservator of Elia's estate, entered into an asset protection services agreement on Elia's behalf with First State Facilitators, LLC . . . an affiliate of [the defendant], on September 15, 2011. Seblatnigg, [in her capacity] as conservator, also signed a legal representation agreement on behalf of Elia with Mauceri. On the same day, Seblatnigg met with Elia and supervised her execution of the instrument that created the [Susan D. Elia Irrevocable Trust (Delaware irrevocable trust)]. The trust instrument named Seblatnigg and Salvatore Mulia . . . as the independent trustees of the Delaware irrevocable trust and named [the

defendant] as the protector of the Delaware irrevocable trust. Seblatnigg did not seek or obtain the approval of the . . . Probate Court to establish the Delaware irrevocable trust or to advise Elia to execute the trust instrument.

"A Delaware limited liability company, [Peace at Last, LLC (Peace at Last)] . . . wholly owned by the Delaware irrevocable trust, was formed on September 15, 2011, to hold Elia's assets. Beginning on September 20, 2011, Seblatnigg directed the transfer of more than $6,000,000 in cash and securities from Elia's conservatorship estate and the Connecticut revocable trust to the Delaware irrevocable trust or to Peace at Last.[7] Seblatnigg did not seek or obtain the approval of the . . . Probate Court before she transferred the assets to the [Delaware irrevocable trust] . . . or to Peace at Last.

"Seblatnigg resigned as the conservator of Elia's estate on April 5, 2013. The . . . Probate Court accepted Seblatnigg's resignation on May 21, 2013, subject to the allowance of her final account, and appointed Mulia the successor conservator of Elia's estate. . . .

"On January 9, 2014, at Elia's request, the . . . Probate Court issued a decree . . . naming the plaintiff the coconservator of Elia's estate for the limited purpose of any matters relating to Elia's interest in the Delaware irrevocable trust, because Mulia had a possible conflict of interest." (Footnotes added; internal quotation marks omitted.) *Day* v. *Seblatnigg*, supra, 186 Conn. App. 486–89.

[7] The plaintiff executed an affidavit in which she averred that $6,538,415.49 was transferred to the Delaware irrevocable trust from the Connecticut revocable trust and that $80,000 was transferred to the Delaware irrevocable trust from "Seblatnigg's conservatorship account . . . ." Nothing in the record indicates whether any funds remained in the Connecticut revocable trust following the transfer of assets to the Delaware irrevocable trust.

The plaintiff subsequently brought this declaratory judgment action, in which she sought a declaration that the Delaware irrevocable trust was null and void ab initio and an order that "any and all assets transferred to the [Delaware irrevocable trust] or to any entity owned by [that] trust be returned to the conservatorship estate from whence they came . . . ." The plaintiff then filed a motion for summary judgment, claiming that there was no genuine issue of material fact as to whether the Delaware irrevocable trust was void because the assets held in the Connecticut revocable trust were part of the conservatorship estate, and Seblatnigg had not obtained the permission of the Probate Court to create or to fund the Delaware irrevocable trust, which, according to the plaintiff, was required by § 45a-655 (e). The plaintiff further contended that Elia's signature on the trust documents could not invalidate the otherwise improper act because, as a voluntarily conserved person, she lacked independent power to create and fund the Delaware irrevocable trust. The defendant contended that § 45a-655 (e) did not apply because the Connecticut revocable trust, which predated the conservatorship, was not part of the conservatorship estate and because Elia herself, not Seblatnigg, created and funded the Delaware irrevocable trust.

The trial court concluded that, when a person is subject to a voluntary conservatorship, "the conservator, as the agent of the Probate Court, has the *exclusive* authority to manage the affairs of the conserved person." (Emphasis added.) The court further concluded that, because Elia held a present equitable interest in the Connecticut revocable trust, it was part of the conservatorship estate subject to the conservator's authority and, in turn, the requirements of § 45a-655 (e).[8]

[8] The trial court concluded that the preexisting Connecticut revocable trust was part of the conservatorship estate because § 45a-655 (a) requires the conservator to make and file an inventory of the conserved person's estate and provides that such inventory shall include any "equitable" interest in property held by the conserved person. The Appellate Court found it

Because Seblatnigg had not complied with the requirement that she obtain Probate Court approval for the creation and funding of trusts on behalf of a conserved person, the court concluded that "the Delaware irrevocable trust [was] void ab initio and unenforceable, and all transfers of assets from Elia's conservatorship estate to the trust or to Peace at Last were unauthorized and improper." Accordingly, the court granted the plaintiff's motion for summary judgment.

The defendant appealed from the trial court's judgment to the Appellate Court, claiming, among other things, that the trial court had incorrectly determined that "Elia lacked the ability to execute the Delaware irrevocable trust while under a voluntary conservatorship."[9] *Day* v. *Seblatnigg*, supra, 186 Conn. App. 501. The Appellate Court concluded that, "[b]ecause a voluntarily conserved person does not retain control over her estate, no genuine issue of material fact existed that Elia lacked the legal capacity to form the Delaware

unnecessary to address this issue; see *Day* v. *Seblatnigg*, supra, 186 Conn. App. 506 n.10; and, for the reasons stated subsequently in this opinion, we also do not address it. See footnote 20 of this opinion.

[9] In its appeal to the Appellate Court, the defendant also contended that there were material issues of material fact in dispute as to whether (1) Seblatnigg or Elia created the Delaware irrevocable trust, and (2) Seblatnigg transferred the funds from the Connecticut revocable trust in her capacity as trustee or conservator. The Appellate Court concluded that the trial court had found that there was no genuine issue of material fact that Elia created the Delaware irrevocable trust (the position advocated by the defendant); see *Day* v. *Seblatnigg*, supra, 186 Conn. App. 501 and n.9; and that Seblatnigg's status as transferor did not constitute a genuine issue of material fact that precluded summary judgment because Elia lacked "legal capacity" to create the trust. Id., 505; see id., 506 n.10. On appeal to this court, the defendant maintains its position that Elia created the trust, and we assume that to be the case for purposes of this opinion. In addition, the defendant contended that the Connecticut revocable trust assets, as assets legally titled to trustees of a preexisting trust, were not part of the conservatorship estate and, thus, not subject to § 45a-655 (e). See id., 506 n.10. The Appellate Court concluded, for reasons set forth later in this opinion, that it was unnecessary to address this claim. Id.

irrevocable trust" and, therefore, that the trial court correctly determined that the Delaware irrevocable trust was void ab initio as a matter of law. Id., 505–506. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 506.

This certified appeal followed. The defendant contends that the Appellate Court incorrectly determined that Elia lacked the "legal capacity" to create the Delaware irrevocable trust because Seblatnigg, as the conservator of her estate, had exclusive control over her estate. We disagree.

We begin by setting forth the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact [that] will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012).

A question of statutory interpretation is presented by the defendant's contention that the Appellate Court incorrectly determined that, under the statutory scheme, conservators have exclusive control over the estates of conserved persons and, therefore, that conserved persons lack the capacity to create and fund trusts on their own behalf. As such, our review is plenary. See, e.g., *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 647–48, 224 A.3d 147 (2020). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 648.

We begin with a review of the relevant statutes. General Statutes (Rev. to 2011) § 45a-644 (a), which applies to voluntary and involuntary representation, defines "conservator of the estate" in relevant part as "a person . . . appointed by the Court of Probate . . . to supervise the [respondent's] financial affairs . . . ." Whereas an involuntary conservatorship may not be ordered in the absence of a finding that the respondent is incapable of managing her affairs; see General Statutes (Rev. to 2011) § 45a-650 (f) (1); when the Probate Court grants an application for voluntary representation, the Probate Court "shall not make a finding that the petitioner is

incapable."[10] General Statutes (Rev. to 2011) § 45a-646. Presumably because of this distinction, a "conserved person" is defined as "a person for whom *involuntary* representation is granted . . . ." (Emphasis added.) General Statutes (Rev. to 2011) § 45a-644 (h). Despite the lack of a finding of incapacity for voluntary representation, a conservator appointed under such circumstances "shall have all the powers and duties of a conservator of the . . . estate of an incapable person . . . ." General Statutes (Rev. to 2011) § 45a-646. Those powers and duties are set forth in § 45a-655, which provides in relevant part that a conservator of the estate "shall manage all the estate" of the conserved person but "shall use the least restrictive means of intervention in the exercise of the conservator's duties and authority." General Statutes (Rev. to 2011) § 45a-655 (a).

The defendant contends that, because Elia was not a "conserved person," as defined by General Statutes (Rev. to 2011) § § 45a-644 (h), and, because the Probate Court made no finding and, indeed, was statutorily prohibited from making a finding, that she was incapable, she retained the capacity to create the Delaware irrevocable trust. In support of the proposition that Elia's capacity to create the trust presents a question of fact, the defendant points to case law recognizing that even involuntarily conserved persons may have the requisite mental capacity to undertake certain acts. It further

[10] General States (Rev. to 2011) § 45a-644 (d) provides: " 'Incapable of managing his or her affairs' means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to perform the functions inherent in managing his or her affairs, and the person has property that will be wasted or dissipated unless adequate property management is provided, or that funds are needed for the support, care or welfare of the person or those entitled to be supported by the person and that the person is unable to take the necessary steps to obtain or provide funds needed for the support, care or welfare of the person or those entitled to be supported by the person."

contends that this conclusion is compelled by the statutory requirement that the conservator "supervise" financial affairs; General Statutes (Rev. to 2011) § 45a-644 (a); through the "use [of] the least restrictive means of intervention . . . ." General Statutes (Rev. to 2011) § 45a-655 (a). The defendant argues that interpreting the conservator's authority over "all the estate" to mean exclusive control, rather than as merely a description of the scope of the estate over which concurrent control exists, would be inconsistent with this restriction. Finally, the defendant contends that, because Elia had the right to establish the trust and the provision of § 45a-655 (e) requiring the permission of the Probate Court to establish a trust for a conserved person applies only to the conservator, the statute simply does not apply in the present case.

We conclude that, although the statutory language does not expressly resolve this question, there is a wealth of evidence that the legislature did not intend to allow a person who has voluntarily sought a conservator to retain joint control over the matters delegated to the conservator's authority.

It is useful at the outset to clarify certain terminology. The Appellate Court framed the question as whether Elia had the "legal capacity" to create the Delaware irrevocable trust. *Day* v. *Seblatnigg*, supra, 186 Conn. App. 505. We find the term "legal capacity" inappropriate and misleading as applied to the case at hand because it implies that we are inquiring into Elia's *mental* capacity. See *Luster* v. *Luster*, 128 Conn. App. 259, 271–72, 17 A.3d 1068, cert. granted, 302 Conn. 904, 23 A.3d 1243 (2011) (appeal dismissed April 12, 2012); see also E. Flynn & A. Arstein-Kerslake, "The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?," 32 Berkeley J. International L. 124, 127 (2014) (some degree of actual or presumed mental incapacity typically is predicate to legislative or legal determination

of lack of legal capacity). A person who is voluntarily represented by a conservator, however, has not been found to be incapable of managing her affairs. We therefore frame the issue as one of Elia's "legal authority." We also note that the term "conserved person" is statutorily defined to mean persons subject to involuntary conservatorships. See General Statutes (Rev. to 2011) § 45a-644 (h). Nevertheless, because the statutes describing the rights and duties in relation to a "conserved person" also apply to voluntary conservatorships; see General Statutes (Rev. to 2011) §§ 45a-646 and 45a-655; we use the term "voluntarily conserved person" to refer to persons who are subject to a voluntary conservatorship.

Having clarified the terminology, we turn to the evidence demonstrating that the legislature did not intend for voluntarily conserved persons to have joint authority with their conservators over the management of their estates. The language prescribing the conservator's duty to "manage all the estate"; General Statutes (Rev. to 2011) § 45a-655 (a); has been part of the conservator statute for more than one century. In 1899, this court explained that this language confers exclusive control on the conservator: "[T]he conservator has as against the ward, the sole care and management of the estate and the sole power over the claims in favor of or against the estate. He alone can collect, by suit or otherwise, debts due to the ward, and he alone can pay the debts due from the ward. As under the law the ward may be thus deprived of substantially all power over his estate . . . ." *Johnson's Appeal from Probate*, 71 Conn. 590, 597, 42 A. 662 (1899); accord *Marshall* v. *Kleinman*, 186 Conn. 67, 69, 438 A.2d 1199 (1982); *State* v. *Tarcha*, 3 Conn. Cir. 43, 45, 207 A.2d 72 (1964).

When the legislature created the concept of voluntary representation by conservators in 1977, it deemed the persons appointed thereunder to have "all the powers

and duties" of the conservator of the estate of an incapable person, with no limitation on the scope of those powers. See Public Acts 1977, No. 77-446, § 5, codified at General Statutes (Rev. to 1977) § 45a-646. This like treatment may have rested on the legislature's intention to allow people who in fact would meet the statutory definition of incapacity under the conservatorship scheme to voluntarily submit to a conservatorship. The legislative history reveals that the voluntary conservatorship was proposed in part to allow such persons to obtain help managing their affairs without having to admit to their incapacity, even if they then met the statutory definition of incapacity. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1977 Sess., pp. 189–90, testimony of Probate Judge Bernard F. Joy (chairman of committee appointed by Probate Court administrator to provide proposal to amend conservatorship scheme). A 1987 amendment to § 45a-646 ensured that, for those persons whose impairments did not quite rise to the level of the statutory definition of incapacity at the time the voluntary conservatorship was ordered, subsequent incapacity would not revoke the voluntary conservatorship. See Public Acts 1987, No. 87-87.

In 1998, the legislature adopted a provision that permitted the Probate Court to limit the powers and duties of the conservator, in light of the conserved person's abilities and other support services available to the conserved person. See Public Acts 1998, No. 98-219, § 17, codified at General Statutes (Rev. to 1999) § 45a-650 (g). Thus, "[p]rior to 1998, in all cases in which a court found that a respondent was incapable, it was obligatory to appoint a plenary conservator. While [the 1998] amendments . . . permitted appointment of a conservator on a limited basis . . . plenary appointments continued to be the norm." (Internal quotation

marks omitted.) *Kortner* v. *Martise*, 312 Conn. 1, 53, 91 A.3d 412 (2014).

In 2007, the legislature undertook a substantial revision of the conservatorship scheme, aimed at protecting the rights and preserving the dignity of persons who were subject to involuntary conservatorships. See Public Acts 2007, No. 07-116; see generally 50 S. Proc., Pt. 10, 2007 Sess., pp. 3228–39. The 2007 act made no changes to court procedures for ordering voluntary conservatorships, which, unlike involuntary conservatorships, always have been subject to termination upon request. See General Statutes § 45a-647. For involuntary conservatorship proceedings, the trial court could assign to the conservator only those duties and authorities that are the "least restrictive means of intervention"[11] necessary to meet the needs of the conserved person; General Statutes (Rev. to 2011) § 45a-650 (*l*); and the involuntarily conserved person would retain "all rights and authority not expressly assigned . . . ." General Statutes (Rev. to 2011) § 45a-650 (k). Both the text and the legislative history of the 2007 act indicate that "the legislature intended . . . for a conservatorship to be *as limited in scope as possible*, [as well as for] the conservatorship [to] be carried out so as to maintain the most independence and self-determination for the conserved person."[12] (Emphasis added.) *Kortner* v.

[11] " 'Least restrictive means of intervention' means intervention for a conserved person that is sufficient to provide, within the resources available to the conserved person either from the conserved person's own estate or from private or public assistance, for a conserved person's personal needs or property management while affording the conserved person the greatest amount of independence and self-determination." General Statutes (Rev. to 2011) § 45a-644 (k).

[12] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 17, 2007 Sess., pp. 5415–16, testimony of James D. McGaughey, executive director of the Office of Protection and Advocacy for Persons with Disabilities (explaining that, under existing scheme, his "office frequently encounter[ed] people who either could have benefited from some very limited, narrowly tailored form of conservatorship, but instead got a full conservatorship and lost all their rights"); id., p. 5443, testimony of Judith Desautell (arguing that

Martise, supra, 312 Conn. 52; see also K. McEvoy, "Recent Developments in Connecticut Conservatorship Law," 81 Conn. B.J. 319, 319 (2007) ("[t]he most fundamental aspect of the [changes made in the 2007 public act] is that they build on prior Connecticut law to require a presumption of limited, rather than plenary, conservatorship").

The 2007 amendments reflected the view that involuntarily conserved persons could be incapable of managing some of their affairs, while retaining the capacity to manage others, and, as to those matters for which they retained such capacity, they would have exclusive authority and would not share joint control with the conservator. With respect to those affairs that are under the control of the conservator, the conservator would have exclusive control, subject to the condition that the conservator must use the least restrictive means of intervention in the *exercise* of those duties assigned to them. See General Statutes (Rev. to 2011) § 45a-655 (a). Thus, the revised scheme did not change the conservator's exclusive authority over "all the estate" assigned to him or her.

Nothing in the statutes suggests that the exclusive nature of the authority conferred on the conservator of the estate with respect to the matters over which the conservator has control differs when there is a voluntary conservatorship. There was in fact no need for the legislature to create a mechanism that would allow persons to voluntarily obtain assistance with the management of their affairs without ceding their authority. Persons seeking a relationship of joint authority

proposed bill would address problems she encountered when involuntarily conserved because "the court could have imposed a limited conservator[-ship]"); id., p. 5462, testimony of Judge Robert Killian (explaining changes proposed in bill as part of committee he chaired, including requiring conservators "to provide assistance only in the limited areas where someone [cannot] function for themselves").

could execute a power of attorney; see General Statutes (Rev. to 1977) §§ 1-42 through § 1-56; and concerns about future incapacity could be addressed through the prophylactic designation of a conservator.[13] See General Statutes § 45a-645.

There also are practical reasons why the legislature would not have intended to allow for joint authority in a conservatorship. A conservator could not fulfill his or her statutory duty to "manage all the estate" pursuant to § 45a-655 (a) if the conserved person retained the same legal authority that the person had before being conserved, including the ability, for example, to give the entire estate away without the conservator's knowledge. As one authority has observed, although the statutory scheme governing conservatorships in this state does not clearly indicate the extent to which persons subject to voluntary conservatorships retain the "legal capacity" to manage their affairs, "[r]etention of legal capacities [to enter into contracts and convey title, for example] would appear inconsistent with the purposes of voluntary representation." R. Folsom et al., Connecticut Estates Practice Series: Incapacity, Powers of Attorney and Adoption in Connecticut (4th Ed. 2021) § 2:8, p. 131. One of those purposes was, as we have

[13] In the underlying conservatorship proceedings in the present case, the Probate Court, *Hopper*, *J.*, informed Elia that the conservator of her estate "would have management control . . . that [is] very similar to a power of attorney. The only difference is that a power of attorney doesn't have Probate Court oversight . . . ." A power of attorney creates a principal-agent relationship, the person granting that control being the principal. See, e.g., *Geriatrics*, *Inc.* v. *McGee*, 332 Conn. 1, 13–14, 208 A.3d 1197 (2019); *Long* v. *Schull*, 184 Conn. 252, 256, 439 A.2d 975 (1981). Although the conservator's obligation to use the least restrictive means of intervention requires the conservator to ascertain the wishes of the conserved person and to adhere to them if reasonable, and a voluntarily conserved person may terminate the conservatorship at will, a voluntary conservatorship does not create the same relationship as a power of attorney. No claim is made in the present appeal that Elia retained joint control as a consequence of the court's statement.

explained, to allow persons who might, in fact, meet the statutory definition of incapacity to obtain help in managing their affairs without having to establish their incapacity in an involuntary conservatorship proceeding. If voluntarily conserved persons had the legal authority to manage all of their affairs, persons who are, in fact, incapable would have no choice but to submit to an involuntary conservatorship.

The defendant's construction also would place the conservator in an untenable position. A voluntary conservator may be required to post a bond; General Statutes § 45a-646; and is required to make and file in the Probate Court, under penalty of false statement, an inventory of the conserved person's estate. General Statutes (Rev. to 2011) § 45a-655 (a). Presumably, the purpose of these requirements is to hold the conservator accountable for distributions from the estate. If the voluntarily conserved person could freely dispose of the estate without the knowledge of the conservator, perhaps without making any record or after having become incapable, few would be willing to take on the risk of becoming a conservator pursuant to a voluntary application. Although the defendant emphasizes the fact that Elia and Seblatnigg were acting together and in full agreement when the acts at issue were undertaken, that will not necessarily always be the case.

The defendant suggests that it would be anomalous to conclude that an involuntarily conserved person, who necessarily has been found incapable of managing his or her own affairs; see General Statutes (Rev. to 2011) § 45a-650 (f) (1); might retain rights that a capable voluntarily conserved person does not. We reach no such conclusion in the present case. The sole issue before us is whether a voluntarily conserved person and her conservator may exercise concurrent control over matters delegated to the conservator. Nothing in this opinion suggests that an involuntarily conserved person may

exercise such concurrent control. As we previously explained, the Probate Court's mandate in involuntary conservatorship proceedings to "assign . . . only the duties and authority that are the least restrictive means of intervention necessary to meet the needs of the conserved person"; General Statutes (Rev. to 2011) § 45a-650 (*l*); means that the conserved person may retain exclusive authority over matters that he or she is capable of handling, with or without support of individuals other than a conservator. Whether a person applying for a voluntary conservatorship may achieve the same end by requesting the assistance of a conservator for limited matters is not before us.[14]

The defendant also cites several appellate cases that recognize the capacities of even involuntary conserved persons to undertake certain acts, but none of these demonstrates that a conservator and a voluntarily conserved person may exercise concurrent authority over matters assigned to the conservator. These cases stand for an entirely different proposition: a conserved person with the requisite mental capacity may retain the authority to engage in acts that are outside of the sphere of conservatorship as a matter of law or under the facts of the particular case.[15] See *Kortner* v. *Martise*, supra,

[14] We observe that, although the voluntary conservatorship statute, § 45a-646, does not include the same express limitation on the court's authority in General Statutes (Rev. to 2011) § 45a-650, it does provide that the voluntarily appointed conservator shall have the "all the powers and duties" of a conservator appointed under General Statutes (Rev. to 2011) § 45a-650. We also note that the standard Probate Court form for an application for voluntary representation provides a section for the applicant to list the duties and authorities of the conservator. See Petition/Voluntary Representation by Conservator, Connecticut Probate Court Form PC-301, available at https://www.ctprobate.gov/Forms/PC-301.pdf (last visited January 20, 2022). There is no claim or evidence in the present case that Elia sought to limit the scope of the voluntary conservatorship in any manner.

[15] The defendant also points to a Superior Court case stating: "Unless a person has been adjudicated incompetent she retains the legal capacity to maintain an action. *Ridgeway* v. *Ridgeway*, 180 Conn. 533, 539 [429 A.2d 801] (1980)." *Reale* v. *Reale*, Superior Court, judicial district of Tolland, Docket No. FA-99-70340-S (January 12, 2000) (26 Conn. L. Rptr. 311, 311).

312 Conn. 4–5, 58 (appointment of mother as conservator of her daughter's person did not deprive conserved person of capacity to consent to sadomasochistic sexual relationship as matter of law when conservator "did not establish, or even allege, that her appointment as conservator . . . specifically included the duty to manage [the conserved person's] interpersonal and/or romantic relationships");[16] *Bassford* v. *Bassford*, 180 Conn. App. 331, 335, 347, 352, 183 A.3d 680 (2018) (adopting trial court decision concluding that involuntarily conserved person properly could revoke trust and thereby receive title to real property held in trust because evidence demonstrated that conserved person had requisite mental capacity and right to revoke trust had not been expressly assigned to conservator).

To the extent that the defendant now contends that Elia's creation of the Delaware irrevocable trust was a testamentary act and that, even if she generally lacked the legal authority to manage her affairs as the result of the voluntary conservatorship, she retained her testamentary capacity,[17] we conclude that any such claim is

The right of access to the courts is not at issue in the present case. *Ridgeway* provides little, if any, guidance on the question before us.

[16] Our holding in *Kortner* does not suggest that, if such a duty had been conferred, the conservator would have been able to give her consent to the man seeking the sexual relationship with her daughter. Rather, the conservator would have been able to grant her daughter permission to engage in that relationship if her daughter so chose. See *Kortner* v. *Martise*, supra, 312 Conn. 58; cf. General Statutes § 46b-29 (a) (requiring written consent of conservator for marriage license to issue to applicant under control of conservator). Certain rights are so personal in nature that they cannot be exercised by another.

[17] The defendant points out that, in *Reid* v. *Lord*, 102 Conn. 365, 368, 128 A. 521 (1925), this court held that the fact that a person was subject to a conservatorship at the time of death was not conclusive of the person's mental capacity to execute a will. As the court in *Citizens State Bank & Trust Co. of Hiawatha* v. *Nolte*, 226 Kan. 443, 601 P.2d 1110 (1979), recognized, although voluntarily conserved persons lack the legal authority to manage their own financial affairs, they may make testamentary dispositions if they have testamentary capacity. See id., 450; see also *Bassford* v. *Bassford*, supra, 180 Conn. App. 349 ("a person may have the mental capacity necessary

unreviewable because it is being raised for the first time in this certified appeal; see, e.g., *Mangiafico* v. *Farmington*, 331 Conn. 404, 436, 204 A.3d 1138 (2019); *State* v. *Darryl W.*, 303 Conn. 353, 371, 33 A.3d 239 (2012); and, in any event, is inadequately briefed.[18] See, e.g., *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

Finally, we observe that several other jurisdictions also have concluded that a voluntary conservatorship of the estate deprives the conserved person of the legal

to make a will although incapable of transacting business generally"); *Kunz* v. *Sylvain*, 159 Conn. App. 730, 741, 123 A.3d 1267 (2015) ("less mental capacity is required for the testator to make a will than to carry on business transactions generally" (internal quotation marks omitted)). We further note that other courts have held that a conservator cannot be given legal authority to make testamentary dispositions for the conserved person both because such rights are purely personal and because the conservator's authority extends only to the lifetime interests of the conserved person. See *Citizens State Bank & Trust Co. of Hiawatha* v. *Nolte*, supra, 449; *In re Estate of Briley*, 16 Kan. App. 2d 546, 549, 825 P.2d 1181 (1992).

[18] The defendant did not address Elia's capacity, testamentary or otherwise, in any of its filings in the trial court in opposition to the motion for summary judgment, focusing instead on the question of whether the Connecticut revocable trust was part of the conservatorship estate. In its briefs submitted to the Appellate Court, the defendant cast this issue as whether Elia retained the capacity to contract and cited no cases relating to testamentary capacity. Because the right to contract is not personal and can be delegated to the conservator, the defendant's Appellate Court brief focused on the question of concurrent authority. We also note that, in its brief to this court, the defendant does not provide any authority to support its assumption that the creation of the Delaware irrevocable trust—which was an inter vivos trust that permitted distributions both during Elia's lifetime, to her and others, and upon her death—was a testamentary act. As the concurring justice notes, there is authority to the contrary. See part I of the concurring opinion; see also *Cate-Schweyen* v. *Cate*, 303 Mont. 232, 239–40, 15 P.3d 467 (2000) (discussing views expressed in § 26 of Restatement (Second) of Trusts and §§ 33 and 88 of Am. Jur. 2d, Trusts). We note that the dual aspects of the trust instrument in the present case, allowing for present and future distributions, raises an interesting question as to whether the execution of such an instrument might require action by both the conservator and the conserved person, not as an act of concurrent authority but jointly taken independent authority. We express no opinion on this question.

authority to manage his or her own financial affairs.[19] The decision of the Supreme Court of Kansas in *Citizens State Bank & Trust Co. of Hiawatha* v. *Nolte*, 226 Kan. 443, 601 P.2d 1110 (1979), is particularly instructive. After concluding that "a conservatee under a voluntary conservatorship cannot contract or deed away his property [i]nter vivos without the prior approval of the conservator or, where required by statute, the approval of [a probate] court"; id., 450; the court stated that a contrary rule "would defeat the primary purpose of the voluntary conservatorship statute to dignify old age by eliminating, in many instances, the stigma of having the elderly person declared incapacitated or incompetent. Incapacity is a matter of degree. . . . If a voluntary conservatee, not mentally incapacitated, were to be given an unbridled power to contract or deed away his property [i]nter vivos, the voluntary conservatorship would seldom be used, because the relatives of the elderly person, seeking to protect the loved one from his or her own actions, would of necessity, utilize the compulsory conservatorship procedure. Hence, the [elderly] would in most instances be required to spend their golden years branded as 'incapacitated' or 'incompetent.'

"It also appears . . . that, if a voluntary conservatee were given the power in his discretion to dispose of his property [i]nter vivos, it is doubtful that any person would want to accept the position of conservator, since such a conservator, although given responsibilities and duties, would really have no control over the estate of

[19] We note that a contrary conclusion was reached in *Board of Regents State Universities* v. *Davis*, 14 Cal. 3d 33, 41, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975), but that court relied heavily on a statutory provision that implicitly recognized that a conserved person retains power to contract, subject to the conservator's right to disaffirm unreasonable contracts other than those involving the purchase of necessaries that cannot be disaffirmed. Notably, the statute also provided a mechanism for the conservator to petition the court when any doubt as to the propriety of the debt existed. See id.

his conservatee. This would be an extremely difficult, if not an impossible situation. . . . [S]uch a holding would create a judicial exception, diminishing the broad powers of a conservator to control and manage the conservatorship assets provided for under the Kansas statutes. The Kansas legislature has not specifically granted a voluntary conservatee the power to contract or to incur debts while the conservatorship is in existence . . . . If the legislature desires to make such an exception, it may do so.

"[The Kansas court] also concluded that there [was] no need for [it to adopt] such a rule. . . . [U]nder [the Kansas statutes], a voluntary conservatorship may be terminated by the mere filing of a verified application by the conservatee that he or she no longer desires to have the conservatorship continued. If the voluntary conservatee really wants to convey his property and is opposed by an uncooperative conservator, the conservatee may go to court and have the voluntary conservatorship terminated. Furthermore, an elderly person, who does not like the [interpretation adopted by the Kansas court], may execute an appropriate power of attorney so that he may have assistance in the management of his affairs without eliminating his power to dispose of his property [i]nter vivos." Id., 450–51.

Similarly, the Wisconsin Court of Appeals has held that, "[a]lthough the appointment of a conservator is not evidence of the incompetency of the conservatee, and although a conservatee is not considered completely incapable of looking after his or her own property . . . the purpose of a conservatorship is to afford the protections akin to those provided by a guardianship but without the stigma of incompetency. . . . If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose.

"If a conservatee wishes to rid himself or herself of the restrictions of a conservatorship, the statute [allowing the conserved person to apply for termination of the conservatorship] supplies an avenue for relief. . . .

"[The Wisconsin court] acknowledge[d] that invalidating [the conservatee's] gift is a harsh result . . . [when] she has been found to be competent at the time of the gift. However . . . to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless. Such interpretations are to be avoided." (Citations omitted.) *Zobel ex rel. Hancox* v. *Fenendael*, 127 Wis. 2d 382, 395–96, 379 N.W.2d 887 (App. 1985), review denied, 128 Wis. 2d 566, 386 N.W.2d 500, appeal dismissed and cert. denied, 479 U.S. 804, 107 S. Ct. 47, 93 L.Ed.2d 9 (1986); see *Bryan* v. *Century National Bank*, 498 So. 2d 868, 872 (Fla. 1986) (competent person subject to voluntary guardianship "may not freely deal with that property which has been placed in the guardian's control in the absence of court approval"); *Foss* v. *Twenty-Five Associates of Roxbury*, 239 Mass. 295, 297–98, 131 N.E. 798 (1921) (competent conserved person who petitioned for conservatorship did not have legal authority to manage own affairs); *Normandin* v. *Kimball*, 92 N.H 62, 64, 25 A.2d 39 (1942) (person who "placed her property in the hands of a conservator . . . could not make a valid contract disposing of that property in her lifetime without his approval" (citation omitted)); *In re Tillman*, 137 N.E.2d 172, 175 (Ohio Prob. 1956) (competent person who consented to appointment of guardian of estate "waived her constitutional rights to control the disposition of her own property and consented to having her property administered by a guardian who was subject to rules of law and the supervision of the [P]robate [C]ourt").

We are in full accord with these authorities. We conclude that a person who is subject to a voluntary conservatorship pursuant to § 45a-646 does not retain the legal authority to jointly manage his or her estate as to those matters assigned to the conservator. Rather, the conservator has exclusive control over such matters, subject to any statutory restrictions or requirements. Therefore, insofar as the defendant relies on the concept of concurrent authority, the Appellate Court correctly determined that Elia lacked the legal authority to establish the Delaware irrevocable trust and, accordingly, that the trust was null and void ab initio.[20]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

MCDONALD, J., with whom PALMER, MULLINS, KAHN and ECKER, Js., join, concurring. I agree with and join the majority opinion but write separately to address two concerns. First, the unusual posture of this case as it ultimately was presented to this court required resolution of a narrow question that leaves several significant questions unanswered regarding the intersection of trusts and conservatorships. This is unfortunate,

[20] As we previously have indicated, the irrevocable trust at issue in the present case was funded largely from a transfer of money from a preexisting revocable trust and, to a lesser extent, from conservatorship estate accounts. The defendant contended throughout the proceedings below that Seblatnigg, as conservator of the estate, had no authority over the assets in the Connecticut revocable trust because, in the defendant's view, trusts created prior to a conservatorship are not part of the conservatorship estate. The Appellate Court concluded that it was not required to reach this claim because, even if Seblatnigg had no control over the revocable trust and thus lacked authority to *transfer* funds from that trust into the Delaware irrevocable trust, Elia lacked the legal capacity to *create* the irrevocable trust. See *Day* v. *Seblatnigg*, supra, 186 Conn. App. 506 n.10. Because we did not grant certification on the question of whether a voluntarily conserved person has the legal authority to create a trust using funds from a preconservatorship trust and the defendant has inadequately briefed the issue, we decline to address it.

and I take this opportunity to explain why these questions, had they been properly presented in this case, might have compelled a different outcome than the one the majority reaches today. Second, this case reveals the need for legislative review of voluntary conservatorships, which were not a focus of the 2007 legislative reforms. See Public Acts 2007, No. 07-116. I therefore take this opportunity to draw attention to this matter so that the legislature is on notice about these potential policy matters.

I

I begin by making clear what this court does and does not decide in the present case. The *only* question before this court is whether a voluntary conservatorship creates a relationship of joint authority, such that a voluntarily conserved[1] person may continue to manage her affairs as she is able. It is on this basis that the defendant First State Fiduciaries, LLC, challenges the Appellate Court's conclusion that Susan D. Elia lacked the legal authority to create the Delaware irrevocable trust. It is important to underscore that the Appellate Court's holding, and, in turn, this certified appeal, rests on an unchallenged assumption, namely, that the former conservator of Elia's estate, Renee F. Seblatnigg, had the authority to create the Delaware irrevocable trust, subject to meeting the conditions prescribed in General Statutes (Rev. to 2011) § 45a-655 (e). After all, if the conservator lacked such authority, there would be no issue of joint authority. If we were so permitted, there would be several reasons to question this assumption, which appears to be the sole impediment to Elia's legal authority to create the irrevocable trust.

[1] For consistency with the majority opinion, I also refer to a voluntarily represented person as "voluntarily conserved," mindful that such persons do not fall within the definition of a conserved person and have not been found by a court to be incapable of managing their affairs. See General Statutes § 45a-644 (g) and (h); General Statutes (Rev. to 2011) § 45a-646.

The majority opinion recognizes that involuntarily conserved persons have the statutory right to retain exclusive authority over those matters that they are capable of managing, with or without support from a source other than a conservatorship. See General Statutes (Rev. to 2011) § 45a-650 (k) and (*l*) (now § 45a-650 (*l*) and (m), respectively). The statutory scheme suggests; see General Statutes (Rev. to 2011) § 45a-646; and logic dictates that voluntarily conserved persons similarly can obtain a limited conservatorship. They may do so by simply designating in their application for voluntary representation which specific matters should be delegated to the conservator, thus retaining exclusive authority over all undesignated matters.[2] The standard Probate Court form for such applications provides a field to make such limited designations. See Petition/Voluntary Representation by Conservator, Form PC-301, p. 2 (last modified January, 2021), available at www.ctprobate.gov/Forms/PC-301.pdf (last visited January 20, 2022) ("I would like a conservator appointed to assist me with the following financial matters"). Elia did not make such a limited designation in her application.

There would be no need for Elia to make such a limited designation, however, if her broad grant of authority to manage her estate did not include the authority to create the irrevocable trust and to fund it with a transfer of funds from her revocable trust. Two theories might support such a proposition.

First, certain matters cannot be delegated to the conservator. See, e.g., 39 Am. Jur. 2d 113, Guardian and Ward § 117 (2008) ("[a]s a general rule, a guardian may not waive legal rights on behalf of [the guardian's] ward,

[2] The exercise of such authority may nonetheless be rendered void if it is demonstrated that the voluntarily conserved person lacked the requisite mental capacity to undertake the act in question. See, e.g., 1 Restatement (Third), Trusts § 11, comment (e), pp. 162–63 (2003).

surrender or impair rights vested in the ward or impose any legal burden thereon, or exercise purely personal elective rights of [the guardian's] ward" (footnotes omitted)); see also, e.g., *Newman* v. *Newman*, 42 Ill. App. 2d 203, 213, 191 N.E.2d 614 (1963) ("certain powers, rights, or elections may be so personal that they cannot be exercised on behalf of an incompetent [by a conservator]"); *Estate of Townson ex rel. East Tennessee Human Resources Agency* v. *Estate of East ex rel. Cooley*, 297 S.W.3d 736, 738 (Tenn. App. 2009) (conservator "has no authority to exercise an elective right or power of the conservatee" (internal quotation marks omitted)), appeal denied, Tennessee Supreme Court, Docket No. E2008-00689-SC-R11-CV (August 31, 2009).

The execution of a testamentary instrument, designating how and to whom the conserved person's assets will be distributed upon his or her death, is one such matter. See generally 1 Restatement (Third), Trusts § 11, comments (a) through (d), pp. 160–62 (2003) (addressing testamentary capacity of persons under conservatorship). Authority to make testamentary dispositions for the conserved person cannot be delegated to the conservator both because such rights are purely personal and because the conservator's authority extends only to the lifetime interests (support and care) of the conserved person. See, e.g., *Citizens State Bank & Trust Co. of Hiawatha* v. *Nolte*, 226 Kan. 443, 449, 601 P.2d 1110 (1979) ("[A conservator's duty] is to manage the estate during the conservatee's lifetime. It is not his function, [or] that of the [P]robate [C]ourt supervising the conservatorship, to control disposition of the conservatee's property after death."); *In re Estate of Briley*, 16 Kan. App. 2d 546, 549, 825 P.2d 1181 (1992) (recognizing that right to change beneficiary of account "is a purely personal elective right of the conservatee" and that "[t]he decision regarding distribution of the conservatee's property after death belongs to the con-

servatee"); see also, e.g., *In re Estate of Garrett*, 81 Ark. App. 212, 218, 100 S.W.3d 72 (2003) (stating that will making requires " 'personal performance' " and thus cannot be delegated).

The majority properly declines to address whether Elia had the testamentary capacity to create the irrevocable trust because that issue was neither preserved[3] nor adequately briefed. See footnote 18 of the majority opinion and accompanying text. Review of the trial court record reveals that the irrevocable trust is not, strictly speaking, a testamentary trust. It was not created by a will; see, e.g., 1 Restatement (Third), supra, § 17, p. 250; see also, e.g., Public Acts 2021, No. 21-39, § 1 (effective January 1, 2022), to be codified at General Statutes (Supp. 2022) § 45a-499c (29); and it vested discretion in the trustees to make distributions in any amount during Elia's lifetime to Elia, her grandchildren, or any charitable institute. See, e.g., *Cate-Schweyen* v. *Cate*, 303 Mont. 232, 239–40, 15 P.3d 467 (2000) ("A testamentary trust . . . not only must comply with the statutory requirements for a will, but also must take effect only upon the testator's death. . . . Therefore, a testamentary disposition is usually incompatible with a trust established by a trustor who retains a life interest, as a beneficiary of the trust, although a new beneficiary or beneficiaries acquire an interest upon the trustor's death." (Citations omitted; internal quotation marks omitted.)) Whether such a trust should be characterized for present purposes as a purely testamentary act, a partially testamentary act requiring concurrent action by the conservator and conserved person, or not

[3] As the majority notes, the defendant had cast the question before the Appellate Court as a question of Elia's capacity to contract, and that court viewed it as such. See footnote 18 of the majority opinion. I note that there is authority indicating that the creation of a trust is not contractual in nature. See, e.g., *Tunick* v. *Tunick*, 201 Conn. App. 512, 525–26, 242 A.3d 1011 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021); see also id. (citing authorities).

a testamentary act at all is a difficult issue best left to a case in which it is the subject of adversarial briefing. The unfortunate effect of the present case is that Elia may have had testamentary capacity when she created the irrevocable trust and, yet, her trust assets will not be distributed in accordance with her wishes following her death, which occurred during the pendency of this appeal.

The second theory that might excuse the need for Elia to make a limited designation of authority to her conservator to reserve her right to create the irrevocable trust would depend on whether such a right is encompassed in the authority to manage the conserved person's "estate." General Statutes (Rev. to 2011) § 45a-655 (a). If a conserved person's present interest in a trust is not part of the conservatorship estate, a good argument could be made that Elia retained the authority to create and fund a trust, as long as she did not use assets of her estate to do so.[4] In the absence of evidence that Elia lacked the mental capacity to make decisions with regard to her trusts, she would retain the legal capacity to revoke or modify the Connecticut revocable trust, to create the Delaware irrevocable trust, and to request that the trustee of her revocable trust—who also happened to be her conservator—transfer funds to the irrevocable trust.

This theory finds some support in both the statutory text and case law.[5] The only explicit discussion of trusts

[4] The defendant pointed out in its memorandum in support of its motion to strike the complaint filed by the plaintiff, Margaret E. Day, coconservator of Elia's estate, that the schedule to the trust instrument recited that $1 was the property conveyed to the irrevocable trust at the time of its establishment, and that the complaint made no allegation that this sum came from conservatorship estate assets. The trial court did not rule on this motion, filed well after the plaintiff filed her motion for summary judgment, and the defendant's appellate briefs appear to assume that the irrevocable trust was funded by a transfer from the revocable trust.

[5] There is an indication in the trial court record that Elia and the Probate Court judge who granted her application for representation did not view

in the conservatorship scheme is in General Statutes (Rev. to 2011) § 45a-655 (e). That subsection prescribes conditions for "transfers of income and principal from" the conserved person's estate to a trust, existing or created by the conservator. General Statutes (Rev. to 2011) § 45a-655 (e). The word "from" suggests that the transfer depletes assets of the estate by directing them to a source outside the estate. If an existing trust or a new trust created by the conservator into which income was transferred was part of the estate, the transfer would be "within" or "to" the estate, not "from" the estate.[6]

This court's decision in *Dept. of Social Services* v. *Saunders*, 247 Conn. 686, 724 A.2d 1093 (1999), lends support to this view. The issue in that case was "whether

the revocable trust to be part of the estate. One of the defendant's filings in opposition to the motion for summary judgment recited an exchange that purportedly occurred at a Probate Court hearing at which Elia's children unsuccessfully sought to have Elia found incapable of managing her affairs and involuntarily conserved. At that proceeding, a question was raised about the omission of Elia's revocable trust from Seblatnigg's inventory of the estate. Both the judge and Elia's counsel made comments indicating that they understood the revocable trust to be outside the conservatorship estate and, thus, properly excluded from the inventory required under § 45a-655 (a). The defendant did not renew this argument in its Appellate Court brief, and nothing in the record indicates how or whether the plaintiff responded to this argument before the trial court.

[6] The trial court concluded that the revocable trust assets were part of the conservatorship estate, pointing to the conservator's duty under § 45a-655 (a) to include "equitable present interest[s]" in an inventory of the conserved person's estate and the uncontested fact that Elia held an equitable interest in the Connecticut revocable trust. Even if we assume that the conservator has the duty to include trust assets in the inventory, I do not view that fact as dispositive of the question of whether the trust is part of the estate, subject to the conservator's management. Cf. *In re Conservatorship of Addison* v. *Touchstone*, 242 So. 3d 926, 935–36 (Miss. App. 2018) ("joint accounts created prior to the [ward's] incapacity [are] not subject to being marshalled by the conservator, although the funds may be used if necessary to pay for the care and expenses of the ward during his lifetime" (internal quotation marks omitted)). If trusts are part of the estate, however, that would raise the question of whether a transfer of funds from one trust to another would be a transfer "from" the estate.

the Probate Court was authorized to permit a conservatrix to establish an irrevocable inter vivos trust funded with the net proceeds recovered in the settlement of a negligence action filed on her ward's behalf, which would not be considered an available resource for the purpose of determining ongoing [M]edicaid eligibility." Id., 687. The Superior Court decision answering that question in the negative, which this court reversed on appeal, was in fact the impetus for the 1998 amendment to General Statutes (Rev. to 1997) § 45a-655 (e) expressly authorizing such an act. See id., 697, 702–704, 715. This court's decision in *Saunders* is noteworthy for its recognition of the effect of the transfer on the estate and on the conservator's control of the transferred assets. The plaintiff department characterized the transfer into the trust as an act that had "divest[ed] the estate by transferring its assets to an inter vivos trustee"; id., 709; and "eliminate[d] [the ward's] estate in its entirety and transfer[red] it to a trustee." (Internal quotation marks omitted.) Id. The court in *Saunders* accepted this premise but nonetheless viewed the Probate Court's permission for the conservator to create the trust to be a proper exercise of that court's authority because the trust assets were still available for the ward's care and support through his exclusive equitable interest and that court would have jurisdiction over both the trustee and the conservator. See id., 709–12. In *Saunders*, this court also rejected the plaintiff department's argument that the transfer of the ward's assets to the trust "would constitute an improper delegation of the Probate Court's responsibility, acting through the conservator, to manage [the ward's] estate" because the Probate Court has "plenary authority to manage a ward's estate" but only limited authority to "review actions of a trustee of an inter vivos trust . . . ." Id., 710. This court acknowledged that the conservator's authority in relation to the trust would be limited to the management

of funds distributed by the trustees, who would actually manage the trust in accordance with the terms of the trust instrument.[7] See id., 710–11; see, e.g., *Ramsdell* v. *Union Trust Co.*, 202 Conn. 57, 70, 519 A.2d 1185 (1987) ("the duties of the conservator and those of the trustees, and the potential liabilities arising from the breaches of these duties, are completely distinct"); see also, e.g., 1 Restatement (Second), Trusts § 175, comment (f), p. 381 (1959) ("[t]he duty of the trustee is not only to take and keep control, but to take and keep exclusive control"); R. Folsom & L. Beck, Connecticut Estates Practice Series: Drafting Trusts in Connecticut (2d Ed. 2021) § 1:15, p. 16 (explaining that statutes and legal principles "[suggest] that the [c]onservator should not have authority to exercise the [g]rantor's right to revoke or amend the trust").

There may well be persuasive counterarguments. The questions of whether trusts are part of the estate, subject to the conservator's management, and, if not, whether Elia retained the legal authority to create the irrevocable trust are not, however, properly before this court. The defendant did argue before the Appellate Court that the assets in the revocable trust were not part of the conservatorship estate but made no argument that this fact had any bearing on the question of Elia's legal authority to create the irrevocable trust. See *Day* v. *Seblatnigg*, 186 Conn. App. 482, 506 n.10, 199 A.3d 1103 (2018). The Appellate Court reasonably construed the defendant's argument to be related exclusively to the question of whether Seblatnigg had the legal authority to *transfer* the revocable trust assets and determined that it was unnecessary to address that argument in light of its conclusion that Elia lacked legal

[7] I am not suggesting that the conservator would lack authority to request a distribution from the trust for the conserved person's support in accordance with the terms of the trust or to file an action on the conserved person's behalf to compel the trustees to meet their fiduciary obligations.

authority to *create* the irrevocable trust. See id. The defendant did not argue in its petition for certification to appeal to this court that the Appellate Court improperly had failed to reach this issue because it was directly connected to the question of whether Elia had authority to create the irrevocable trust.[8] We therefore must leave to another day the questions of whether trusts are part of the conservatorship estate and, if not, whether a conserved person retains exclusive authority to create and fund trusts with assets that are not part of the conservatorship estate.

II

I also take this opportunity to highlight the possibility that the legislature may wish to consider revisions to the conservatorship scheme as it applies to voluntary representation, which was not directly considered in the 2007 reforms.

As the majority explains, it is not uncommon for persons seeking voluntary representation to have the same degree of incapacity as involuntarily conserved persons, whether at the time the application is submitted or sometime thereafter. See, e.g., Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1977 Sess., p. 190, testimony of Probate Judge Bernard F. Joy; see also, e.g., Public Acts 1987, No. 87-87. This fact would suggest that some members of the former class may be equally vulnerable to some of the abuses that prompted the 2007 reforms. Yet, because the statutory definition

[8] The defendant petitioned this court for certification of two issues: (1) whether the Appellate Court correctly determined that Elia did not retain any control over her estate; and (2) whether "the *trial court* err[ed] when it concluded that [General Statutes (Rev. to 2011)] § 45a-655 (e), a statute directed solely to the conduct of conservators, applied to the conduct of a voluntarily conserved person." (Emphasis added.) We granted certification, limited to the first issue. See *Day* v. *Seblatnigg*, 331 Conn. 913, 204 A.3d 702 (2019); see also footnote 5 of the majority opinion (reframing certified question).

of a "conserved person" includes only involuntarily conserved persons; see General Statutes § 45a-644 (h); it appears that protections available in involuntary conservatorships are unavailable in voluntary conservatorships. Those protections include the right to clear notice of the legal consequences of the appointment of a conservatorship, including the fact that conserved persons "will lose some of [their] rights"; (internal quotation marks omitted) General Statutes § 45a-649 (b); the right to appointed counsel, the right to have the Probate Court ascertain whether the applicant has the capacity to retain certain rights, and the right to periodic judicial review of the conservatorship to ascertain whether the court should modify or terminate the conservatorship. See General Statutes §§ 45a-649 (d), 45a-649a, 45a-650 (m) and 45a-660 (c). The only right provided to the person in a proceeding for voluntary representation, other than to be present and heard, is that the court shall "[explain] to the [applicant] that granting the petition will subject the [applicant] or the [applicant's] property . . . to the authority of the conservator . . . ." General Statutes § 45a-646.

Perhaps not all of the procedural protections afforded to involuntarily conserved persons are necessary when the conservatorship is being requested, rather than imposed, and the voluntarily conserved person has the distinct right to terminate the conservatorship at will, with thirty days notice. See General Statutes § 45a-647. But the present case illustrates the pitfalls of the lack of any explicit procedural requirements. The Probate Court made no effort to ascertain what authority, if any, Elia wanted to retain or what limits, if any, she wanted to place on her conservatorship. The court's explanation of the legal consequences of the appointment of a conservator of Elia's estate; see footnote 13 of the majority opinion; could have misled Elia to believe that she retained authority over her entire estate

and had given Seblatnigg authority only to act as her agent under a relationship of joint authority. Hopefully, this court's opinion in this case will provide clearer direction on that matter.

ORDERS

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ORDERS

KEVIN DALEY *v.* WILLIAM B. KLEIN ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 208 Conn. App. 906 (AC 41837), is denied.

Eddie Papic, self-represented, and *William B. Klein*, self-represented, in support of the petition.

Peter M. Nolin and *Liam S. Burke*, in opposition.

Decided February 8, 2022

EMILY S. SCHOONMAKER ET AL. *v.* MATTHEW G. CRIBBINS ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 208 Conn. App. 906 (AC 43151), is denied.

Richard C. Stewart, in support of the petition.

John H. Kane, in opposition.

Decided February 8, 2022

STATE OF CONNECTICUT *v.* MICHAEL F.

The defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 663 (AC 43485/AC 43504), is denied.

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

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

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

Decided February 8, 2022

U.S. BANK TRUST, N.A., TRUSTEE *v.*
GREGG P. HEALEY ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 208 Conn. App. 903 (AC 43586), is denied.

Gregg P. Healey, self-represented, *Bridgette G. Healey*, self-represented, and *Claire A. Healey*, self-represented, in support of the petition.

John P. Fahey, in opposition.

Decided February 8, 2022

J. W. *v.* S. H.

The defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 904 (AC 43757), is denied.

David V. DeRosa, in support of the petition.

Decided February 8, 2022

STEPHEN NELSON *v.* COMMISSIONER
OF CORRECTION

The petitioner Stephen Nelson's petition for certification to appeal from the Appellate Court, 208 Conn. App. 878 (AC 44294), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

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

Decided February 8, 2022

STATE OF CONNECTICUT *v.* MICHAEL BRYANT BOUVIER

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 9 (AC 42430), is denied.

MULLINS and KAHN, Js., did not participate in the consideration of or decision on this petition.

Gregory A. Jones, assigned counsel, and *Patrick Tomasiewicz*, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided February 8, 2022

BILLY WRIGHT *v.* COMMISSIONER OF CORRECTION

The petitioner Billy Wright's petition for certification to appeal from the Appellate Court, 209 Conn. App. 50 (AC 43607), is denied.

Adele V. Patterson, senior assistant public defender, in support of the petition.

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

Decided February 8, 2022

STATE OF CONNECTICUT *v.* WILLIAM MCKINNEY

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 363 (AC 43611), is denied.

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

Raymond L. Durelli, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided February 8, 2022

SOLOMON WHITE *v.* COMMISSIONER OF CORRECTION

The petitioner Solomon White's petition for certification to appeal from the Appellate Court, 209 Conn. App. 144 (AC 43988), is denied.

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

Melissa E. Patterson, senior assistant state's attorney, in opposition.

Decided February 8, 2022

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Benjamin *v.* Island Management, LLC. 189
Request for information pursuant to provision (§ 34-255i (b) (2)) of Connecticut Uniform Limited Liability Company Act; alleged violation of defendant limited liability company's operating agreement; claim that, in order for investigation of mismanagement to be proper purpose, as required by § 34-255i (b) (2) (A), member of limited liability company must assert facts evidencing credible basis to infer that mismanagement may have occurred; claim that, in absence of credible proof requirement, there would be no basis to limit inspection to information directly connected to stated purpose of inspection, as is required by § 34-255i (b) (2) (C); claim that trial court was required to determine, pursuant to § 34-255i (b) (2) (C), that there was direct connection between each of the categories of information at issue and one of two specific purposes asserted in written demands for inspection of defendant's books and records but that it failed to engage in such analysis; claim that certain information sought at trial was not requested with reasonable particularity, as required by § 34-255i (b) (2) (B).

Daley *v.* Klein (Order) 901

Day *v.* Seblatnigg 815
Conservatorships; declaratory judgment; summary judgment; application for voluntary appointment of conservator pursuant to statute ((Rev. to 2011) § 45a-646); certification from Appellate Court; whether Appellate Court properly upheld trial court's granting of plaintiff's motion for summary judgment; whether irrevocable trust created by voluntarily conserved person was void ab initio and unenforceable because, pursuant to statute ((Rev. to 2011) § 45a-655 (a)), authority to manage conserved person's estate rested exclusively with conservator.

Fajardo *v.* Boston Scientific Corp. 535
Product liability; lack of informed consent; innocent, negligent and intentional misrepresentation; claim under Connecticut Product Liability Act (§ 52-572m et seq.) that allegedly defective design of transvaginal mesh sling manufactured by named defendant caused named plaintiff to suffer personal injuries; whether trial court properly rendered summary judgment for defendant gynecologist and defendant medical practice in connection with plaintiffs' claim that gynecologist failed to obtain patient's informed consent to sling procedure, when gynecologist recommended and advised named plaintiff regarding risks of that procedure but referred her to specialist, who ultimately performed procedure; whether trial court properly rendered summary judgment for defendant gynecologist and defendant medical practice in connection with plaintiffs' misrepresentation claims; claim that trial court improperly declined to instruct jury on reasonable alternative design prong of risk-utility test for product liability claims alleging design defect.

Goguen *v.* Commissioner of Correction 508
Habeas corpus; sexual assault in second degree; whether Appellate Court properly dismissed self-represented petitioner's appeal because he failed to brief that habeas court had abused its discretion in denying his petition for certification to appeal; claim that sex offender registration requirement relating to expired conviction satisfied requirement under federal habeas corpus law that petitioner be in custody at time petition was filed.

Gonzalez *v.* O & G Industries, Inc. 644

Negligence; personal injuries plaintiff employees sustained in explosion that occurred at natural gas fueled power plant as result of defendants' alleged negligence in connection with construction of that power plant and use of "gas blow" procedure; strict liability; abnormally dangerous activity; claim that trial court improperly rendered judgment with respect to strict liability claims by concluding that gas blow procedure was not abnormally dangerous activity; whether totality of six factors in § 520 of Restatement (Second) of Torts established that gas blow procedure was not abnormally dangerous; claim that significant risk would remain even after precautions are employed given inherently dangerous attributes of natural gas; claim that trial court improperly granted defendants' motions for summary judgment with respect to plaintiffs' negligence claims; whether trial court correctly concluded that defendants did not exercise sufficient control over general contractor's or its subcontractors' performance of gas blow procedure to overcome general rule that employer is not vicariously liable for torts of its independent contractor; whether defendants exercised sufficient contractual control over gas blow procedure to establish existence of legal duty; claim that, even in absence of any contractual control, defendants in fact exercised control over gas blow procedures by assuming control or interfering with work; claim that defendants were vicariously liable for general contractor's negligence because general contractor was engaged in intrinsically dangerous activity, which satisfied distinct exception to general rule that employer is not liable for torts of its independent contractor; claim that plaintiffs' negligence claims survived summary judgment because defendants were directly negligent.

Grabe *v.* Hokin. 360

Dissolution of marriage; prenuptial agreement; claim that trial court incorrectly determined that enforcement of prenuptial agreement was not unconscionable in light of all relevant facts and circumstances, despite occurrence of unforeseen events during marriage; whether it was inconsistent for trial court to conclude that it would be unconscionable to enforce attorney's fees provision of agreement while also finding remainder of agreement enforceable in light of severability clause in agreement.

Jordan *v.* Commissioner of Correction 279

Habeas corpus; ineffective assistance of counsel; claim that criminal trial counsel's performance was constitutionally deficient because she had failed to adequately investigate and to call six eyewitnesses whose testimony purportedly would have supported petitioner's self-defense claim; claim that trial counsel's performance was constitutionally deficient on ground that counsel had unreasonably failed to raise third-party culpability defense as result of her inadequate investigation and decision not to call certain witnesses; framework for inquiry into trial counsel's allegedly defective performance when trial counsel is unavailable to testify at habeas trial, discussed.

JPMorgan Chase Bank, National Assn. *v.* Virgulak 750

Foreclosure; certification from Appellate Court; whether Appellate Court properly upheld trial court's decision declining substitute plaintiff's request to reform mortgage deed executed by defendant property owner to reference fact that it was given to secure note executed by defendant's husband; whether absence of finding by trial court that parties intended mortgage deed signed by defendant to secure note was clearly erroneous; claim that, because mortgage deed referenced note with same date and in same amount as note that defendant's husband signed, note must be note defendant agreed to secure when she executed mortgage deed; whether Appellate Court properly upheld trial court's determination that substitute plaintiff was not entitled to foreclose mortgage because defendant was not borrower on note; claim that foreclosure was proper equitable relief on grounds that it was undisputed that defendant entered into mortgage transaction and common sense dictated that she intended her property interest to serve as security for note contemporaneously executed by defendant's husband.

J. W. *v.* S. H. (Order) 902

Klass *v.* Liberty Mutual Ins. Co. 735

Application to compel appraisal to resolve dispute between parties concerning claim under homeowners insurance policy; whether trial court abused its discretion in denying plaintiff's motion to reargue and reconsider; whether trial court improperly granted plaintiff's motion to compel appraisal; claim that dispute

as to extent of insurer's replacement obligation pursuant to statute (§ 38a-316e (a)) was question of coverage to be resolved by court before insurance appraisal could proceed.

L. H.-S. *v.* N. B.. 483
Application for civil protection order pursuant to statute (§ 46b-16a); alleged stalking; appeal involving matter of substantial public interest pursuant to statute (§ 52-265a); claim that § 46b-16a was ambiguous with respect to whether to apply subjective-objective standard for determining whether applicant for civil protection order fears for his or her physical safety; claim that legislative history of statute supports objective-only standard; whether trial court improperly interpreted § 46b-16a as creating subjective-objective standard; whether trial court's findings relating to whether plaintiff, in fact, feared for her physical safety were clearly erroneous; claim that trial court abused its discretion in excluding testimony that defendant had requested that plaintiff provide him with nude photographs and testimony regarding whether defendant ever had had suicidal thoughts or had taken medication for his mental health; unpreserved claim that § 46b-16a violated equal protection clause of Connecticut constitution; whether record was inadequate to review plaintiff's state constitutional claim.

Larmel *v.* Metro North Commuter Railroad Co. 332
Personal injury action; civil arbitration; certification from Appellate Court; whether plaintiff's action filed after arbitration could be saved by accidental failure of suite statute (§ 52-592 (a)); whether plaintiff's prior action was "tried on its merits" within meaning of § 52-592 (a).

Nelson *v.* Commissioner of Correction (Order) 902

Pfister *v.* Madison Beach Hotel, LLC 702
Zoning; permanent injunction; action seeking to enjoin defendants from hosting free outdoor concerts on strip of land in town park that was adjacent to property on which defendants' hotel was situated; certification from Appellate Court; claim that Appellate Court improperly applied plenary review to trial court's determination that hotel's use of park for concerts illegally expanded hotel's nonconforming use of hotel property; whether Crabtree Realty Co. *v.* Planning & Zoning Commission *(82 Conn. App. 559) supported trial court's determination; whether trial court applied incorrect legal standard; claim that Appellate Court misapplied actual use doctrine in concluding that concerts were permitted use in park; claim that Appellate Court incorrectly concluded that town zoning regulations, which limited use of park to all active and passive recreational purposes, permitted holding of concerts in park.*

Riccio *v.* Bristol Hospital, Inc. 772
Medical malpractice; accidental failure of suit statute (§ 52-592); claim that trial court erred in concluding that § 52-592 did not save plaintiff's otherwise time barred action because her first medical malpractice action was dismissed due to her attorney's gross negligence for failing to file legally sufficient medical opinion letters with her complaint; whether plaintiff met her burden of proving that her attorney's lack of knowledge of and failure to comply with Appellate Court opinions that established requirements for legally sufficient medical opinion letters was mistake, inadvertence or excusable neglect rather than egregious conduct or gross negligence.

Scholz *v.* Epstein 1
Statutory theft; litigation privilege; certification from Appellate Court; whether litigation privilege afforded defendant attorney absolute immunity from liability for statutory (§ 52-564) theft in connection with prior judicial proceeding in which defendant represented company foreclosing on plaintiff's property; claim that litigation privilege was inapplicable to extent that defendant's recording of certificate of foreclosure on land records and role in sale of property purportedly fell outside scope of foreclosure action.

Schoonmaker *v.* Cribbins (Order) 901

South Windsor *v.* Lanata 31
Zoning; legal impossibility; certification from Appellate Court; claim that Appellate Court improperly remanded case for new trial as to liability, rather than proceeding limited to damages.

State *v.* A. B. 47
Possession of child pornography first degree; motion to dismiss information; whether trial court properly granted defendant's motion to dismiss; claim that delay in executing arrest warrant was unreasonable under State *v.* Crawford *(202 Conn.*

443); whether trial court incorrectly concluded that applicable statute of limitations ((Rev. to 2009) § 54-193 (b)) was not tolled by tolling provision of § 54-193 (c).

State *v.* Bermudez 233
Felony murder; certification from Appellate Court; whether Appellate Court correctly concluded that trial court properly admitted evidence of gang affiliations of defendant, among others, and evidence of key state witness' relocation by state after witness provided written statement to police that implicated defendant in victim's death; whether gang affiliation evidence was probative to explain why witness feared defendant and defendant's brothers, who had participated in the charged crime, and why she waited twelve years before providing statement to police; whether trial court's limiting instruction minimized prejudicial impact of evidence; whether trial court abused its discretion in determining that prejudicial effect of three salacious letters that witness had written to defendant outweighed their probative value; failure of defendant to establish that his constitutional rights to present defense and to confront witnesses against him were violated by trial court's decision to preclude admission of letters into evidence; whether Appellate Court correctly concluded that defendant's claim that trial court had violated his constitutional rights by precluding defense counsel from questioning witness about circumstances surrounding termination of her employment and her birth control practices was not constitutional in nature and that trial court did not abuse its discretion in precluding those lines of inquiry.

State *v.* Bouvier (Order) 903

State *v.* Bradley 72
Sale of controlled substance; violation of probation; motions to dismiss; standing; certification from Appellate Court; claim that defendant had standing, in his individual capacity, to raise constitutional challenge to his conviction of sale of controlled substance in violation of statute ((Rev. to 2017) § 21a-277 (b)) on ground that statute violated equal protection clause of federal constitution insofar as legislature enacted it for purpose of discriminating against African Americans and Mexican Americans; claim that defendant had established classical aggrievement under State *v.* Long *(268 Conn. 508) insofar as he was charged, prosecuted, and convicted under unconstitutional statute; whether defendant lacked standing to claim that § 21a-277 (b) violated equal protection rights of other racial and ethnic groups.*

State *v.* Coltherst 97
Capital felony; murder; felony murder; kidnapping first degree; robbery first degree; robbery second degree; larceny first degree; conspiracy to commit kidnapping first degree; larceny fourth degree; motion to correct illegal sentence; certification from Appellate Court; claim that Appellate Court incorrectly concluded that trial court followed statutory (§ 54-91g) requirements in resentencing defendant; whether and when defendant, who was serving two distinct total effective sentences of eighty-five years of imprisonment and eighty years of imprisonment, to run consecutively, will be eligible for parole under applicable statutes (§§ 53a-38 (b) (2) and 54-125a (f) (1)); claim that § 54-91g applied to defendant; whether defendant met conditions under § 54-91g that restrict its application to child whose case has been transferred from juvenile docket to regular criminal docket and who has been convicted of class A or B felony pursuant to such transfer; whether § 54-91g applied retroactively to defendant.

State *v.* Hughes 387
Manslaughter first degree with firearm; criminal possession of firearm; self-defense; motion for new trial; claim that state presented insufficient evidence to satisfy its burden of disproving defendant's claim of self-defense beyond reasonable doubt; claim that trial court improperly denied defendant's motion for new trial on ground that juror consulted dictionary for definition of "manslaughter"; applicability of presumption of prejudice articulated in Remmer *v.* United States *(347 U.S. 227); whether defendant established his entitlement to presumption of prejudice; whether state satisfied its burden of proving that juror misconduct was harmless; whether juror misconduct caused actual prejudice to defendant.*

State *v.* Lopez 793
Violation of probation; whether evidence was sufficient to support trial court's finding that defendant, by possessing airsoft pellet gun, violated terms of his probation prohibiting him from violating state or federal criminal laws and from possessing

any firearm; claim that airsoft pellet gun could not be considered firearm within meaning of statute (§ 53a-3 (19)) that defines firearm as any weapon from which shot may be discharged.

State *v.* McKinney (Order) 903

State *v.* Michael F. (Order) 901

State *v.* Streit 170

Manslaughter first degree; claim that trial court abused its discretion by denying motion seeking to introduce evidence, in support of defendant's self-defense claim, that victim had searched retail website for weapons in days preceding stabbing; whether trial court incorrectly concluded that evidence of victim's Internet searches was inadmissible evidence of victim's violent character; whether victim's online search history was admissible as prior act of misconduct.

State *v.* Ward 142

Manslaughter first degree; assault first degree; whether Appellate Court correctly concluded that trial court lacked subject matter jurisdiction over defendant's motion to correct illegal sentence on ground that he failed to allege colorable challenge, within scope of applicable rule of practice (§ 43-22), to sentencing procedure rather than underlying conviction.

Tillman *v.* Planning & Zoning Commission 117

Zoning; planned development districts; claim that zoning authority conferred by statute (§ 8-2) did not support creation of planned development district; claim that this court's decision in Campion *v.* Board of Aldermen *(278 Conn. 500), did not permit municipalities that derive their zoning authority from § 8-2 to create planned development districts; claim that planned development district proposed by defendant violated uniformity requirement of § 8-2; whether defendant planning and zoning commission's decision resulted in unlawful subdivision.*

Toro Credit Co. *v.* Zeytoonjian 316

Foreclosure; order of foreclosure by sale; whether trial court abused its discretion in ordering foreclosure by sale of two parcels encumbered by one mortgage; whether defendants appealed from final judgment for purposes of appellate jurisdiction when trial court had determined method of foreclosure and amount of debt; whether trial court properly considered remedies provision in mortgage agreement as one factor in determining whether to order foreclosure by sale.

U.S. Bank, National Assn. *v.* Madison 809

Foreclosure; bankruptcy; certification from Appellate Court; claim that Appellate Court, in affirming trial court's judgment of strict foreclosure, improperly treated defense to foreclosure action as being same as claims and counterclaims, which are property of bankruptcy estate that must be disclosed in bankruptcy proceeding; appeal dismissed on ground that certification was improperly granted.

U.S. Bank Trust, N.A. *v.* Healey (Order) 902

Wells Fargo Bank, N.A. *v.* Lorson 430

Foreclosure; mortgages; judgment of strict foreclosure; certification from Appellate Court; whether compliance with applicable regulations of federal Department of Housing and Urban Development (HUD) is condition precedent to accelerating payment of debt and foreclosing on mortgage that is guaranteed or insured by Federal Housing Administration; whether compliance with applicable HUD regulations must be pleaded and ultimately proven by plaintiff lender; claim that plaintiff's compliance with applicable HUD regulations was condition subsequent rather than condition precedent to foreclosure; claim that, even if compliance with applicable HUD regulations is condition precedent to foreclosure, defendant borrower still should shoulder burden of pleading and proving noncompliance as special defense; adoption of burden shifting procedure to be followed in cases in which plaintiff lender is required to comply with HUD regulations before seeking acceleration of debt and foreclosure; whether Appellate Court correctly concluded that, even if plaintiff had burden to plead and prove compliance with applicable HUD regulations, evidence in record supported conclusion that plaintiff had met its burden.

White *v.* Commissioner of Correction (Order) 904

Woods *v.* Commissioner of Correction 506

Habeas corpus; murder; whether Appellate Court improperly dismissed petitioner's appeal from habeas court's dismissal of his petition for writ of habeas corpus; claim that Appellate Court improperly construed allegations in petition, which

petitioner filed as self-represented party, in concluding that he failed to raise claim regarding ineffective assistance of prior habeas counsel; appeal dismissed on ground that certification was improvidently granted.
Wright *v.* Commissioner of Correction (Order) 903

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STATE OF CONNECTICUT *v.* KEITH BELCHER
(SC 20531)

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

Syllabus

The defendant appealed from the trial court's denial of his motion to correct an illegal sentence. The defendant's lengthy prison sentence had been imposed in connection with his conviction of kidnapping in the first degree, sexual assault in the first degree, robbery in the first degree, burglary in the first degree, and attempt to commit sexual assault in the first degree. In his motion to correct, the defendant claimed, inter alia, that his sentence was imposed in an illegal manner insofar as the sentencing court relied on materially false information, namely, a baseless and subsequently discredited theory alleging the rise of teenage superpredators who would terrorize society. The defendant specifically claimed that the sentencing court improperly imposed his sentence on the basis of its characterization of the defendant as a "charter member" of that group of superpredators. The trial court rejected the defendant's claim, concluding, inter alia, that the evidence supported the determination that the defendant fit the definition of a "superpredator," regardless of the validity of that theory, and that the sentencing court's remarks about the superpredator theory were not central to its sentencing decision. On appeal from the trial court's denial of the defendant's motion,

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices D'Auria, Mullins, Kahn, Ecker and Keller. Thereafter, Justice McDonald was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

the defendant claimed that the trial court had abused its discretion in concluding that the sentencing court did not substantially rely on materially false information in sentencing him. *Held* that the trial court abused its discretion in denying the defendant's motion to correct an illegal sentence because the superpredator theory constituted materially false and unreliable evidence on which the sentencing court substantially relied in imposing the defendant's sentence: this court reviewed social science research and government reports and concluded that the superpredator theory was baseless when it originally was espoused by a university professor in the mid-1990s and has since been thoroughly debunked and universally rejected as a myth; moreover, this court determined that, in the context of the sentencing of the defendant, a Black teenager, the sentencing court's invocation of the baseless superpredator theory was especially detrimental to the integrity of the sentencing procedure, as the sentencing court relied on materially false, racial stereotypes that perpetuate systemic racial inequities, which historically have pervaded the criminal justice system, and as the sentencing court treated the characteristics of youth, namely, impulsivity, submission to peer pressure, and deficient judgment, as an aggravating, rather than a mitigating, factor, in violation of the precedent of this court and the United States Supreme Court; furthermore, the sentencing court substantially relied on the materially false superpredator theory when it sentenced the defendant, as that court gave explicit attention to the theory when it expressly referenced the defendant's supposed status as a charter member of the superpredator group prior to imposing the defendant's sentence, and the court's discussion of the superpredator theory throughout its brief sentencing remarks demonstrated that the sentencing court's view of the defendant was shaped by the theory that there was a group of youths, including the defendant, who were destined to live an irredeemable life of violence; accordingly, the trial court's decision to deny the defendant's motion to correct an illegal sentence was reversed, and the case was remanded with direction to grant the defendant's motion and for resentencing.

Argued January 11, 2021—officially released January 21, 2022**

Procedural History

Substitute information charging the defendant with two counts each of the crimes of kidnapping in the first degree and sexual assault in the first degree, and with one count each of the crimes of robbery in the first degree, burglary in the first degree, and attempt to commit sexual assault in the first degree, brought to the

** January 21, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Superior Court in the judicial district of Fairfield and tried to the jury before *Hartmere*, *J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, the Appellate Court, *Foti*, *Schaller* and *Daly*, *Js.*, affirmed the trial court's judgment; subsequently, the court, *Devlin*, *J.*, dismissed in part and denied in part the defendant's motion to correct an illegal sentence, and the defendant appealed. *Reversed*; *further proceedings.*

Michael W. Brown, with whom, on the brief, was *Alexandra Harrington*, deputy assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Keith Belcher, a juvenile offender, appeals from the trial court's denial of his motion to correct an illegal sentence.[1] After his conviction, the defendant received a total effective sentence of sixty years of incarceration. He claims, inter alia, that the trial court improperly denied his motion to correct on the basis of the court's conclusion that the sentencing court did not impose the sentence in an illegal manner by relying on materially false information.[2]

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

We note that the trial court dismissed in part the defendant's motion to correct. We are concerned only with the trial court's denial of that motion; see footnote 3 of this opinion; and our reversal of the trial court's ruling pertains to the denial rather than the dismissal in part of that motion.

[2] The issue of whether a sentencing court has imposed a sentence in an illegal manner by relying on materially false information frequently has arisen when the court relied on factually inaccurate information in a presentence investigation report in imposing a defendant's sentence. See, e.g., *State* v. *Parker*, 295 Conn. 825, 832, 992 A.2d 1103 (2010). Our decisions, however,

Our review of the record reveals that the defendant established that the sentencing court substantially relied on materially false information in imposing his sentence, specifically, on the court's view that the defendant was a "charter member" of a mythical group of teenage "superpredators." Therefore, we conclude that the trial court abused its discretion in denying the defendant's motion to correct. Accordingly, we reverse the judgment of the trial court, and the case is remanded with direction to grant the defendant's motion and for resentencing.[3]

The following facts and procedural history are relevant to this appeal. "The defendant was fourteen years of age when, on December 24, 1993, he and a companion approached the victim in front of her apartment in Bridgeport. The victim was unloading groceries from her car when the defendant approached her from behind, pulled out a gun and demanded that she give

have used the phrases "inaccurate information," "false information" and "misinformation" interchangeably for purposes of applying the standard. See, e.g., *State* v. *Ward*, 341 Conn. 142, 156, A.3d (2021) ("inaccurate information"); *State* v. *Parker*, supra, 832 ("misinformation"); id., 844 ("inaccurate information" and "materially false" information (internal quotation marks omitted)); *State* v. *Collette*, 199 Conn. 308, 319, 507 A.2d 99 (1986) ("false information"). We recognize that there is a distinction between the inaccuracy of facts set forth in a report and the falsity of a theory. Both share, however, the core defect that renders a sentence illegal—in each instance, the sentencing court has relied on something that is not true. In the present case, we believe that the phrase "false information" is the best fit for the sentencing court's reliance on a false theory.

[3] The defendant also raises two other claims. First, he claims that the trial court incorrectly denied his motion to correct an illegal sentence because his sentence is disproportionate, in violation of the eighth amendment to the United States constitution. Second, the defendant asserts that the trial court incorrectly concluded that it lacked jurisdiction over his claim that, in light of evolving standards of decency, his sentence was disproportionate, in violation of article first, §§ 8 and 9, of the Connecticut constitution. Because our resolution of the defendant's claim that the sentencing court relied on materially false information requires us to remand the case for resentencing, resolution of these additional claims is not necessary to this appeal.

him her purse. When she informed the defendant that the purse was upstairs, he dragged her up to the apartment to retrieve it, all the time holding the gun on her." *State* v. *Belcher*, 51 Conn. App. 117, 119, 721 A.2d 899 (1998). While in the apartment, the defendant sexually assaulted the victim twice, attempted to do so a third time, and pistol-whipped her. See id., 120.

Soon thereafter, based on the victim's identification of him from police photographs, the police arrested the defendant. Id. Proceedings against him were initiated in the docket for juvenile matters of the Superior Court. See id. Following a hearing, the court granted the state's motion to transfer the defendant's case to the regular criminal docket of the Superior Court. Id., 120–21. The state charged the defendant with two counts each of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B) and sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), and with one count each of attempt to commit sexual assault in the first degree in violation of General Statutes § 53a-49 (a) (2) and § 53a-70 (a) (1), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and burglary in the first degree in violation of General Statutes (Rev. to 1993) § 53a-101 (a) (1). See id., 118–19, 121. The defendant was convicted on all seven counts. Id., 121. The sentencing court imposed a total effective sentence of sixty years of incarceration.[4]

[4] The court sentenced the defendant, on the first count, for kidnapping in the first degree, to twenty years, on the second count, for kidnapping in the first degree, to twenty years, on the third count, for robbery in the first degree, to ten years, on the fourth count, for sexual assault in the first degree, to twenty years, on the fifth count, for sexual assault in the first degree, to twenty years, on the sixth count, for attempt to commit sexual assault in the first degree, to ten years, and, on the seventh count, for burglary in the first degree, to ten years. The court further ordered counts two, five and six to run concurrently to count one, and counts three, four and seven to run consecutively to count one, for a total effective sentence of sixty years of imprisonment.

In the decades following the defendant's sentencing, juvenile sentencing law has undergone significant developments. These changes had their genesis in the decision of the United States Supreme Court in *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In *Roper*, the court held that the execution of persons for crimes committed when they were children (under eighteen years of age) constitutes disproportionate punishment in violation of the eighth amendment to the federal constitution. Id., 564, 568, 575, 578. Children, the court explained, are different from adults for purposes of culpability and punishment, as certain characteristics of youth are, by their nature, mitigating. See id., 569–70. Children's " 'lack of maturity,' " " 'underdeveloped sense of responsibility,' " vulnerability to peer pressure and other outside influences, as well as the transient nature of their personality traits, led the court to conclude that "juvenile offenders cannot with reliability be classified among the worst offenders." Id.

Following *Roper*, decisions by this court and the United States Supreme Court have relied on these mitigating characteristics of youth to further define the constitutional limits of juvenile sentencing law. We recently summarized those limitations. "Under the federal constitution's prohibition on cruel and unusual punishments, a juvenile offender cannot serve a sentence of imprisonment for life, or its functional equivalent, without the possibility of parole, unless his age and the hallmarks of adolescence have been considered as mitigating factors. *Miller* v. *Alabama*, 567 U.S. 460, 476–77, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 60–61, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); *State* v. *Riley*, 315 Conn. 637, 641, 110 A.3d 1205 (2015), cert. denied, 577 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016)." *State* v. *Williams-Bey*, 333 Conn. 468, 470, 215 A.3d 711 (2019). Thus, "[t]o comport with federal constitutional

requirements, the legislature passed No. 15-84 of the 2015 Public Acts (P.A. 15-84) . . . [which] retroactively provided parole eligibility to juvenile offenders sentenced to more than ten years in prison." (Footnote omitted.) *State* v. *McCleese*, 333 Conn. 378, 383, 215 A.3d 1154 (2019). In addition, "[§] 2 of P.A. 15-84 . . . requires a court to consider the *Miller* factors [which are the aforementioned hallmarks of youth] when imposing certain sentences [on] juvenile offenders." Id., 400.

Relying on those changes to juvenile sentencing law, the defendant filed a motion to correct an illegal sentence, claiming that (1) the sentencing court failed to consider his youth, as required by *Miller* and its progeny, including the decision of this court in *State* v. *Riley*, supra, 315 Conn. 641 (sentencing court must consider age related evidence in mitigation when deciding whether to irrevocably sentence juvenile offender to term of life imprisonment, or equivalent, without parole), (2) his sentence was disproportionate in violation of the eighth amendment to the United States constitution, (3) his sentence was disproportionate in violation of article first, §§ 8 and 9, of the Connecticut constitution, and (4) his sentence was imposed in an illegal manner because the sentencing court relied on materially false information, namely, a baseless and subsequently discredited theory alleging the rise of teenage superpredators who would terrorize society.

After hearing argument on the motion, the trial court initially concluded that the defendant was entitled to a new sentencing hearing pursuant to *Riley*. The court grounded its decision on its finding that the sentencing court had failed to give "mitigating effect to the defendant's young age and its hallmarks." Because the trial court's conclusion as to the defendant's *Miller* claim was dispositive, the court did not address the defendant's remaining three claims. Thereafter, the trial court stayed its order, pending the resolution of the appeals

in *State* v. *Boyd*, 323 Conn. 816, 151 A.3d 355 (2016), and *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016). *Boyd* and *Delgado* addressed whether the parole eligibility retroactively conferred by P.A. 15-84 remedied a violation of the defendants' federal constitutional rights, as explicated in *Miller*. See *State* v. *Boyd*, supra, 820; *State* v. *Delgado*, supra, 802–804. Answering that question in the affirmative, we held that the trial court properly dismissed those defendants' motions to correct an illegal sentence for lack of subject matter jurisdiction. *State* v. *Boyd*, supra, 820–21; *State* v. *Delgado*, supra, 810–11, 816. Relying on those decisions, the trial court vacated its order granting the defendant a new sentencing hearing and dismissed, for lack of subject matter jurisdiction, the defendant's claim that the sentencing court had failed to give mitigating effect to the defendant's youth in violation of *Miller* and *Riley*.[5] The trial court also rejected the defendant's remaining three claims.[6]

The defendant appealed from the trial court's ruling to the Appellate Court. That court stayed the appeal,

[5] We emphasize that our holding today is grounded solely on the sentencing court's imposition of the defendant's sentence in an illegal manner by relying on materially false information. That is, we do not ground our holding on the sentencing court's failure to give mitigating effect to the defendant's youth and its hallmark features. As we have explained, our decisions have held that such a pre-*Miller* failure would not require resentencing. See *State* v. *Williams-Bey*, supra, 333 Conn. 470; *State* v. *Delgado*, supra, 323 Conn. 804.

[6] Specifically, the trial court held that, in light of the gravity of the underlying offenses, the defendant's sentence was not disproportionate, in violation of the eighth amendment. The court concluded that it lacked jurisdiction over the defendant's claim that the passage of No. 15-183 of the 2015 Public Acts—which bars, but for one narrow exception, the transfer of fourteen year olds to the regular criminal docket—demonstrated that contemporary standards of decency dictated that sentencing a fourteen year old to sixty years of incarceration was disproportionate, in violation of article first, §§ 8 and 9, of the Connecticut constitution. Finally, the trial court rejected the defendant's claim that, by stating in its ruling that the defendant was a "charter member" of an alleged demographic group of teenage "superpredators," the sentencing court relied on materially false information in sentencing him.

pending this court's disposition of *State* v. *McCleese*, supra, 333 Conn. 378, and *State* v. *Williams-Bey*, supra, 333 Conn. 468.[7] Following the official release of *McCleese* and *Williams-Bey* on August 23, 2019, and the decision of the Appellate Court lifting the stay, this appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

Relevant to the resolution of this appeal, the defendant claims that the trial court abused its discretion in concluding that the sentencing court did not substantially rely on materially false information, in violation of his right to due process, in sentencing him to a total effective sentence of sixty years of incarceration. Specifically, the defendant claims that his sentence was imposed in an illegal manner because the sentencing court relied on the erroneous and subsequently discredited theory of teenage superpredators in making its sentencing decision. We agree with the defendant and, accordingly, reverse the trial court's ruling.

The following additional facts and procedural history are relevant to this claim. Prior to the defendant's sentencing hearing on January 24, 1997, the sentencing court had reviewed the presentence investigation report (PSI), which the court stated was thorough and included school records and psychological reports.[8] The court heard argument from the prosecutor and defense counsel. In his remarks, the prosecutor emphasized the trauma suffered by the victim, who testified at trial that she would never be the same. The prosecutor also

[7] Both decisions held that the parole eligibility granted retroactively by P.A. 15-84, § 1, remedies a *Miller* violation under the Connecticut constitution. See *State* v. *Williams-Bey*, supra, 333 Conn. 470, 472–73, 477; *State* v. *McCleese*, supra, 333 Conn. 381, 383, 387.

[8] The PSI revealed that the defendant had an extensive juvenile delinquency history, including an incident in which he shot his younger sister. The PSI also revealed that the defendant had rejected "any efforts at rehabilitation" and had been diagnosed with " 'severe conduct disorder.' "

highlighted the defendant's "extensive juvenile record." In fact, when the defendant committed his crimes, he was on a holiday furlough from Long Lane School, which was a facility for delinquent children. School officials indicated that the defendant showed no remorse for his prior actions. The prosecutor referred the sentencing court to the PSI, arguing that the information therein supported a "substantial sentence . . . ."

Defense counsel argued in mitigation that the defendant was only fourteen years old when he committed his crimes, that he came from a "troubled background," and that this was his first conviction as an adult. Counsel acknowledged the defendant's juvenile history but pointed out that, with the exception of one conviction for assault in the second degree, that history involved nonviolent offenses.

The defendant's claim that his sentence was imposed in an illegal manner arises from the sentencing court's brief remarks prior to imposing the sentence. The court began by stating that, in arriving at the defendant's sentence, it relied on the PSI and the evidence presented at trial. Of particular import, the court explained, was the victim's testimony, which the court found "most compelling . . . ." On the basis of the evidence, the court said: "To say that the conduct here was extremely serious and egregious is simply to understate the facts of what happened. The conduct here was just so inhumane as to be considered subhuman. This is despite the fact that, as disclosed in the [PSI], [the defendant's] . . . testing shows average intelligence. He could have chosen another lifestyle, even at his very young age, but deliberately chose not to. *Professor John* [*J. DiIulio, Jr.*], *of Princeton University has coined the term 'superpredator,' which refers to a group of radically impulsive, brutally remorseless youngsters who assault, rape, rob and burglarize. Mr. Belcher, you are a charter member of that group.* You have no fears,

from your conduct, of the pains of imprisonment; nor do you suffer from the pangs of conscience. I agree with the [prosecutor], the probation officer, and the victim, who, incidentally, still suffers physically and psychologically from your conduct, who all ask for substantial incarceration to ensure the safety of the community." (Emphasis added.)

In rejecting the defendant's claim that the sentencing court's remarks demonstrated that it had substantially relied on materially false information in sentencing him, the trial court reasoned that the superpredator theory did not constitute "information." Specifically, the trial court observed that the term "superpredator" is descriptive, rather than factual. Additionally, the trial court noted that, although the superpredator theory has since been discredited, at the time of sentencing, the sentencing court had a reasonable basis to rely on the theory. The trial court finally observed both that the evidence supported the conclusion that the defendant fit the definition of a "superpredator," regardless of the truth of the theory, and that the sentencing court's remarks about the superpredator theory were not central to the sentencing decision. The trial court went on to say that "[t]he superpredator reference was just a gloss. This court has no doubt that, had Professor DiIulio repudiated his theory before sentencing, [the sentencing court] would have imposed the same sentence."

We begin by setting forth the legal principles that govern our review of the trial court's denial of the defendant's motion to correct a sentence imposed in an illegal manner. "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is [typically] reviewed pursuant to the abuse of discretion standard . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Bischoff*, 337 Conn. 739, 745, 258 A.3d 14 (2021). We have explained, in pertinent part, that "[s]entences imposed in an illegal

manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be sentenced by a judge relying on accurate information or considerations solely in the record . . . ." (Internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010). We have emphasized that the protection against sentencing in an illegal manner "reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure [that] leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Internal quotation marks omitted.) Id.

We also have acknowledged that "[a] sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial. . . . Consistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance. . . . It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come. . . . Finally, although a trial court's discretion is not completely unfettered, and information may be considered as a basis for a sentence only if it has some minimal indicium of reliability . . . [a]s long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Bletsch*, 281 Conn. 5, 20–21, 912 A.2d 992 (2007).

To prevail on a claim that the sentencing court violated his due process rights by relying on materially false information, a defendant cannot merely allege that the information relied on by the court contained factual inaccuracies or inappropriate information. "[T]he mere reference to information outside of the record does not require a sentence to be set aside unless the defendant shows: (1) that the information was materially false or unreliable; and (2) that the trial court substantially relied on the information in determining the sentence." *State* v. *Collette*, 199 Conn. 308, 321, 507 A.2d 99 (1986). "A sentencing court demonstrates [substantial] reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Internal quotation marks omitted.) *State* v. *Parker*, supra, 295 Conn. 843 n.12.

We consider each of these factors in turn. First, a review of the superpredator theory and its history demonstrates that the theory constituted materially false and unreliable information. In the mid-1990s, Professor DiIulio of Princeton University coined the term "superpredator." J. DiIulio, "The Coming of the Super-Predators," The Weekly Standard, November 27, 1995, available at https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators (last visited January 20, 2022). DiIulio, whose work the sentencing court referenced specifically, warned that "the demographic bulge of the next [ten] years will unleash an army of young male predatory street criminals who will make even the leaders of the Bloods and Crips . . . look tame by comparison." Id. DiIulio predicted that this coming wave of superpredators would include "elementary school youngsters who pack guns instead of lunches" and "have absolutely no respect for human life . . . ." Id. He further warned: "On the horizon . . . are tens of thousands of severely morally impoverished

juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them. So for as long as their youthful energies hold out, they will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high." Id.

These dire predictions centered disproportionately on the demonization of Black male teens. DiIulio warned readers that, although "the trouble will be greatest in [Black, inner city] neighborhoods," those in other areas should expect a "spill over" of morally impoverished, "crime-prone young males." Id. A few months later, in an article about race, crime and law enforcement, DiIulio wrote: "[N]ot only is the number of young [B]lack criminals likely to surge, but also the [B]lack crime rate, both black-on-black and black-on-white, is increasing, so that as many as [one] half of these juvenile super-predators could be young [B]lack males." J. DiIulio, "My Black Crime Problem, and Ours," City Journal, Spring, 1996, available at https://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html (last visited January 20, 2022).

Extensive research data and empirical analysis quickly demonstrated that the superpredator theory was baseless. In fact, contrary to DiIulio's assertion, even at the time that he coined the term in the mid-1990s, juvenile offense rates already had dropped significantly from their peak across demographic groups. The falsity of DiIulio's claim was demonstrated in a 2000 bulletin of

the United States Department of Justice, which provided a data-driven assessment of juvenile crime patterns through the 1990s. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Challenging the Myths, 1999 National Report Series: Juvenile Justice Bulletin (February, 2000), available at https://www.ojp.gov/pdffiles1/ojjdp/178993.pdf (last visited January 20, 2022), adopted from H. Snyder & M. Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report (September, 1999), available at https://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html (last visited January 20, 2022). The bulletin revealed that, although serious juvenile offense rates did peak in the late 1980s into the early 1990s, "by 1995, the rate had returned to its traditional level." Id., p. 2. The bulletin concluded that, therefore, "[r]ather than providing evidence for development of a juvenile superpredator, the . . . data indicate that, despite a temporary increase, the rate of serious juvenile offending as of the mid-[1990s] was comparable to that of a generation ago." Id.

In 2001, the United States Office of the Surgeon General labeled the superpredator theory a myth. See U.S. Dept. of Health & Human Services, Youth Violence: A Report of the Surgeon General (2001) c. 1, p. 5, available at https://www.ncbi.nlm.nih.gov/books/NBK44297/?report=reader (last visited January 20, 2022) ("There is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. . . . There is no scientific evidence to document the claim of increased seriousness or callousness . . . ." (Citation omitted.));[9] see also, e.g., F. Zimring, American Youth

[9] By the late 1990s, after a steady decline in juvenile crime, DiIulio recanted his theory and expressed regret that he had promulgated it. See, e.g., E. Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," N.Y. Times, February 9, 2001, p. A19 ("DiIulio said, while praying at Mass on Palm Sunday in 1996, that he had an 'epiphany' . . . . He tried, he said, to put the brakes on the superpredator theory, which had all but taken on

Violence (1998) pp. 61–63 (critiquing use of temporal spike in youth violence to predict future trends); F. Zimring, "The Youth Violence Epidemic: Myth or Reality?," 33 Wake Forest L. Rev. 727, 728 (1998) (challenging predictions of "'coming storm'" of juvenile superpredators as distortion of statistics and "fundamentally unscientific" guesswork). We conclude that the superpredator theory was baseless when it originally was espoused and has since been thoroughly debunked and universally rejected as a myth, and it therefore constituted false and unreliable information that a sentencing court ought not consider in crafting a sentence for a juvenile offender.

In the context of the sentencing of the defendant, a Black teenager, the court's reliance on the materially false superpredator myth is especially detrimental to the integrity of the sentencing procedure for two reasons. First, reliance on that myth invoked racial stereotypes, thus calling into question whether the defendant would have received as lengthy a sentence were he not Black. Second, the use of the superpredator myth supported treating the characteristics of youth as an aggravating, rather than a mitigating, factor. To fully appreciate how the use of this term was not simply a

a life of its own. 'I couldn't write fast enough to curb the reaction . . . .' "). He admitted, on more than one occasion, that his views had turned out to be completely wrong. See, e.g., id. ("DiIulio . . . conceded today that he wished he had never become the [1990s] intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators' ").

Notably, in the landmark case of *Miller* v. *Alabama*, supra, 567 U.S. 460, DiIulio signed on to an amici curiae brief filed in support of the petitioners, which denounced the superpredator theory as a "myth" grounded on "baseless" predictions. *Miller* v. *Alabama* (No. 10-9646), United States Supreme Court Briefs, October Term, 2011, Amici Curiae Brief of Jeffrey Fagan et al., p. 8. The United States Supreme Court ultimately sided with the juvenile offenders, writing that a young person's immaturity reduces his or her accountability and that juveniles have an inability to assess consequences, are often rash, and prone to risk-taking—mitigating factors that should be considered at sentencing. See *Miller* v. *Alabama*, supra, 471, 476–77.

gloss but, rather, an inappropriate sentencing consideration, some historical and sociological context is needed.[10]

The superpredator theory tapped into and amplified racial stereotypes that date back to the founding of our nation. Specifically relevant to the present case, the dehumanization of Black children pervades this country's history. In 1776, when Thomas Jefferson, a slave owner, declared "all men are created equal," in many of the colonies, Black adults and children were property and "were not legally considered human . . . ." (Internal quotation marks omitted.) J. Bell, W. Haywood Burns Institute for Youth Justice Fairness & Equity, Repairing the Breach: A Brief History of Youth of Color in the Justice System (2015) p. 1, available at https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI_compressed.pdf (last visited January 20, 2022).

As one legal scholar has observed, throughout the history of our country, our policies have reflected that only some children—white ones—have deserved societal protection. See K. Nunn, "The Child as Other: Race and Differential Treatment in the Juvenile Justice System," 51 DePaul L. Rev. 679, 679–82 (2002). Professor Kenneth B. Nunn explained that the mid-nineteenth century saw the birth of the concept of "adolescence," resulting in a shift from the understanding of children over the age of ten as a labor resource for families to a class of persons deserving of societal protection. Id., 679–80. A particular part of this shift arose from concerns regarding a rise in childhood poverty and a perception of increasing crime among children. See, e.g.,

[10] We do not intend to provide a comprehensive review of the relevant historical background of the ideas underlying the superpredator myth. Instead, we highlight some aspects of that background that are particularly helpful to understanding why the superpredator theory constitutes materially false information for purposes of sentencing. For thorough discussions of the historical underpinnings of the disparate treatment of Black children in the juvenile justice system, see G. Ward, The Black Child-Savers: Racial Democracy and Juvenile Justice (2012), and Our Children, Their Children (D. Hawkins & K. Kempf-Leonard eds., 2005).

T. Birckhead, "The Racialization of Juvenile Justice and the Role of the Defense Attorney," 58 B.C. L. Rev. 379, 395–96 (2017). Those concerns prompted social reforms, grounded in the doctrine of parens patriae,[11] aimed at directing " 'wayward youth' " to reform schools rather than incarcerating them with adult prisoners. Id., 396–97. Notably, the protections and progressive social innovations afforded by these reforms were not provided to Black children, who were considered " 'unsalvageable and undeserving' " of the "citizen-building ideals" that had prompted the changes. Id., 398; see, e.g., G. Ward, The Black Child-Savers: Racial Democracy and Juvenile Justice (2012) pp. 52–62 (discussing role of race in differential treatment of white and Black juveniles during antebellum period); see also, e.g., id., 52 (noting that, during antebellum period, "[e]arly . . . reformatories were typically first open exclusively to whites"). As a result, by 1850, rather than being sent to reform schools, "a disproportionate number of Black youths were jailed in cities with majority white populations."[12] T. Birckhead, supra, 398.

[11] "Parens patriae" literally means " 'parent of the country' " and "refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles . . . ." (Citation omitted.) Black's Law Dictionary (6th Ed. 1990) p. 1114.

[12] We recognize that the protections afforded to adolescents in the juvenile justice system have not followed a direct trajectory. That is, the recognition of adolescence as a stage of human development has not guaranteed that teenagers receive an ever increasing, or even stable, level of protection under the law. Instead, it is widely acknowledged that juvenile justice has swung in a pendulum between the goals of rehabilitation and punishment. See, e.g., J. Radice, "The Juvenile Record Myth," 106 Geo. L.J. 365, 378–83 (2018) (providing historical overview of shifts between rehabilitative and punitive purposes of juvenile justice system); C. Loomis-Gustafson, "Adjusting the Bright-Line Age of Accountability Within the Criminal Justice System: Raising the Age of Majority to Age 21 Based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders," 55 Duq. L. Rev. 221, 225–27 (2017) (same). Through each swing of the pendulum, however, Black children always have been seen as less capable of rehabilitation than white children because of the pervasive view of Black children as subhuman. See, e.g., K. Nunn, supra, 51 DePaul L. Rev. 679–81.

At the time that adolescence was being recognized as a distinct developmental stage for white children, many Black children remained enslaved and were viewed as subhuman. See, e.g., K. Nunn, supra, 51 DePaul L. Rev. 680. In contrast to white children in their teens, Black children could be separated from their parents, bought and sold like chattel. See, e.g., id.; see also, e.g., J. Bell, supra, p. 6. The nascent concept of adolescence, therefore, did not apply to them. See, e.g., K. Nunn, supra, 680. The historical fiction that Black adolescents are not actually "children," meriting societal protection, stems from the dehumanization of Black Americans and is one of the roots of the disparate treatment of Black teens by the justice system. See, e.g., P. Goff et al., "The Essence of Innocence: Consequences of Dehumanizing Black Children," 106 J. Personality & Soc. Psych. 526, 526–29, 539–41 (2014) (documenting connection between dehumanization of Black male children, perception that they are older and less innocent than white peers, and disparate treatment of Black male children in juvenile justice system); see also footnote 14 of this opinion (illustrating disparate treatment).

Against this backdrop, the superpredator myth employed a particular tool of dehumanization—portraying Black people as animals. See, e.g., P. Goff et al., supra, 106 J. Personality & Soc. Psych. 528 (documenting historical dehumanizing association of Black people, including first Black president of United States, with nonhuman primates). A "predator" is defined as "one that preys, destroys, or devours," or "an animal that depends on predation for its food . . . ." Webster's Third New International Dictionary (2002) p. 1785. The superpredator metaphor invoked images of packs of teens prowling the streets. The news coverage in the mid-1990s, which depicted "young Black males, showing them [handcuffed] and shackled, held down by [the] police, or led into courtrooms wearing orange jumpsuits";

T. Birckhead, supra, 58 B.C. L. Rev. 410; left little doubt that the "packs" were Black teens.

The superpredator myth triggered and amplified the fears inspired by these dehumanizing racial stereotypes, thus perpetuating the systemic racial inequities that historically have pervaded our criminal justice system. Looming on the apocalyptic horizon were tens of thousands of these fabricated, subhuman superpredators, who would "do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high." J. DiIulio, "The Coming of the Super-Predators," supra. A threat on this scale called for a response. And the response came in the form of a public panic and media frenzy, prompting nearly every state in the country to step up the sentencing and punishment of juveniles. See, e.g., J. Short & C. Sharp, Disproportionate Minority Contact in the Juvenile Justice System (2005) p. 7 ("[b]etween 1992 and 1999, [forty-nine] states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation");[13] see also, e.g., F. Zimring, "The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s," 71 La. L. Rev. 1, 8 (2010); D. Bishop, "Juvenile Offenders in the Adult Criminal Justice System," 27 Crime & Just. 81 (2000). This shift in the law subjected "juvenile offenders to sentencing regimes that were originally conceived for adults . . . ." *Miller* v. *Alabama* (No. 10-9646), United States Supreme Court Briefs, October Term, 2011, Amici Curiae Brief of Jeffrey Fagan et al., pp. 7–8.

[13] Like many other states, in the mid-1990s, Connecticut revised its laws to make it easier to try juveniles as adults. See, e.g., Public Acts 1995, No. 95-225, § 13 (revising juvenile transfer provision to allow automatic transfer to regular criminal docket for child charged with commission of capital felony, class A or B felony, or violation of General Statutes § 53a-54d; previous language required court to make written findings, after hearing, that probable cause existed to believe child committed charged crime prior to such transfer).

And the consequences of the changes to juvenile justice fell disproportionately on Black teens.[14]

[14] In 1999, the United States Department of Justice reported: "Overrepresentation of [B]lack juveniles occurs at all stages of the juvenile justice system. In 1996–97, while 26 [percent] of juveniles arrested were [B]lack, they made up 45 [percent] of cases involving detention. Thirty-two percent of adjudicated cases involved [B]lack youth, yet 40 [percent] of juveniles in residential placement are [B]lack. Even recognizing the overrepresentation of [B]lack juveniles involved in violent crimes reported by victims (39 [percent]), they still accounted for a disproportionate share of juvenile arrests for violent crime (44 [percent]) and confinement (45 [percent])." Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Minorities in the Juvenile Justice System, 1999 National Report Series: Juvenile Justice Bulletin (December, 1999) p. 2, available at https://www.ojp.gov/pdffiles1/ojjdp/179007.pdf (last visited January 20, 2022), adopted from H. Snyder & M. Sickmund, supra.

Particularly relevant to the present case were the racial disparities in the sentencing stage. Specifically, in 1998, the Office of Juvenile Justice and Delinquency Prevention reported that "[j]uvenile court judges [were] more likely to place [Black] youth in residential placement facilities, and less likely to place [Black] youth on probation in comparison to similarly situated white youth. Although 32 [percent] of cases adjudicated delinquent involved [Black youth], a larger proportion of those cases (36 [percent]) were ordered into residential placement facilities than received probation (31 [percent]). Overall, white youth were underrepresented among cases receiving residential placement and overrepresented among cases receiving probation. The disparity between white and Black children [was] present across all offense categories . . . ." (Footnotes omitted.) K. Nunn, supra, 51 DePaul L. Rev. 686.

Connecticut reported similar disparities within the state's juvenile justice system during the relevant time period. See E. Hartstone & D. Richetelli, An Assessment of Minority Overrepresentation in Connecticut's Juvenile Justice System (1995), available at https://www.ojp.gov/pdffiles1/Digitization/155321NCJRS.pdf (last visited January 20, 2022). In order to comply with the 1988 amendment to the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109, the state of Connecticut commissioned a study to evaluate overrepresentation of minority children in secure facilities. Id., p. 1. The study evaluated data from 1990 to 1992. See id., pp. 14, 20, 21. Although 1990 census data reflected that roughly 11 percent of Connecticut's population of ten to sixteen year olds were Black, Black youth accounted for approximately 28.6 percent of youths referred to the court of juvenile matters for instant offenses, including felonies, misdemeanors, violation or status charges, 46 percent of youths placed in detention for such offenses, and 46.6 percent of youths placed in Long Lane School for such offenses. See id., p. 21 (figure 2).

In Bridgeport specifically, where the defendant committed his offenses, although white juveniles accounted for 61 percent of the 10 to 16 year old

The second reason the superpredator myth constituted particularly harmful materially false information for sentencing purposes is because it turns upside down the constitutional mandate of *Roper* and its progeny. By labeling a juvenile as a superpredator, the very characteristics of youth that should serve as mitigating factors in sentencing—impulsivity, submission to peer pressure, deficient judgment—are treated instead as aggravating factors justifying harsher punishment. The superpredator theory and the correspondingly harsh punishment of juvenile offenders cannot be reconciled with the recognition in *Roper* v. *Simmons*, supra, 543 U.S. 551, that the medical and social science research demonstrates that "the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (Internal quotation marks omitted.) Id., 570; see, e.g., *Miller* v. *Alabama*, supra, 567 U.S. 477 (requiring that, in sentencing juveniles to life without possibil-

population, they comprised only 27 percent of those referred to court, 10 percent of those placed in detention, and less than 6 percent of those placed in Long Lane School. Id., p. 28. By contrast, Black juveniles accounted for less than 20 percent of the 10 to 16 year old population, yet comprised 40 percent of those referred to court, 52 percent of those placed in detention and 54 percent of those placed in Long Lane School. Id.

The Connecticut study revealed that, "[f]or all types of offenses, Black juveniles were several times more likely than [w]hite juveniles to be placed in detention." Id., 41. Furthermore, those Black juveniles charged with serious juvenile offenses remained in detention longer than white juveniles charged with similar offenses. See id., 65. This disparity was particularly notable in Bridgeport. Id.

Black juveniles charged with nonserious juvenile offenses were more likely than white juveniles charged with similar offenses to be handled judicially. Id. Black juveniles charged with serious juvenile offenses were more likely than white juveniles charged with similar offenses to be adjudicated for serious juvenile offenses. Id., 66. The report clarified that "[r]ace/ethnicity was found to indirectly impact this decision, as race/ethnicity significantly predicts detention decisions and detention predicts [a serious juvenile offense] adjudication." (Emphasis omitted.) Id. Similarly, "race/ethnicity was found to be an indirect predictor of court commitment to Long Lane School" because "race/ethnicity significantly predicts detention decisions and detention predicts commitment to Long Lane School." Id.

ity of parole, courts must consider in mitigation child's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"); *State* v. *Riley*, supra, 315 Conn. 659–60 (applying *Miller* to sentence of functional equivalent of life imprisonment without possibility of parole and holding that *Miller* applies to discretionary sentencing schemes, as well as mandatory ones).

In summary, by invoking the superpredator theory to sentence the young, Black male defendant in the present case, the sentencing court, perhaps even without realizing it, relied on materially false, racial stereotypes that perpetuate systemic inequities—demanding harsher sentences—that date back to the founding of our nation. In addition, contrary to *Roper* and its progeny, in relying on the superpredator myth, the sentencing court counted the characteristics of youth as an aggravating factor against the defendant. Although we do not mean to suggest that the sentencing judge intended to perpetuate a race based stereotype, we cannot overlook the fact that the superpredator myth is precisely the type of materially false information that courts should not rely on in making sentencing decisions. Whether used wittingly or unwittingly, reliance on such a baseless, illegitimate theory calls into question the legitimacy of the sentencing procedure and the sentence.

Having concluded that the superpredator doctrine was materially false information, we next must determine whether the sentencing court *substantially relied* on the materially false and unreliable superpredator theory in arriving at the defendant's sentence. In other words, we review the record to determine whether the sentencing court gave explicit attention to the superpredator theory, whether that court based its sentence at least in part on it, or whether that court gave specific consideration to the theory before imposing sentence.

See *State* v. *Parker*, supra, 295 Conn. 843 n.12. Because the test is framed in the disjunctive, any of the three conditions would suffice. We conclude that the sentencing court did all three.

We already have observed that the sentencing court's remarks were brief—the court's comments occupied less than one and one-half pages of the sentencing transcript. The court expressly referenced the defendant's supposed status as a "charter member" of the superpredator group, and the court's comments regarding the superpredator theory comprised a substantial portion of its brief remarks. Given that the court's brief remarks were heavily directed at and shaped by the superpredator theory, it is evident that the court gave explicit attention to the theory, gave specific consideration to it and also based its sentence, in part, on the fact that it considered the defendant a superpredator.

Furthermore, the sentencing court's discussion of the superpredator theory throughout its brief remarks demonstrates that the court's view of the defendant was shaped by this theory that there was a group of youths who were destined to live an irredeemable life of violence and that the defendant was a "member" of that group. The sentencing court described the superpredator group as "a group of radically impulsive, brutally remorseless youngsters who assault, rape, rob and burglarize." Echoing DiIulio's description of superpredators, the court stated to the defendant: "You have no fears, from your conduct, of the pains of imprisonment; nor do you suffer from the pangs of conscience." The court went further and called the defendant a "charter member" of that fictitious group. This was more than a mere gloss or broad statement. The court's reliance on the superpredator theory, and its view that it had to protect society from a charter member of this remorseless group, dominated its sentencing remarks. The superpredator theory, and the court's application of

that theory to the defendant, was central to the court's sentencing determination. It was the prism through which the court viewed this defendant. The sentencing court's explicit attention to the superpredator theory demonstrates that the court substantially relied on that baseless and now debunked theory when sentencing the defendant. See, e.g., *State* v. *Parker*, supra, 295 Conn. 843 n.12. Consequently, we conclude that reliance on the false and pernicious superpredator theory in the present case so infected the sentencing that the sentence was imposed in an illegal manner.

It is axiomatic "that [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence . . . ." (Internal quotation marks omitted.) Id., 839. We conclude that, because the superpredator theory constituted materially false, and, therefore, unreliable, evidence on which the sentencing court substantially relied, the trial court abused its discretion in denying the defendant's motion to correct an illegal sentence. The defendant's sentence was imposed in an illegal manner, in violation of his right to due process.

The trial court's decision is reversed and the case is remanded to that court with direction to grant the defendant's motion to correct an illegal sentence and for resentencing.

In this opinion the other justices concurred.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* EDGE FITNESS, LLC, ET AL.
(SC 20538)

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

Syllabus

Pursuant to the Public Accommodation Act (§ 46a-64 (a)), "[i]t shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public

accommodation . . . because of . . . sex . . . [or] to discriminate, segregate or separate on account of . . . sex . . . ."

Pursuant further to that act (§ 46a-64 (b) (1)), the provisions of § 46a-64 prohibiting sex discrimination "shall not apply to . . . separate bathrooms or locker rooms based on sex."

The plaintiff, the Commission on Human Rights and Opportunities, appealed to the trial court from the decision of the commission's human rights referee, who found that the defendants, E Co. and C Co., had not engaged in discriminatory public accommodations practices by providing separate women's only workout areas in their otherwise public fitness facilities. The complainants, two members of the defendants' respective gyms who both identified as male, filed complaints with the commission after they experienced delays in completing their workouts because they had to wait for other members to finish using the equipment in the coed portions of the facilities. The human rights referee concluded that the defendants did not violate § 46a-64 by maintaining women's only workout areas and dismissed their complaints. On appeal to the trial court, that court recognized that a women's only workout area is neither a bathroom nor a locker room but nonetheless concluded that the defendants' provision of such areas did not violate the sex discrimination provisions of the Public Accommodation Act because there was an implied customer gender privacy exception encompassed within § 46a-64 (b) (1). In so concluding, the court considered the privacy interests underlying the bathroom and locker room exceptions, as well as the burden that the elimination of women's only areas would place on women of certain religious practices. The trial court observed that, without an implied gender privacy exception, the provision of other types of separate facilities, such as showers, dressing rooms and hospital rooms, would constitute a violation of the act. Accordingly, the court rendered judgment dismissing the commission's administrative appeal, from which the commission appealed. *Held* that the trial court incorrectly concluded that § 46a-64 (b) (1) contains an implied gender privacy exception that exempted the defendants' provision of women's only workout areas from the act's general prohibition against sex discrimination, and, accordingly, this court reversed the trial court's judgment and remanded the case with direction to render judgment sustaining the commission's administrative appeal: it was undisputed that the defendants' gyms are places of public accommodation and that their provision of women's only workout areas constitutes a discriminatory practice under the act unless subject to a statutory exception, and, because women's only workout areas did not fit within the plain meaning of the terms "bathroom" or "locker room," as gleaned from their dictionary definitions, this court concluded that the exceptions set forth in § 46a-64 (b) (1) plainly and unambiguously did not encompass women's only workout areas; moreover, if the legislature had intended to include an additional exception to the act's general ban on sex based discrimination

in public accommodations, it could have done so, as it did in the statute (§ 46a-60 (b) (1)) providing for an exception to the general ban on sex discrimination when sex constitutes a bona fide occupational qualification for a position of employment, and interpreting § 46a-64 (b) (1) to include an implied gender privacy exception would be inconsistent with the maxim that remedial statutes, like the act, should be construed liberally but that exceptions to remedial statutes should be construed narrowly; furthermore, the legislative history indicated that the legislature had rejected a version of the act that exempted the provision of separate facilities for males and females "based on considerations of privacy and modesty" as being too broad and subjective, instead adopting the cabined exception limited to "separate bathrooms or locker rooms based on sex"; in addition, the fact that this court's construction of § 46a-64 may lead to results unintended by the legislature, as posited by the parties, the referee and the trial court with respect to lactation and dressing rooms, was not a reason to depart from the plain and unambiguous statutory text of the statute, and the sensitivity of the determination of where to limit antidiscrimination protections on the basis of sex rendered the issue uniquely well suited for consideration in the first instance by the legislature.

Argued May 5, 2021—officially released January 25, 2022*

Procedural History

Appeal from the decision of the plaintiff that the named defendant and the defendant Club Camel, Inc., Bloomfield, did not engage in discriminatory public accommodations practices, brought to the Superior Court in the judicial district of New Britain, where the case was tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Reversed*; *judgment directed.*

Michael E. Roberts, human rights attorney, for the appellant (plaintiff).

James F. Shea, with whom was *Allison P. Dearington*, for the appellee (named defendant).

Mario R. Borelli, for the appellee (defendant Club Camel, Inc., Bloomfield).

* January 25, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Kenneth J. Bartschi filed a brief for the GLBTQ Legal Advocates & Defenders et al. as amici curiae.

Kevin M. Barry filed a brief for the Quinnipiac University School of Law Legal Clinic as amicus curiae.

Erick M. Sandler filed a brief for the Jewish Federation of Greater Hartford et al. as amici curiae.

Dan Barrett filed a brief for the American Civil Liberties Union of Connecticut as amicus curiae.

Opinion

ROBINSON, C. J. This appeal presents a significant question of first impression with respect to whether the Public Accommodation Act, General Statutes § 46a-64,[1] contains an implied customer gender privacy exception to its general prohibition against sex based discrimination.[2] The plaintiff, the Commission on Human Rights

[1] General Statutes § 46a-64 provides in relevant part: "(a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran, of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons; (2) to discriminate, segregate or separate on account of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran . . . .

"(b) (1) The provisions of this section with respect to the prohibition of sex discrimination shall not apply to (A) the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or (B) separate bathrooms or locker rooms based on sex. . . ."

[2] For purposes of this opinion, we describe the claim at issue as "sex discrimination" because that is the nature of the claim as raised and described by the complainants. This description is consistent with this court's general practice of accepting the parties' characterization of the nature of the discrimination at issue. See, e.g., *Spiotti* v. *Wolcott*, 326 Conn. 190, 193, 163 A.3d 46 (2017) (considering complainant's allegations of sex

and Opportunities (commission), appeals[3] from the judgment of the trial court dismissing its administrative appeal from the decision of the commission's human rights referee (referee), who found that the defendants Edge Fitness, LLC (Edge Fitness) and Club Camel, Inc., Bloomfield, doing business as Club Fitness (Club Fitness),[4] did not engage in discriminatory public accommodations practices. On appeal, the commission claims that the trial court incorrectly concluded that women's only workout areas in otherwise public gyms did not violate § 46a-64 because that statute contains an implied customer gender privacy exception. We conclude that the exceptions to the general prohibition against discrimination on the basis of sex in public accommodations are limited to those expressly provided by the plain language of § 46a-64 and, therefore, that there is no implied customer gender privacy exception to the statute. Accordingly, we reverse the judgment of the trial court.

discrimination). We do, however, recognize that the terms "sex" and "gender" are not specifically defined by the statutory scheme and that the understanding of them has evolved over time. See, e.g., R. Oliveri, "Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After *Bostock* v. *Clayton County*," 69 U. Kan. L. Rev. 409, 423–25 (2021). Resolution of this appeal does not, however, require us to delve further into the definitions of the terms "sex" or "gender," as used in the statutory scheme.

[3] The commission appealed from the judgment of the trial court to the Appellate Court, and we subsequently transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[4] "Due to unusual procedures applicable to proceedings before the commission, in this administrative appeal, the commission is named as both a plaintiff (in its own capacity) and as a defendant (in its capacity as the agency under which the . . . referee issued the decision from which the commission appealed). See General Statutes § 46a-94a." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 157 n.1, 140 A.3d 190 (2016). Likewise, the complainants before the commission, Alex Chaplin and Daniel Brelsford, were named as defendants in the administrative appeal, but they did not participate therein. Accordingly, unless otherwise indicated, all references herein to the defendants are to Edge Fitness and Club Fitness, collectively.

The record reveals the following undisputed facts and procedural history. The complainants, Alex Chaplin and Daniel Brelsford, were members of the defendants' gyms, Club Fitness and Edge Fitness, respectively. Both individuals identify as males and used the larger coed portions of the facilities. While using equipment in the main workout areas, the complainants experienced slight delays in completing their workouts because they had to wait for other members to finish using that equipment. This led the complainants to believe that the defendants, by providing separate women's only fitness areas in their facilities, had discriminated against them on the basis of sex, and they filed complaints with the commission challenging the practice. The referee concluded that the defendants did not violate § 46a-64 by maintaining women's only workout areas and dismissed the complaints.

The commission filed an administrative appeal from the decision of the referee with the trial court pursuant to General Statutes § 4-183. In its memorandum of decision, the trial court first recognized that a women's only fitness area is neither a bathroom nor a locker room. The court then questioned whether "§ 46a-64 (b) (1) allow[s] for exceptions to the sex based antidiscrimination prohibitions in cases other than bathrooms or locker rooms [in which] the same gender privacy interests that allowed for the exceptions for bathrooms and locker rooms are in play." The trial court observed that, "unless the statute is read to include a gender privacy exception similar to the express exception for bathrooms and locker rooms, it would be a violation to provide separate showers, dressing rooms and hospital rooms for men and women in public accommodations." The trial court further considered the burden that the elimination of women's only workout areas would place on women of certain religious practices. The trial court, therefore, concluded that "the provision of women's

only exercise areas in fitness centers of public accommodation does not violate the sex based antidiscrimination provisions of . . . § 46a-64." Accordingly, the trial court rendered judgment dismissing the commission's administrative appeal. This appeal followed.[5] See footnote 3 of this opinion.

On appeal, the commission claims that the language of § 46a-64 (b) (1) is plain and unambiguous and does not contain a gender privacy exception to the general prohibition against sex discrimination. The commission asserts that a gender privacy exception is not a valid defense to an otherwise discriminatory sex based classification.[6] In response, the defendants argue that, because

[5] We note that, on March 2, 2021, we invited amici curiae to file briefs to address the following question: "In this administrative appeal, did the trial court and the [referee] properly determine that the provision of [women's] only workout areas by the defendant gyms did not violate . . . § 46a-64 (a) and its prohibition against sex discrimination in public accommodations?"

The following amici curiae accepted our invitation and filed briefs: (1) the Jewish Federation of Greater Hartford, the Muslim Coalition of Connecticut, and other religious organizations (collectively, interfaith amici); (2) the Quinnipiac University School of Law Legal Clinic; (3) the GLBTQ Legal Advocates & Defenders, Lambda Legal Education and Defense Fund, Inc., and the Connecticut Transadvocacy Coalition; and (4) the American Civil Liberties Union of Connecticut. We are grateful to the amici for their thoughtful advocacy in response to our invitation for briefs.

[6] We note that the commission also argues that Edge Fitness failed to plead the customer gender privacy exception before the referee and, therefore, waived the defense. We disagree. As the trial court observed in rejecting this claim, (1) "these matters were consolidated and tried as one matter," (2) "the formal requirements of pleading do not apply in administrative proceedings," (3) "these two issues were in fact specifically raised at the hearing, tried, and reflected in the [referee's] decision," (4) "issues such as the appropriateness of pleadings and evidentiary rulings in an administrative [proceeding] are reviewed on appeal . . . on an abuse of discretion basis," (5) "the issue presented in this matter is an important issue that has ramifications beyond the parties," and (6) "issues such as gender privacy and religious rights are legal principles that are naturally intertwined with a defense against the discrimination alleged." See generally *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 412 n.15, 158 A.3d 772 (2017) ("[t]he fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway" (internal quotation marks omitted)).

antidiscrimination statutes are to be construed broadly to effectuate their beneficent purpose, the remedial purpose of § 46a-64 is advanced by the defendants' provision of women's only workout areas. The defendants also contend that the commission's reading of the statute is so narrow that it would yield absurd results. We agree with the commission and conclude that the trial court's expansion of the exceptions in § 46a-64 (b) (1) to the general prohibition against sex discrimination was inconsistent with the plain language of the statute.

Whether the trial court correctly determined that there is an implied customer gender privacy exception encompassed within § 46a-64 (b) (1) is a question of statutory construction that presents a question of law, over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). It is well settled that we follow the plain meaning rule in General Statutes § 1-2z in construing statutes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see, e.g., id., 45–46 (setting forth plain meaning rule).

In interpreting statutes, words and phrases not otherwise defined by the statutory scheme are construed according to their "commonly approved usage . . . ." General Statutes § 1-1 (a); see, e.g., *State* v. *Panek*, 328 Conn. 219, 227–28, 177 A.3d 1113 (2018). In determining the commonly approved usage of the statutory language at issue, we consult dictionary definitions. See, e.g., id., 229. It is well established that a statute is considered plain and unambiguous when "the meaning . . . is so strongly indicated or suggested by the [statutory] lan-

We therefore agree with the trial court's conclusion that Edge Fitness did not waive the special defense, which was raised and argued during the administrative proceeding, because the commission was on notice of it.

guage . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning. . . . [I]f the text of the statute at issue . . . would permit more than one likely or plausible meaning, its meaning cannot be said to be plain and unambiguous." (Emphasis in original; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 698 n.6, 258 A.3d 1268 (2021).

As required by § 1-2z, we first determine whether the statutory language is ambiguous. Section 46a-64 (a) provides in relevant part that it "shall be a discriminatory practice in violation of this section: (1) [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of . . . sex . . . [or] (2) to discriminate, segregate or separate on account of . . . sex . . . ." Section 46a-64 (b) (1) then sets forth the exceptions to the statute's general prohibition against discrimination based on sex, which it limits to "the rental of sleeping accommodations provided by associates and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or . . . separate bathrooms or locker rooms based on sex." See footnote 1 of this opinion.

It is undisputed that the defendants' gyms are "place[s] of public accommodation" within the meaning of § 46a-64 (a) (1). It is also undisputed that the defendants' provision of women's only workout areas constitutes a "discriminatory practice"[7] in violation of that

[7] We note that, for purposes of the Public Accommodation Act, the legislature defines the term "discrimination" as "includ[ing] segregation and separation . . . ." General Statutes § 46a-51 (6); see also General Statutes § 46a-51 (8) (defining "discriminatory practice" as, inter alia, "a violation of" § 46a-64). The statutory scheme does not, however, define the terms "segregate," "segregation," "separate," or "separation." Looking to the dictionary for the common usage of those terms; see, e.g., *State* v. *Panek*, supra, 328 Conn. 229; we observe that Merriam Webster's Collegiate Dictionary defines the term "segregate" as "to separate or set apart from others or from the general

subsection unless it is subject to a statutory exception, which is the focus of our analysis in this appeal.

The legislature enacted the bathroom and locker room exceptions set forth in § 46a-64 (b) (1) as No. 94-238, § 4, of the 1994 Public Acts (P.A. 94-238). In determining the commonly approved usage of the terms "bathroom" and "locker room," we look to their dictionary definitions. See, e.g., *State* v. *Panek*, supra, 328 Conn. 229. Contemporary to the passage of the 1994 amendment to § 46a-64, "bathroom" was defined as "a room equipped for taking a bath or shower . . . toilet . . . ." Random House Unabridged Dictionary (2d Ed. 1993) p. 177. "Locker room" was defined as "a room containing lockers, as in a gymnasium, factory, or school, for changing clothes and for the storage and safekeeping of personal belongings." Id., p. 1128. The parties do not proffer alternative meanings for these terms or suggest that the women's only workout areas

mass: isolate . . . ." Merriam Webster's Collegiate Dictionary (10th Ed. 1993) p. 1058. Similarly, the term "segregation" refers to the "act or process of separation"; Black's Law Dictionary (6th Ed. 1990) p. 1358; or to "the separation or isolation of a race, class, or ethnic group by . . . divided educational facilities, or other discriminatory means . . . ." Webster's Third New International Dictionary (1961) p. 2057; accord Merriam Webster's Collegiate Dictionary, supra, p. 1058; see also *Sheff* v. *O'Neill*, 238 Conn. 1, 28 and n.31, 678 A.2d 1267 (1996) (similarly defining term "segregation," as used in article first, § 20, of state constitution). The term "separate" is defined as "set or kept apart," "not shared with another: INDIVIDUAL, SINGLE," "AUTONOMOUS, INDEPENDENT," and "DISTINCT, DIFFERENT . . . ." Webster's Third New International Dictionary, supra, p. 2069; see also Merriam Webster's Collegiate Dictionary, supra, p. 1067 (defining "separate" as "set or kept apart" and "existing by itself"). These definitions plainly and unambiguously prohibit, without qualification, any isolation, separation or keeping apart "on account of sex," within a "public accommodation," and do not by themselves account for isolation, separation or keeping apart to protect or advantage a class of people that might be deemed to need or deserve protection or advantage, as the defendants argue with respect to the salutatory effects of women's only fitness facilities. Cf. General Statutes § 46a-64 (b) (2) (prohibition on age discrimination "shall not apply to minors or to special discount or other public or private programs to assist persons sixty years of age and older").

fit within the plain meaning of those definitions as a factual matter.[8] Accordingly, we conclude that the exceptions set forth in § 46a-64 (b) (1) plainly and unambiguously do not encompass the women's only workout areas for purposes of the § 1-2z analysis.

Because the women's only workout spaces do not fall under an express exception, the defendants ask us to interpret § 46a-64 (b) (1) to include a third, implicit exception to the prohibition against sex based discrimination, namely, a broad gender privacy exception. The defendants argue that such an exception is implied by the bodily privacy interests that the enumerated exceptions protect and that the inclusion of a third exception would be consistent with other portions of the statutory scheme. The defendants further rely on General Statutes § 46a-60 (b) (1),[9] which provides for an exception to the general ban on sex discrimination in employment when sex constitutes a bona fide occupational qualification (BFOQ) for a position. The defendants ask us to read the statutes in relation to one another and to conclude that the inclusion of the BFOQ defense in the context of employment discrimination evidences a legislative intent to include an implied gender privacy

[8] We note that it is undisputed that the women's only workout areas at issue in this appeal do not fall within the plain meaning of the statutory terms "bathroom" or "locker room." More specifically, the record indicates that the women's only workout areas in each facility are separated from the larger portions of the gyms by doors with blinds and branding, as well as by walls without windows. The women's only areas are small relative to the rest of the facilities and, therefore, contain a lesser amount of the same equipment. There is no indication in the record that either of the women's only workout areas at issue contain showers, toilets, lockers, or any other feature associated with a bathroom or locker room.

[9] General Statutes § 46a-60 (b) (1) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . sex . . . ."

exception to the ban on discrimination in public accommodations. We disagree with this reading of § 46a-64 (b) (1).

It is well established "that the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law . . . ." (Internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 709, 998 A.2d 1 (2010). Declining to read a BFOQ like exception into § 46a-64 (b) (1) does not render it inconsistent with § 46a-60 (b) (1). Had the legislature intended to include a third exception to the general ban on sex based discrimination in public accommodations, it could have done so. Indeed, the legislature's inclusion of a BFOQ exception in § 46a-60 (b) (1) demonstrates that the legislature could have provided such an exception in the public accommodation statute but consciously elected not to do so. See, e.g., *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016) (common principle of statutory construction is that, when legislature expresses list of items, exclusion of particular item is deliberate); *Stafford* v. *Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014) ("[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted; internal quotation marks omitted)). As this court stated more than thirty years ago, "[a] review of our labor legislation discloses that our General Statutes treat employment discrimination separately from public accommodation discrimination. We deem it especially significant that only the former statute contains an express exception for a 'bona fide occupational qualification or need' . . . [in concluding that] [o]ur public accommodation statute . . . gives no indication that it was intended to encompass the proffer of services within its definition of discriminatory accommodation practices. The absence of a statutory

exception for a 'bona fide occupational qualification or need' in the text of [the public accommodation statute] is more consistent with a legislative intent to leave such practices to be regulated by statutes that address employment discrimination rather than by statutes directed to discrimination in public accommodations." (Citations omitted.) *Quinnipiac Council, Boy Scouts of America, Inc.* v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 302, 528 A.2d 352 (1987); see id., 302–303 (denying woman opportunity to serve as scoutmaster of Boy Scout troop did not deprive her of "accommodation" on basis of sex).

Declining to import a gender privacy exception into § 46a-64 is consistent with the maxim that "remedial statutes should be construed liberally in favor of those whom the law is intended to protect," but exceptions to those statutes "should be construed narrowly." (Internal quotation marks omitted.) *Fairchild Heights, Inc.* v. *Dickal*, 305 Conn. 488, 502, 45 A.3d 627 (2012); see *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731 (2002) ("recogniz[ing] the balance that the legislature has struck between the state's dual interest" in broadly prohibiting sex discrimination and narrowly exempting small employers); *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 473–74, 673 A.2d 484 (1996) ("provisos and exceptions to statutes are to be strictly construed with doubts resolved in favor of the general rule rather than the exception and . . . those who claim the benefit of an exception under a statute have the burden of proving that they come within the limited class for whose benefit it was established" (internal quotation marks omitted)). Particular caution is warranted in the construction of exceptions to antidiscrimination laws because a broad construction poses the risk of swallowing the rule. See, e.g., *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250

Conn. 763, 788–89, 739 A.2d 238 (1999) (concluding that " 'insufficient income' " exception to Fair Housing Act under General Statutes § 46a-64c (b) (5) does not categorically exclude tenants receiving section 8 assistance but, instead, receives "[a] narrow construction . . . [that] affords a landlord an opportunity to determine whether, presumably for reasons extrinsic to the section 8 housing assistance calculations, a potential tenant lacks sufficient income to give the landlord reasonable assurance that the tenant's portion of the stipulated rental will be paid promptly and that the tenant will undertake to meet the other obligations implied in the tenancy").

In this vein, we address the argument of the defendants and interfaith amici; see footnote 5 of this opinion; that a conclusion that the statutory text plainly and unambiguously lacks a gender privacy exception will lead to absurd or bizarre results by eliminating other women's only spaces and impeding the religious freedom of women seeking to use those facilities.[10] They rely on the prediction of the referee and the trial court that, if the statute's exceptions were construed strictly, the provision of separate showers, dressing rooms, lac-

[10] We note that no constitutional claim has been raised in this appeal. Thus, we do not consider the implications that § 46a-64 may have in relation to constitutional provisions and statutory safeguards such as the Connecticut Act Concerning Religious Freedom. See General Statutes § 52-571b. We leave these questions, including any gloss necessary to save § 46a-64 (a) from constitutional jeopardy, for another day, in a case that squarely presents them. See *Bostock* v. *Clayton County*, U.S. , 140 S. Ct. 1731, 1753–54, 207 L. Ed. 2d 218 (2020) (declining to address "[the employers'] fear that complying with Title VII's requirement [as to not discriminating against homosexual or transgender persons] may require some employers to violate their religious convictions" because "how [the] doctrines protecting religious liberty [namely, the first amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq.] interact with Title VII [is a question] for future cases" given lack of religious liberty claim); see also *Fay* v. *Merrill*, 338 Conn. 1, 21 n.18, 256 A.3d 622 (2021) (noting "the general rule that [c]onstitutional issues are not considered unless absolutely necessary to the decision of a case" (internal quotation marks omitted)).

tation rooms, domestic violence shelters, and hospital rooms would constitute a violation of the statute. We disagree. First, although such facilities are not at issue in this appeal, it is not at all clear that they would not fall within the existing statutory exceptions for bathrooms, locker rooms, and sleeping accommodations, as interpreted using our rules of statutory construction. See General Statutes § 46a-64 (b) (1) and (2). Second, even if we were to assume, without deciding, that restricting the facilities identified by the referee and the trial court to women constitutes impermissible discrimination and that such a result is indeed absurd,[11] thus permitting resort to the legislative history of § 46a-64 (b) (1), that legislative history does not support the defendants' argument. See, e.g., *State* v. *Bischoff*, 337 Conn. 739, 746, 258 A.3d 14 (2021) ("[o]nly if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment" (internal quotation marks omitted)). Instead, it indicates that the legislature has rejected the concept of abstract notions of gender privacy in favor of a more narrowly cabined exception when warranted.

As we noted previously, the bathroom and locker room exception in § 46a-64 (b) (1) was enacted in 1994 as § 4 of P.A. 94-238, which was first introduced as Substitute House Bill No. 5606. In his written testimony before the Judiciary Committee in support of Substitute

[11] We may consider hypothetical scenarios beyond the facts of the case before us in determining whether a construction of the plain language of a statute will lead to an absurd result. See, e.g., *State* v. *Brown*, 310 Conn. 693, 708–709, 80 A.3d 878 (2013) (determining that interpretation of special parole statute created absurd results on basis of hypothetical factual scenarios); *State* v. *Gelormino*, 291 Conn. 373, 383–84, 968 A.2d 379 (2009) (considering but rejecting defendant's argument that plain and unambiguous language of mandatory minimum sentencing statute yielded absurd result when considered in context of hypothetical fact patterns).

House Bill No. 5606,[12] then Attorney General Richard Blumenthal described the bill as intended to "clarif[y] that the prohibition against discrimination based on sex does not mean that places of public accommodations such as gyms, bars, and restaurants cannot provide separate bathroom and locker room facilities. *Although this is common sense, it is not clear that such an exception exists in the current statute.*" (Emphasis added.) Written testimony from Richard Blumenthal, Attorney General, submitted to the Joint Committee on Judiciary, Connecticut General Assembly (March 11, 1994);[13] see 37 H.R. Proc., Pt. 20, 1994 Sess., p. 7240, remarks of Representative Richard D. Tulisano ("this section . . . makes it clear that it's not illegal under the public accommodations act to have separate bathrooms in locker rooms for men and women"). The originally raised House Bill No. 5606 was expressly intended to allow "the provision of separate facilities for males and females where privacy concerns exist"; it would have exempted from the act "the provision of bathroom and locker room facilities *based on considerations of privacy and modesty.*" (Emphasis added.) Raised Bill No. 5606, 1994 Sess., § 1. During testimony on House Bill No. 5606 before the Judiciary Committee, Commission Counsel Philip A. Murphy, Jr., representing the commission, criticized the drafting of this proposed exception

[12] "[I]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or purposes for which the legislature used the language in question." (Internal quotation marks omitted.) *In re Elianah T.-T.*, 326 Conn. 614, 625–26 n.10, 165 A.3d 1236 (2017); see, e.g., *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 314–15, 819 A.2d 260 (2003).

[13] We note that the written testimony of then Attorney General Blumenthal is not contained in the printed record of the Joint Standing Committee Hearings but is included in the legislative bill file available in the Connecticut State Library.

for its potential to "be interpreted too broadly and . . . [to] cause needless litigation." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1994 Sess., p. 513. In his written testimony, Murphy urged that the "section [of the raised bill] be deleted or substantially rewritten," arguing that "the exception is so broad that it will result in the exception swallowing the discriminatory practice. Thus a public accommodation that wishes to serve only men can decline to provide women's restrooms or locker rooms and claim that it does not have to serve women because of 'privacy and modesty' concerns." Id., p. 591. Subsequently, the substitute bill, which was ultimately enacted as Public Act No. 94-238, addressed this criticism by eliminating the potentially problematic "considerations of privacy and modesty" language in favor of the more simple exception for "separate bathrooms or locker rooms based on sex." Substitute House Bill No. 5606, 1994 Sess., § 1. Our legislature elected, therefore, to address an application of the sex discrimination prohibition that might be inconsistent with "common sense," by using simpler terms, rather than qualifying the prohibition with reference to the subjective morass of "modesty" and "privacy" urged by the defendants and the amici. See *In re Valerie D.*, 223 Conn. 492, 518 n.19, 523, 613 A.2d 748 (1992) (noting that court ordinarily does not consider legislature's failure to act but considering "limited circumstances" of legislature's rejection of one bill and immediate adoption of competing bill "in its stead" as evidence of legislative intent); see also *Rainbow Housing Corp.* v. *Cromwell*, 340 Conn. 501, 519 n.10, A.3d. (2021).

Consistent with the concerns of the commission in advocating for the enactment of a bathroom and locker room exception that did not include vague language allowing for the "consideration of privacy and modesty," we observe that a reading of § 46b-64 (b) (1) to imply a gender privacy exception, although presumably

to benefit women, could also negatively affect the rights of women in a different way. As discussed in the amicus briefs filed by the Quinnipiac University School of Law Legal Clinic, the American Civil Liberties Union of Connecticut, and the GLBTQ Legal Advocates & Defenders, Lambda Legal Education and Defense Fund, Inc., and the Connecticut Transadvocacy Coalition, such an exception could be invoked to exclude women based on the privacy interests of *men* and could justify discrimination against transgender individuals because some customers, "due to modesty, find it uncomfortable" to be around such people. *Livingwell (North), Inc.* v. *Pennsylvania Human Relations Commission*, 147 Pa. Commw. 116, 121, 606 A.2d 1287, appeal denied, 533 Pa. 611, 618 A.2d 401 (1992); see id., 121–22 ("The privacy interest expressed involves situations [in which] the customers, due to modesty, find it uncomfortable to have the opposite sex present because of the physical condition in which they find themselves or the physical activity in which they are engaged as customers at the business entity. These customers would be embarrassed or humiliated if cared for or observed by members of the opposite sex."). Such a result of potentially limiting the access of women and transgender people access to spaces on the basis of the privacy interests of men or the "moral comfort" of customers defeats the purpose of our state's antidiscrimination legislation. See, e.g., *Corcoran* v. *German Social Society Frohsinn, Inc.*, 99 Conn. App. 839, 843–44, 916 A.2d 70 (noting legislative intent to broaden rather than limit scope of § 46a-64), cert. denied, 282 Conn. 910, 922 A.2d 1098 (2007).

Nevertheless, we acknowledge that our analysis of the plain and unambiguous statutory text of § 46a-64 may lead to a result that might well have been unintended by the legislature, including with respect to its application in hypothetical scenarios involving lactation

rooms or dressing rooms, as posited by the defendants, the referee, and the trial court. See footnotes 10 and 11 of this opinion and accompanying text. As the United States Supreme Court recently noted in construing the language "because of sex" in Title VII of the Civil Rights Act of 1964 to apply to employment discrimination against homosexual or transgender persons, this effect is not a reason to depart from the plain and unambiguous statutory text of § 46a-64. See *Bostock* v. *Clayton County*, U.S. , 140 S. Ct. 1731, 1737, 207 L. Ed. 2d 218 (2020) ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the [Civil Rights] Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands."); see also id., 1749 ("the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command" (internal quotation marks omitted)). The purpose of the Public Accommodation Act is to provide all sexes "full and equal accommodations in any place of public accommodation . . . ." General Statutes § 46a-64 (a) (1). This purpose is not frustrated by a broad reading of the statutory language of § 46a-64 (a) or a narrow construction of the exceptions provided under subsection (b) of the statute.

Thus, the sensitivity of the determination of where to limit antidiscrimination protections, along with evolving contemporary understandings of the terms "gender" and "sex"; see footnote 2 of this opinion; renders this issue uniquely well suited for consideration in the first instance by the legislature, which is the policy-making branch of our government. See, e.g., *Thi-*

bodeau v. *Design Group One Architects, LLC*, supra, 260 Conn. 715 (recognizing policy-making role of legislature in context of sex discrimination); see also *Fay* v. *Merrill*, 338 Conn. 1, 51–52, 256 A.3d 622 (2021) ("[g]iven the reasonable policy concerns that support the parties' respective state constitutional arguments, in interpreting our state's constitution, we must defer to the legislature's primary responsibility in pronouncing the public policy of our state" (internal quotation marks omitted)); *State* v. *Lockhart*, 298 Conn. 537, 574, 4 A.3d 1176 (2010) (The court declined to adopt a state constitutional rule requiring the recording of custodial interrogations because, although the rule would likely be beneficial, "[d]etermining [its] parameters . . . requires weighing competing public policies and evaluating a wide variety of possible rules. . . . In [the court's] view, such determinations are often made by a legislative body because it is in a better position to evaluate the competing policy interests at play . . . ." (Citation omitted.)).

We therefore conclude that the defendants' gyms are places of public accommodation that have denied the complainants full and equal accommodations on the basis of their sex. We further conclude that that denial does not fall within an exception expressly provided for in § 46a-64 (b) (1), rendering the practice of maintaining women's only workout areas within an otherwise public gym a violation of the Public Accommodation Act.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the commission's administrative appeal.

In this opinion the other justices concurred.

O. A. *v.* J. A.*
(SC 20590)

D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

The plaintiff sought to dissolve her marriage to the defendant. Thereafter, the defendant filed a cross complaint in which he sought enforcement of a postnuptial agreement that the parties had executed, which set forth terms for the distribution of property and for determining support awards in the event of the dissolution of the parties' marriage. The plaintiff subsequently filed motions for pendente lite alimony, attorney's fees, and expert fees. The trial court, relying on this court's decision in *Fitzgerald* v. *Fitzgerald* (169 Conn. 147), concluded that it was not required to determine, prior to deciding the plaintiff's motions, whether the parties' postnuptial agreement was enforceable and deferred its decision on that issue until the end of trial. The court, after considering each party's financial resources and the fact that the plaintiff was completely reliant on the defendant for financial support during the marriage, ordered the defendant to pay the plaintiff pendente lite alimony, attorney's fees, and expert fees. The defendant appealed from the trial court's orders, claiming that the trial court incorrectly had determined that it did not need to consider the enforceability of the parties' postnuptial agreement prior to awarding the plaintiff pendente lite alimony and litigation expenses. *Held* that the trial court properly relied on *Fitzgerald* and acted within its discretion in deferring its decision on the enforceability of the parties' postnuptial agreement until the end of trial, and, accordingly, this court affirmed the trial court's orders: the trial court's broad equitable powers and discretion in deciding matters arising in a dissolution action include the discretion to defer a decision on the enforceability of a marital agreement until the parties have had a full and fair opportunity to litigate all issues in the case at a trial on the merits; moreover, contrary to the defendant's contention that *Fitzgerald* was distinguishable from the present case because it involved a separation agreement rather that a postnuptial agreement, the underlying principle in *Fitzgerald*, that the validity of a marital agreement may be assessed when the case is tried on its merits, applies equally to all marital agreements, including prenuptial, postnuptial and separation agreements, and there was no merit to the defendant's assertion that this court had indicated in *Bedrick* v. *Bedrick* (300 Conn. 691) that

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

reliance on *Fitzgerald* in the context of postnuptial agreements is misplaced; furthermore, although this court was not unsympathetic to the defendant's argument that the holding in this case could work an injustice because the plaintiff would not have the means to make the defendant whole if the trial court ultimately determined, after a trial, that the parties' postnuptial agreement is enforceable and that it precludes an award of pendente lite alimony and litigation expenses, the defendant was not without a remedy in such circumstances, as the trial court could ultimately adjust any final financial orders to compensate the defendant for pendente lite payments that previously had been made in contravention of the agreement.

Argued September 17, 2021—officially released January 27, 2022**

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a cross complaint; thereafter, the court, *McLaughlin*, *J.*, issued certain orders awarding the plaintiff pendente lite alimony, attorney's fees, and expert fees, from which the defendant appealed. *Affirmed*.

James P. Sexton, with whom were *Thomas D. Colin*, *Julia K. Conlin* and, on the brief, *Emily Graner Sexton*, for the appellant (defendant).

Kenneth J. Bartschi, with whom was *Karen L. Dowd*, for the appellee (plaintiff).

Opinion

KELLER, J. In this interlocutory appeal,[1] we must decide whether a spouse seeking pendente lite alimony, attorney's fees, and expert fees during the pendency of a dissolution action must demonstrate that a postnuptial agreement that purportedly precludes such payments is invalid or otherwise unenforceable before the trial

** January 27, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

court properly may order the other spouse to make any such payments.

Shortly after their marriage in 2013, the plaintiff, O. A., and the defendant, J. A., executed a postnuptial agreement setting forth terms for the distribution of property and determining support awards in the event of the dissolution of their marriage. In 2019, the plaintiff brought this action, seeking, inter alia, dissolution of the marriage and temporary and permanent alimony. The defendant filed a cross complaint in which he sought, inter alia, enforcement of the parties' postnuptial agreement. Thereafter, the plaintiff filed motions for pendente lite attorney's fees, alimony, and expert fees. After an evidentiary hearing, the trial court granted in part the plaintiff's motions and ordered the defendant to pay the plaintiff (1) temporary alimony in the amount of $20,000 per month, (2) $114,019.99 in current attorney's fees and a retainer for legal counsel in the amount of $250,000, and (3) a contribution toward specified future expert fees in the amount of $25,000. On appeal, the defendant claims that the trial court incorrectly determined that it need not determine the enforceability of the parties' postnuptial agreement before awarding the plaintiff pendente lite alimony, attorney's fees, and expert fees (hereinafter alimony and litigation expenses), which the defendant contends the plaintiff is not entitled to under the agreement. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which were either found by the trial court or are otherwise undisputed, are relevant to our resolution of this appeal. The plaintiff and the defendant married in Greenwich on September 29, 2013. At the time of marriage, the plaintiff was approximately twenty-eight years old, had no children, and had an approximate net worth of $275,400, and the defendant was forty-five years old, had one daughter from a previ-

ous marriage, and had an approximate net worth of $32 million.

Nearly four months after their marriage, on January 17, 2014, the parties entered into a postnuptial agreement in hopes that it would "settle questions with respect to certain marital rights and property to prevent strife and to enhance the prospects for marital harmony . . . ." Both parties were represented by separate and independent counsel and made financial disclosures to the other prior to executing the agreement. Pursuant to the agreement, the parties waived any legal right that they might otherwise have to the property of the other in the event of a "[t]ermination [e]vent," which is defined to include the filing of a dissolution action. The agreement further provides that, should a termination event occur, the parties will have restored to them the value of the individual property[2] that each party brought into the marriage plus the monetary value of any bequest, trust interest, inheritance, gift, insurance benefits, or the like that either party received during the marriage. The defendant also agreed to assume full financial responsibility for any child born to the marriage or adopted by the parties prior to the termination event.

With respect to marital property,[3] the agreement provides that it "shall be distributed to the parties in the same proportion to the value of their respective [i]ndi-

[2] Under the postnuptial agreement, individual property is defined as the "monetary value of property, which a party held on the [d]ate of [m]arriage, plus the monetary value on the date of transfer to a party of any bequest, trust interest, inheritance, gift, insurance benefits or the like received by a party after the [d]ate of [m]arriage and prior to a [t]ermination [e]vent . . . ."

[3] Marital property is defined in the postnuptial agreement as "the increase in value of the [i]ndividual [p]roperty of the parties held on the [d]ate of [m]arriage until a [t]ermination [e]vent . . . plus . . . the increase in the monetary value from the date of transfer to a party of any bequest, trust interest, inheritance, gift, insurance benefits or the like received by a party after the [d]ate of [m]arriage until a [t]ermination [e]vent."

vidual [p]roperty (each party's asset value on the [d]ate of [m]arriage plus the monetary value at the date of transfer of any subsequent gifts or inheritance received by either party during marriage and prior to a [t]ermination [e]vent)." With respect to spousal support, the agreement provides that the defendant waives any claim to receive alimony from the plaintiff but agrees to pay the plaintiff alimony, the amount of which is to be determined pursuant to a complex formula that takes into account various factors, including, but not limited to (1) the length of the parties' marriage, (2) whether they conceived children who were born alive, and (3) the amount of individual property returned to the defendant.

Of particular relevance here, the agreement provides that, if a termination event occurs between the fifth and eighth anniversaries of the date of the parties' marriage, a child was conceived prior to the termination event and later born alive, the plaintiff receives "an aggregate of [m]arital [p]roperty and alimony equaling less than $500,000," and "the value of [the defendant's] [i]ndividual [p]roperty restored to him by the court upon the termination of the marriage is in excess of $10,000,000, then . . . [the defendant] will be obligated to pay a minimum of $100,000 of alimony annually to [the plaintiff] until she receives gifts or inheritances having an aggregate value greater than $10,000,000, taking the value of each such gift or inheritance on the date of transfer, whether prior to or after the [t]ermination [e]vent."

The agreement does not expressly address the issue of pendente lite alimony. It defines the term "alimony" as "the dollar amount of the alimony award made by the court *upon the formal termination of the marriage*"; (emphasis added); a definition that would not clearly and unambiguously include an award of pendente lite alimony, which is made during the pendency of the

dissolution action, *prior* to the formal termination of the marriage. See, e.g., *Connolly* v. *Connolly*, 191 Conn. 468, 480, 464 A.2d 837 (1983) ("[p]endente lite orders necessarily cease to exist once a final judgment in the dispute has been rendered because their purpose is extinguished at that time"). The agreement also does not discuss attorney's fees or expert fees, except to state that, if a party unsuccessfully challenges the agreement or breaches it, then he or she will be responsible for the other party's attorney's fees.

After the execution of the postnuptial agreement, the parties began what the trial court described as a "fairly affluent" and "bicoastal" lifestyle, with family homes in Greenwich and Malibu, California. They later had two children—a girl, born in 2015, and a boy, born in 2017. During the marriage, the defendant was the sole financial provider for the family, and the plaintiff relied on him entirely for financial support. The defendant, who is self-employed, is involved in a number ofbusiness ventures. Specifically, "[h]e manages his own money through an investment [management firm] . . . . He [also] works with the plaintiff's brother on three real estate projects in Los Angeles, [California] . . . [and] founded a not-for-profit solar company . . . . Finally, the defendant serves on two boards of directors for life science companies . . . ." Despite the defendant's numerous business ventures, however, he testified that the parties had, and continue to have, significant " 'cash flow' " issues due to the illiquidity of the defendant's assets.

These " 'cash flow' " problems, as well as the plaintiff's mental health challenges, are two of the factors that precipitated the decline of the parties' marriage. Additionally, on a family trip to Colorado in December, 2018, the plaintiff and the defendant's then teenage daughter were involved in a physical altercation. Subsequently, in April, 2019, the plaintiff and the defendant

were involved in a physical altercation, after which the police were called and the plaintiff was arrested.[4]

In July, 2019, the plaintiff admitted herself into Silver Hill Hospital in New Canaan. The plaintiff testified that "she went to Silver Hill Hospital because she realized [that] she needed help after having gone through several difficult situations, including, in November, 2018, losing an election for public office in Malibu [California], shortly thereafter, having her home destroyed [by fire], then, the December, 2018 altercation with her stepdaughter, and, finally, in 2019 . . . a miscarriage." The plaintiff spent thirty days at Silver Hill Hospital and received treatment for a mild cannabis disorder and for managing her emotions.

The plaintiff was discharged from Silver Hill Hospital on August 21, 2019, and commenced this dissolution action two days later. On August 21, the defendant sought and was granted an ex parte restraining order against the plaintiff, barring her from the marital home and from contacting the defendant, his daughter, and the parties' children. On September 20, 2019, the defendant filed an answer and a cross complaint, seeking, inter alia, enforcement of the parties' postnuptial agreement. The plaintiff thereafter filed separate motions for pendente lite attorney's fees, temporary alimony, and expert fees.[5] In her reply to the defendant's cross complaint, the plaintiff sought avoidance of the parties' postnuptial agreement on a number of grounds, including that the agreement was signed by her under duress, that

[4] There are separate criminal charges pending against the plaintiff that relate to the April, 2019 altercation with the defendant.

[5] Specifically, the plaintiff's motions for pendente lite support requested that the court order the defendant to pay her (1) $25,000 per month in temporary alimony, retroactive to October 31, 2019; (2) $83,242 in past due attorney's fees, $250,000 in prospective attorney's fees, and $100,000 per month, beginning on May 1, 2020, in presumed ongoing attorney's fees; and (3) $25,000 for the retention and utilization of experts.

the defendant did not provide full, fair and reasonable financial disclosure prior to its execution, and that it would be unconscionable to enforce it in light of present circumstances. In response, the defendant filed a motion to bifurcate the trial, arguing that the trial court should first determine the enforceability of the parties' postnuptial agreement before awarding the plaintiff pendente lite alimony and litigation expenses to which she may not be entitled.

The trial court conducted an evidentiary hearing on the parties' motions, after which it issued orders regarding, inter alia, the postnuptial agreement and the pendente lite alimony and litigation expenses. Relying on this court's decision in *Fitzgerald* v. *Fitzgerald*, 169 Conn. 147, 362 A.2d 889 (1975), the trial court concluded, contrary to the defendant's assertion, that it was not required to determine, prior to deciding the motions, whether the postnuptial agreement was enforceable and, if so, whether it precluded an award of pendente lite alimony and litigation expenses. The court further explained that "[t]o preclude pendente lite support in a matter like this, where one party has no income and, during the course of the marriage, was completely reliant on the other for financial support, would work a great injustice by allowing one side to have access to unlimited resources while the other party [is] left to rely on the financial resources and kindness of family and friends. This is contrary to the basic purpose of temporary support [which is] to provide financial support to a spouse in need of [such support] until the entry of a final dissolution [judgment]." The court then found, on the basis of "all the credible evidence," that the defendant has an imputed net income or earnings in the amount of $900,000 annually or $75,000 per month. The court therefore determined that the defendant was "able to provide the plaintiff with the financial support she needs" and awarded the plaintiff temporary

alimony in the amount of $20,000 per month, retroactive to October 31, 2019, the date on which she filed her motion for pendente lite alimony.[6]

With respect to the pendente lite attorney's fees and expert fees, the court similarly concluded that, due to the financial disparity between the parties, an award of such fees was proper notwithstanding the defendant's assertion that the requested amount was unreasonable in light of the parties' postnuptial agreement, which, in the defendant's view, would preclude such an award if the agreement were found to be enforceable. In reaching its determination, the court observed: "The nature of the defendant's occupation and assets is complicated. At this juncture, it seems likely that valuing his assets will require considerable discovery and expert assistance. Further, this case has the added issues involving the [temporary restraining order]. Based on the pertinent evidence, statutory criteria, and the parties' financial affidavits, the court orders the defendant to pay the plaintiff $114,019.99, the current amount owed to her attorneys, and a $250,000 retainer as contributions toward her attorney's fees." The court further ordered the defendant to pay the plaintiff expert fees in the amount of $25,000.

On appeal, the defendant claims that the trial court incorrectly determined that it need not consider the enforceability of the parties' postnuptial agreement prior to awarding the plaintiff pendente lite alimony and litigation expenses. Specifically, the defendant argues that this court "should . . . hold that a nuptial agreement is presumed to be valid and enforceable until the party challenging it successfully demonstrates

[6] Initially, the defendant's appeal raised a second claim, specifically, that the trial court abused its discretion in awarding pendente lite alimony and litigation expenses because its attribution of a net income to the defendant of $75,000 per month was in error. The defendant subsequently withdrew this claim, and, therefore, it is not before us on appeal.

otherwise" and that no pendente lite alimony or litigation expenses may be awarded until such a demonstration is made. The plaintiff responds that the trial court's decision to award pendente lite alimony and litigation expenses pending final disposition of the dissolution action comports with this court's decision in *Fitzgerald* and this state's public policy.[7] We agree with the plaintiff.

Whether the trial court properly deferred its decision on the enforceability of the parties' postnuptial agreement until the end of trial presents a question of law over which our review is plenary. See, e.g., *Bedrick* v. *Bedrick*, 300 Conn. 691, 697, 17 A.3d 17 (2011); see also *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008) ("[t]he trial court's determination of the proper legal standard in any given case is a question of law subject to our plenary review").

Although it is well established that "[t]he state does not favor divorces . . . [and] [i]ts policy is to maintain the family relation as a life[long] status"; (citation omitted) *McCarthy* v. *Santangelo*, 137 Conn. 410, 412, 78 A.2d 240 (1951); this court has long held that prospective spouses may contract with one another regarding certain issues that may arise in the event of the dissolution of their marriage, so long as the agreement complies with ordinary principles of contract law and does not violate the law or public policy.[8] See, e.g., *Crews*

[7] The plaintiff also argues, as an alternative ground for affirmance, that enforcing the postnuptial agreement now to preclude pendente lite alimony and litigation expenses on the facts found by the trial court would be unconscionable. As we discuss more fully in this opinion, any hearing on the enforceability of the postnuptial agreement will require extensive pretrial discovery and testimony, including the testimony of various experts. Accordingly, the existing record is inadequate for our review of this claim.

[8] "Prenuptial agreements entered into on or after October 1, 1995, are governed by the Connecticut Premarital Agreement Act, General Statutes § 46b-36a et seq. The statutory scheme provides that a prenuptial agreement is unenforceable when: (1) the challenger did not enter the agreement voluntarily; (2) the agreement was unconscionable when executed or enforced; (3) the challenger did not receive a fair and reasonable disclosure of the

v. *Crews*, 295 Conn. 153, 159–60, 989 A.2d 1060 (2010); *McHugh* v. *McHugh*, 181 Conn. 482, 485–86, 436 A.2d 8 (1980). We previously have explained that prenuptial agreements violate public policy if, for example, they promote, facilitate, or provide an incentive for divorce, or if the agreement or a provision thereof purports to relieve a prospective spouse of the obligation to support his or her children or the obligation to support his or her spouse throughout the duration of the marriage. See *McHugh* v. *McHugh*, supra, 488–89.

More recently, in *Bedrick* v. *Bedrick*, supra, 300 Conn. 691, this court held that postnuptial agreements, like prenuptial agreements, do not violate public policy but, instead, "realistically acknowledge the high incidence of divorce and its effect [on] our population." Id., 698; see also id., 699 ("[w]ith divorce as likely an outcome of marriage as permanence, we see no logical or compelling reason why public policy should not allow two mature adults to handle their own financial affairs" (internal quotation marks omitted)). At the same time, we also recognized that "spouses [executing a postnuptial agreement] do not contract under the same conditions as either prospective spouses [executing a prenuptial agreement] or spouses who have determined to dissolve their marriage [executing a separation agreement]"; id., 701; and, therefore, that postnuptial agreements require stricter scrutiny in their assessment than do prenuptial agreements. Id., 703. Specifically, we held that "a court may enforce a postnuptial agreement only if it complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the

amount, character and value of property, financial obligations and income of the other party before execution of the agreement; or (4) the challenger did not have a reasonable opportunity to consult with independent counsel. General Statutes § 46b-36g . . . ." (Citation omitted; internal quotation marks omitted.) *Bedrick* v. *Bedrick*, supra, 300 Conn. 699–700.

time of dissolution"; (footnote omitted) id., 703–704; and that "the terms of a postnuptial agreement are fair and equitable at the time of execution if the agreement is made voluntarily, and without any undue influence, fraud, coercion, duress or similar defect. Moreover, each spouse must be given full, fair and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse." Id, 704. "[I]n determining whether a particular postnuptial agreement is fair and equitable at the time of execution, a court should consider the totality of the circumstances surrounding execution." Id., 705. "[T]he ques-tion of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case." (Internal quotation marks omitted.) Id.

Just as we have recognized that spouses must be free to enter into contracts regarding the distribution of property and other financial matters in the event of divorce, we repeatedly have stated that spouses have a continuing duty to support each other throughout the duration of the marriage and, oftentimes, beyond. See, e.g., *Rubin* v. *Rubin*, 204 Conn. 224, 228, 527 A.2d 1184 (1987) ("[t]he purpose of alimony is to meet one's continuing duty to support" (internal quotation marks omitted)); A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 33:3, p. 35 ("[a]limony . . . is based primarily [on] a continuing duty to support arising out of the obligation of support which the spouses assume toward each other as a result of the marriage" (footnote omitted)). In particular, pendente lite alimony—also referred to as temporary alimony—ensures that a dependent spouse is supported while the parties are living apart pending the outcome of the dissolution action. See, e.g., *Stern* v. *Stern*, 165 Conn. 190, 196, 332 A.2d 78 (1973) ("[t]he

purpose of an order that a husband make payments of support pendente lite to his wife is to afford her a means of livelihood while she is living apart from him pending the determination of the question whether she has a right to separate maintenance").[9] Accordingly, General Statutes § 46b-83[10] authorizes the trial court to award alimony and support pendente lite to either party throughout the duration of a dissolution of marriage proceeding. In determining whether to make an alimony award pendente lite, the court is directed to consider the factors enumerated in General Statutes § 46b-82.[11] See General Statutes § 46b-83 (a).

[9] We recognize that much of our earlier case law addressing spousal support reflects the outdated and paternalistic gender hierarchy of a bygone era, when it was considered the husband's sole duty to provide for the wife and children. See, e.g., *Cary* v. *Cary*, 112 Conn. 256, 259, 152 A. 302 (1930) ("[t]he common-law obligation of the husband to give support to his wife is the foundation [on] which alimony in this [s]tate rests"). Indeed, earlier versions of our alimony statute provided for the payment of alimony only from the husband to the wife, presumably under a theory that a wife would never have a duty to support her husband. See, e.g., General Statutes (1918 Rev.) § 5287 ("[t]he superior court . . . may order alimony to be paid from the *husband's* income" (emphasis added)). Our current statute, however, provides for an award of alimony to either party; see General Statutes § 46b-82 ("the Superior Court may order *either* of the parties to pay alimony to the other" (emphasis added)); and this court has since emphasized the right of either party to receive such support, depending on the facts and circumstances of each case. See, e.g., *Fattibene* v. *Fattibene*, 183 Conn. 433, 441 n.4, 441 A.2d 3 (1981) ("[t]he Connecticut [alimony] statute avoids the equal protection constitutional infirmity of the statutes of some other states which provide that husbands, but not wives, may be required to pay alimony [by providing that the court can award alimony to either party]"). Moreover, other provisions of our General Statutes require relatives, including spouses, to furnish necessary support to a spouse or a child under the age of eighteen, according to such relative's ability. See General Statutes § 46b-215; see also General Statutes § 17b-745.

[10] General Statutes § 46b-83 (a) provides in relevant part: "At any time after the return day of a complaint under section 46b-45 or 46b-56 or after filing an application under section 46b-61, and after hearing, alimony and support pendente lite may be awarded to either of the parties from the date of the filing of an application therefor with the Superior Court. . . ."

[11] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider . . . the length of the marriage, the causes

The trial court also has broad discretion to award attorney's fees or expert fees, pendente lite, if circumstances and justice so require. See General Statutes § 46b-62 (a) ("[i]n any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82"); *Eslami* v. *Eslami*, 218 Conn. 801, 818–21, 591 A.2d 411 (1991) (upholding awards of attorney's fees and expert witness fees as within trial court's sound discretion under § 46b-62); *Medvey* v. *Medvey*, 98 Conn. App. 278, 287–88, 908 A.2d 1119 (2006) (concluding that trial court did not abuse its discretion in awarding plaintiff expert witness fees under § 46b-62).

With this legal framework in mind, we turn to the defendant's claim that the trial court improperly declined to address the enforceability of the parties' postnuptial agreement prior to awarding the plaintiff pendente lite alimony and litigation expenses. As previously indicated, in declining the defendant's request to make a finding as to the agreement's enforceability prior to entering pendente lite orders, the trial court relied on this court's decision in *Fitzgerald*. The defendant contends that the trial court's reliance on *Fitzgerald* was misplaced because the agreement in that case was a separation agreement, whereas the agreement in the present case is a postnuptial agreement. We conclude that the distinction drawn by the defendant is one without a difference in the context of the present case and that the trial court properly relied on *Fitzgerald* in ordering the defendant to pay pendente lite alimony and litigation expenses.

for . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

In *Fitzgerald*, four months before the plaintiff wife filed a marital dissolution action, the parties entered into a written separation agreement governing alimony and child support—including temporary support—in contemplation of their approaching divorce. *Fitzgerald* v. *Fitzgerald*, supra, 169 Conn. 148. In her complaint, the plaintiff sought to invalidate the separation agreement and, later, moved for temporary alimony, custody, support, and counsel fees. Id., 149. The trial court, after hearing oral argument on the plaintiff's motion, ordered the defendant to pay the plaintiff temporary alimony and child support. Id. In so doing, "[t]he court recognized the existence of the separation agreement but ruled that its validity and effectiveness [were matters] to be determined at the time of trial on the merits of the plaintiff's complaint, which, in the first count, concerned the validity of the [agreement] and, in the second count, the divorce action. The court concluded that the validity and effectiveness of the [agreement] need not be determined in awarding temporary alimony and support." Id., 150.

On appeal to this court, the defendant argued, inter alia, that the trial court erred in failing to determine the enforceability of the separation agreement prior to ruling on the plaintiff's request for pendente lite support. See id. ("[t]he defendant's principal contention . . . is that the court erred in refusing to determine the validity of the separation agreement prior to ordering [him], contrary to that agreement, to pay temporary support"). We disagreed, reasoning that "[t]he court's authority to award alimony and support pendente lite at the time of the hearing was expressly provided for [by statute]" and that "[p]ayment pursuant to such an award is to provide for the wife and the dependent children while they are living apart from her husband pending a determination of the issues in the case." Id., 151; see also *Wolk* v. *Wolk*, 191 Conn. 328, 330–31, 464

A.2d 780 (1983) (explaining that pendente lite support is fundamentally different from final orders of support entered at conclusion of dissolution proceeding). We further reasoned that the proper time for a determination as to the enforceability of the parties' separation agreement was "when the case is tried on its merits," because only then "will [the parties] have an opportunity to be heard . . . in a meaningful manner." *Fitzgerald* v. *Fitzgerald*, supra, 169 Conn. 151; see also id., 152 ("[w]hether [certain] trusts may be relied [on] by the defendant to fulfill his primary duty to support his minor children is *for the court to decide upon the full hearing of the case, that is, when it is determined by the court whether the separation agreement is valid* and, if so found, whether [it] is fair and equitable under all the circumstances" (emphasis added)).

We find no merit in the defendant's contention that *Fitzgerald* is distinguishable because it involved a separation agreement rather than a postnuptial agreement. The underlying principle in *Fitzgerald*—namely, that a determination regarding the validity of an agreement may be made when the case is tried on its merits—applies equally to any marital agreement, regardless of whether it is a prenuptial, postnuptial, or separation agreement. Nor do we agree with the defendant that this court "signaled" in *Bedrick* "that reliance on *Fitzgerald* in the context of postnuptial agreements is misplaced." Indeed, to the extent that *Bedrick* is relevant at all, it is to underscore the propriety of the trial court's decision in the present case.

In *Bedrick*, we were required to determine whether a postnuptial agreement is per se violative of public policy and, therefore, unenforceable. See *Bedrick* v. *Bedrick*, supra, 300 Conn. 693. In deciding that issue, we explained that there are three types of marital agreements—prenuptial, postnuptial, and separation—and that, although separation agreements and postnuptial

agreements are both entered into during the marriage, they are distinguishable insofar as one is entered into in contemplation of divorce, whereas the other is entered into "after a couple weds, but before they separate, when the spouses plan to continue their marriage . . . and when separation or divorce is not imminent." (Citation omitted; internal quotation marks omitted.) Id., 693 n.1. We ultimately concluded that the differences were significant enough to require that a higher level of scrutiny be applied to postnuptial agreements than is applied to the other two agreements. Id., 703–704. Specifically, we explained that, "[b]ecause of the nature of the marital relationship, the spouses to a postnuptial agreement may not be as cautious in contracting with one another as they would be with prospective spouses, and they are certainly less cautious than they would be with an ordinary contracting party. With lessened caution comes greater potential for one spouse to take advantage of the other." Id., 703.

We further stated that spouses entering into a postnuptial agreement "do not contract under the same conditions as either prospective spouses or spouses who have determined to dissolve their marriage," meaning that "a postnuptial agreement stands on a different footing from both a [prenuptial agreement] and a separation agreement. Before marriage, the parties have greater freedom to reject an unsatisfactory [prenuptial agreement]. . . .

"A separation agreement, in turn, is negotiated when a marriage has failed and the spouses intend a permanent separation or marital dissolution. . . . The circumstances surrounding [postnuptial] agreements in contrast are pregnant with the opportunity for one party to use the threat of dissolution to bargain themselves into positions of advantage." (Internal quotation marks omitted.) Id., 701; see also id., 703 ("Prospective spouses share a confidential relationship . . . but spouses

share the institution of marriage, one of the most fundamental of human relationships . . . . Courts simply should not countenance either party to such a unique human relationship dealing with each other at arms' length." (Citations omitted; internal quotation marks omitted.)).

The defendant does not explain, nor can we perceive, how this court's statements in *Bedrick* explaining the differences between the three types of marital agreements takes this case outside of the holding in *Fitzgerald* that the validity of marital agreements should be assessed when the case is tried on its merits, or how it otherwise informs the question of when the trial court should decide the enforceability of a postnuptial agreement. However, to the extent that *Bedrick* has any bearing at all on that question, we believe that it reinforces our conclusion that the trial court acted within its discretion in deferring its decision until the end of trial given that, under *Bedrick*, the court is required to conduct a more searching inquiry into the circumstances surrounding the postnuptial agreement's execution than the trial court in *Fitzgerald* was required to undertake with respect to the separation agreement in that case.[12] See id., 703–704.

[12] The defendant argues that "the heightened scrutiny afforded postnuptial agreements . . . is nothing more than an obligation to apply the usual criteria that guide the relevant analysis with heightened diligence," arguing that the guideposts used to analyze prenuptial and postnuptial agreements are the same in Connecticut and, therefore, that the heightened scrutiny afforded to postnuptial agreements "fails to present any obstacle to determining their validity and enforceability at a preliminary hearing." (Citation omitted; internal quotation marks omitted.) We are unpersuaded. As we explained, and as the trial court found, such an inquiry will likely take considerable time and consume substantial resources, given the complexity of the defendant's finances, during which the plaintiff would be left without the very funds that she would need to litigate the matter. We can also imagine other issues relating to the enforceability of a marital agreement that can and likely will arise during the pendency of a dissolution action that would be ill-suited to summary adjudication at the pendente lite stage of a dissolution proceeding.

Indeed, as the trial court noted, because of the complexity of the defendant's finances, valuing his assets—a necessary step in determining the enforceability of the postnuptial agreement—will likely require considerable discovery and expert assistance, a process that could take a good deal of time during which, under the bifurcated approach advocated by the defendant, the plaintiff would be left without the means to support herself, to pay an attorney, and to hire an expert to make sense of the defendant's complicated finances.[13]

In reaching our conclusion, we are mindful that the "the question of whether enforcement of [a postnuptial] agreement would be unconscionable is analogous to determining whether enforcement of an agreement would work an injustice. . . . Marriage, by its very nature, is subject to unforeseeable developments, and no agreement can possibly anticipate all future events. Unforeseen changes in the relationship, such as having a child, loss of employment or moving to another state, may render enforcement of the agreement unconscionable." (Citation omitted.) Id., 706. This is why we held in *Bedrick* that "a court may enforce a postnuptial agreement only if it . . . [is] not unconscionable *at*

[13] Although the issue is not before us, we note that a number of courts have concluded that "an agreement of the parties that waives or limits the right to request temporary support and attorney's fees to a spouse in need in a pending dissolution action is a violation of public policy." *Khan* v. *Khan*, 79 So. 3d 99, 100 (Fla. App. 2012), citing *Belcher* v. *Belcher*, 271 So. 2d 7 (Fla. 1972); see also *McAlpine* v. *McAlpine*, 679 So. 2d 85, 90 (La. 1996) ("prenuptial waivers of alimony pendente lite [are] void as contrary to the public policy of this [s]tate"). See generally *Furer* v. *Furer*, Docket No. 51198, 2010 WL 3271504, *2 (Nev. June 10, 2010) (decision without published opinion, 126 Nev. 712, 367 P.3d 770) ("court has discretion in any divorce action to require either party to pay the other party money necessary for temporary maintenance or to enable the other party to participate in the case"). In *McHugh* v. *McHugh*, supra, 181 Conn. 489, this court observed that provisions of a prenuptial agreement purporting to relieve one spouse of the duty to support the other during the marriage have been held to contravene public policy.

the time of dissolution." (Emphasis added; footnote omitted.) Id., 703–704. We are not prepared to say that unforeseen changes cannot also occur during the pendency of a divorce action. This is all the more reason why the trial court's broad equitable powers and discretion in deciding matters arising in a dissolution action must include the discretion to postpone a decision as to the enforceability of a marital agreement until the parties have had a full and fair opportunity to litigate all issues in the case at a trial on the merits.[14] See, e.g., *Loughlin* v. *Loughlin*, 280 Conn. 632, 641, 910 A.2d 963 (2006) ("Although created by statute, a dissolution

[14] The defendant nevertheless argues that, "[a]s our sister states have held . . . [our] policy preferences are chilled when pendente lite relief is ordered that directly contravenes the terms of a nuptial agreement" and that "a majority of jurisdictions hold a preliminary hearing on the validity and enforceability of a nuptial agreement when the existence of such an agreement is [pleaded] as part of the dissolution action or [when] it is raised as a defense to pendente lite support." In support of this argument, the defendant cites a number of out-of-state cases, most of which are unreported, that he claims ought to persuade us to adopt the rule he advocates. Two of these cases, however, do not involve pendente lite support or a request for a preliminary hearing to determine the enforceability of a marital agreement. See *Volid* v. *Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Ware* v. *Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009). These cases, therefore, have no value in the context of the present case. Some of the cases that do touch on the issue before us are inapposite because those states have criteria for evaluating the enforceability of marital agreements that are different from our own. See *Bamberger* v. *Hines*, Docket Nos. 2007-CA-000933-MR and 2007-CA-000992-MR, 2009 WL 1025122 (Ky. App. April 17, 2009); *Darr* v. *Darr*, 950 S.W.2d 867 (Mo. App. 1997); *Colon* v. *Colon*, Docket No. A-5986-02T5, 2006 WL 2318250 (N.J. Super. App. Div. August 11, 2006); *Simeone* v. *Simeone*, 525 Pa. 392, 581 A.2d 162 (1990); *Howell* v. *Howell*, Docket No. M2019-01205-COA-R3-CV, 2021 WL 408862 (Tenn. App. February 5, 2021), appeal denied, Tennessee Supreme Court, Docket No. M2019-01205-SC-R11-CV (May 12, 2021); *Gust* v. *Gust*, Docket Nos. 0901-15-2 and 0024-16-2, 2016 WL 2636612 (Va. App. May 10, 2016). To whatever extent any of the cited cases apply a similar framework to our own in evaluating marital agreements and nevertheless require that courts determine the enforceability of the agreement prior to awarding pendente lite support, such as *Trbovich* v. *Trbovich*, 122 App. Div. 3d 1381, 1383–84, 997 N.Y.S.2d 855 (2014), those courts are free to do as they see fit with respect to these matters. We remain convinced that our approach is the better course.

action is essentially equitable in nature. . . . The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances [that] arise out of the dissolution of a marriage. . . . [I]n the exercise of its inherent equitable powers it may also consider any other factors [besides those enumerated in the statute that] may be appropriate for a just and equitable resolution of the marital dispute." (Internal quotation marks omitted.)); *Gluck* v. *Gluck*, 181 Conn. 225, 228, 435 A.2d 35 (1980) ("[a] dissolution of a marriage, although a creature of statute, is essentially an equitable action").

The defendant contends that our decision today could work an injustice because, if the trial court ultimately determines that the postnuptial agreement is enforceable and, further, that it precludes the award of the pendente lite alimony and litigation expenses at issue, he may be unable to obtain restitution for the pendente lite alimony and litigation expenses he was required to pay the plaintiff throughout the course of the litigation. The defendant argues that the trial court's decision is "particularly harmful where, as here, the plaintiff . . . is without the means necessary to repay the defendant if the agreement is ultimately enforced."

We are not unsympathetic to the defendant's argument and recognize the possibility that he may not be made entirely whole in the event that the trial court determines that the parties' postnuptial agreement is enforceable under the criteria set forth in *Bedrick* for determining that question and that its provisions, in fact, preclude the award of the pendente lite alimony or litigation expenses at issue. Even if this scenario occurs, however, the defendant may not be without any remedy. For example, the trial court could ultimately adjust any financial orders to compensate the defendant for pendente lite payments that were made in contravention of the terms of the agreement, should it be

found to be enforceable and should the court, in the exercise of its discretion, determine that such a remedy is warranted. See *Volid* v. *Volid*, 6 Ill. App. 3d 386, 393, 286 N.E.2d 42 (1972) ("[t]he [trial] court in the exercise of its discretion awarded temporary alimony . . . [but] [t]he order should have contained a provision that any temporary sums for [the wife's] support [that] are paid will ultimately be deducted from the lump sum settlement agreed to by the parties [in their prenuptial agreement]").

Moreover, by our decision today, we do not foreclose the ability of the trial court to decide the enforceability of a marital agreement in connection with a request for pendente lite alimony or litigation expenses if the court determines, in its considered judgment, that a decision can be made at that time without doing an injustice to either party. See *Clarke* v. *Clarke*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA17-6031321-S (October 10, 2017) (65 Conn. L. Rptr. 327, 328) (applying prenuptial agreement in connection with request for pendente lite alimony because "enforcement of the premarital agreement . . . is not an issue in dispute; both parties are seeking its enforcement"). In considering such a request, the court is also free to fashion a pendente lite order of alimony or litigation expenses that takes into account the existence of a marital agreement that purports to preclude such support. See *Belcher* v. *Belcher*, 271 So. 2d 7, 9 (Fla. 1972) (provision in prenuptial agreement that purports to contract away spouse's future obligation to pay alimony, litigation expenses, and attorney's fees during separation prior to dissolution of the marriage "is a factor to be considered but not the sole factor, nor conclusive, in a determination of [an award for] support pendente lite" (emphasis omitted)). For the reasons previously set forth, however, we conclude that a trial court is also free to decide to delay a decision on the enforceability

of a postnuptial agreement until the conclusion of trial if circumstances and equity so require.

The trial court's orders are affirmed.

In this opinion the other justices concurred.

CATHERINE CRANDLE ET AL. *v.* CONNECTICUT STATE EMPLOYEES RETIREMENT COMMISSION
(SC 20532)

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

Syllabus

The plaintiffs, C and R, former state employees who are members of Tier II and Tier IIA, respectively, of the State Employees Retirement System (SERS), appealed to the trial court from the ruling of the defendant, the State Employees Retirement Commission. C's last day of paid state employment was in October, 2012, and R's last day of paid state employment was in October, 2015. Thereafter, C and R each submitted an application for disability retirement benefits to the Retirement Services Division, which received R's application in March, 2016, and C's application in April, 2016. The Medical Examining Board for Disability Retirement granted the plaintiffs' applications, and payment of their benefits commenced on the first day of the month following the Retirement Services Division's receipt of their respective applications. Accordingly, R's benefits became payable on April 1, 2016, and C's benefits became payable on May 1, 2016. The plaintiffs subsequently filed with the commission a petition for a declaratory ruling, claiming that, under the State Employees Retirement Act (§ 5-152 et seq.), payment of disability retirement benefits commences on the day after an employee's last day of paid state employment. The commission rejected the plaintiffs' claim, concluding instead that disability retirement benefits are payable on the first day of the month after the Retirement Services Division receives the employee's application. The commission noted that, although the act is silent as to when disability retirement benefits become payable, the attorney general had issued an opinion in 1981, in which he concluded that, under Tier I of SERS, such benefits are not payable from the date of the employee's termination of employment. Moreover, the commission observed that it had implemented that interpretation of the act on a number of occasions since 1981 and that the legislature had not overruled that interpretation. In the plaintiffs' administrative appeal before the

trial court, that court upheld the commission's ruling on the ground that the commission's interpretation of the act was entitled to substantial deference because it was time-tested and reasonable. The trial court rendered judgment dismissing the plaintiffs' administrative appeal, from which the plaintiffs appealed. *Held*:

1. The plaintiffs could not prevail on their claims that the trial court improperly deferred to the commission's interpretation of the act on the basis that that interpretation was neither time-tested, insofar as it was not formally articulated or adopted pursuant to formal rule-making or adjudicatory procedures, nor reasonable, insofar as the provisions of the act clearly and unambiguously provide that disability retirement benefits become payable on the day after the employee's last day of paid employment:

a. The commission's interpretation of the act was time-tested: even if an agency's interpretation of a statute is entitled to no deference unless it had been adopted pursuant to formal rule-making or adjudicatory procedures, the commission attached to its ruling an exhibit showing that, since 1986, it has issued decisions in a number of cases applying the rule that disability retirement benefits commence on the first day of the month after the application is received, this court repeatedly has afforded deference to an agency's interpretation of a statute, as reflected in the agency's rulings in specific cases, and the plaintiffs did not explain why these cases were not issued pursuant to adjudicatory procedures; moreover, unlike agency interpretations that are set forth only in private correspondence and internal documents, which are not entitled to judicial deference, the commission's interpretation of the act in the present case had been formally articulated pursuant to adjudicatory procedures, namely, in the specific cases it cited in its exhibit; in addition, the attorney general's 1981 opinion had been distributed to the heads of all state agencies shortly after it was issued, presumably so that agencies could make the substance of the opinion known to any SERS member who inquired about the date on which disability retirement benefits become payable.

b. There was no merit to the plaintiffs' claim that the commission's interpretation of the act, which was based on the attorney general's 1981 opinion, was unreasonable because it conflicted with the legislature's 1983 amendments to the act adopting tier II of SERS: the provisions (§§ 5-169 (j) and 5-192*l* (c)) of the act on which the plaintiffs relied did not specify the date that payment of retirement disability benefits commences but, rather, distinguished between the member's date of disability and date of retirement, nothing in the act indicated that the date a member becomes eligible for retirement disability benefits and the date that benefits become payable are identical, and, accordingly, the 1983 amendments did not clearly indicate that the attorney general's interpretation of the act was incorrect; moreover, although the act is silent regarding when disability retirement benefits commence and its

express provisions do no compel the interpretation that the commission adopted, that interpretation was nonetheless reasonable, especially in view of the fact that the provisions of the act were negotiated by the state and representatives of the state employee unions pursuant to collective bargaining, and approved and codified by the legislature, and neither those parties nor the legislature, which were all presumed to have been aware of the attorney general's 1981 opinion and the commission's decisions applying its interpretation of the act, has sought to renegotiate the agreement or to amend the provisions of the act to reflect a different understanding, even though the legislature has amended the act several times since 1981; furthermore, because the express terms of the act provide that, for normal retirement, early retirement and hazardous duty retirement, retirement occurs after the date that an application is filed, and payment of retirement benefits commences on the day of retirement, it was reasonable for the commission to treat disability retirement consistently with these other forms of retirement; in addition, having disability retirement benefits become payable on the first day of the month after an application for such benefits is received allows the state to predict at any given time its potential liability for the payment of such benefits, changing the rule could subject the state to claims for retroactive payments from members who are already retired, and it was appropriate for this court to defer to the commission's reasonable interpretation of the act in light of the gap that the legislature left in the act by failing to specify the date on which an employee's disability retirement benefits begin.

2. There was no merit to the plaintiffs' claim that the commission, as a fiduciary of the plaintiffs, had the burden of proving, by clear and convincing evidence, fair dealing with respect to its use of an unwritten practice to set a start date for disability benefits: when a breach of fiduciary duty is alleged, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence only when the dominant party is the beneficiary of the transaction or obtains a possible benefit, and, in the present case, the plaintiffs did not allege that the commission took advantage of its fiduciary relationship with SERS members to benefit itself; moreover, even if it were unfair for the commission to apply its unwritten interpretation of the act, the plaintiffs failed to raise a colorable claim because it would be anomalous to conclude that the commission must apply the plaintiffs' preferred interpretation, which also is not expressly set forth in the act or related regulations.

Argued January 12, 2021—officially released February 1, 2022*

Procedural History

Administrative appeal from the decision of the defendant determining the commencement date of the plain-

* February 1, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tiffs' disability retirement benefits, brought to the Superior Court in the judicial district of New Britain, where the court, *Huddleston*, *J.*, granted in part the defendant's motion to dismiss; thereafter, the court, *Cordani*, *J.*, rendered judgment dismissing the appeal, from which the named plaintiff et al. appealed. *Affirmed.*

Russell D. Zimberlin, for the appellants (named plaintiff et al.).

Cindy M. Cieslak, with whom, on the brief, was *Michael J. Rose*, for the appellee (defendant).

Opinion

ROBINSON, C. J. The principal issue in this appeal is whether the State Employees Retirement Act (act), General Statutes § 5-152 et seq., requires the state to commence payment of state employee disability retirement benefits on the day after the employee's last day of paid employment or, instead, the act permits the payment of such benefits to start on the first day of the month after receipt of the employee disability retirement application. The plaintiffs, Catherine Crandle and Ronald Robinson,[1] who are former state employees, appeal[2] from the judgment of the trial court dismissing

[1] In addition to Crandle and Robinson, the plaintiffs in the underlying administrative appeal were Stephanie Hawthorne, Pedro Rodriguez, Michael Gardner, Leslie Cavanagh, Leah Margentino, Tammy Fettig, Ebone Kearse, Dana Goldberg, Gerard Bernier, Darcie Dockum, Stanley Jarosz, Derek Williams, Linda Walsh, Maria Sous and Karla Carey. The trial court, *Huddleston*, *J.*, dismissed the claims of Margentino, Fettig, Kearse, Goldberg, Bernier, Dockum, Jarosz, Williams, Walsh, Sous and Carey for their failure to exhaust their administrative remedies. The trial court, *Cordani*, *J.*, dismissed the claims of Hawthorne, Cavanagh, Gardner and Rodriguez for lack of aggrievement.

Because only Crandle and Robinson are participating in this appeal, all references herein to the plaintiffs are to them collectively, and we refer to them individually by name when appropriate. Moreover, all references in this opinion to the trial court are to Judge Cordani.

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

their administrative appeal from the declaratory ruling of the defendant, the Connecticut State Employees Retirement Commission (commission). On appeal, the plaintiffs claim that the trial court improperly upheld the commission's declaratory ruling that, under various provisions of the act, disability retirement benefit payments commence on the first day of the month following receipt by the Retirement Services Division (division) of the employee's approved application for such benefits. The plaintiffs contend that the trial court improperly (1) deferred to the commission's interpretation of the act because that interpretation is neither reasonable nor time-tested, and (2) failed to consider that the commission, as a fiduciary of members of the State Employees Retirement System (SERS), had the burden of proving fair dealing by clear and convincing evidence. We disagree with these claims. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which the commission found or which are undisputed, and procedural history. Crandle is a member of Tier II of SERS.[3] On April 13, 2016, the division received Crandle's application for disability retirement benefits. Because Crandle's last date of state employment was October 16, 2012, the application was untimely under § 5-155a-2 (d) of the Regulations of Connecticut State Agencies, which requires such applications to be filed within twenty-four months of the applicant's last day of paid employment. Crandle requested that the commission toll the limitation period for submitting the application, and the com-

[3] Tier II of SERS is governed by part V of the act, General Statutes § 5-192e et seq., which applies to all members who joined SERS after July 1, 1984, and to some members who joined SERS after January 1, 1984. See General Statutes § 5-192e (a). Tier II does not apply to members who joined SERS after June 30, 1997. See Office of the State Comptroller, Retirement Services Division, Tier II/ IIA–Retirement Basics, available at https://www.osc.ct.gov/empret/tier2summ/workshop/tierprint22a.htm (last visited January 31, 2022).

mission granted her request. Thereafter, the State of Connecticut Medical Examining Board for Disability Retirement (board) conducted a hearing on Crandle's application for disability retirement benefits and granted it. Payment of the benefits commenced on May 1, 2016, the first day of the month following the division's receipt of the application.

Robinson is a member of Tier IIA of SERS.[4] His last date of state employment was October 31, 2015. On March 30, 2016, Robinson applied for disability retirement benefits. The board approved his application, and payment of the benefits commenced on April 1, 2016, the first day of the month following the division's receipt of his application.

On March 1, 2018, the plaintiffs filed a petition for a declaratory ruling with the commission, contending that, under the act, payment of disability retirement benefits commences the day after the employee's last day of paid employment.[5] In its decision and declaratory ruling, the commission noted that the act is silent with respect to when disability retirement benefits become payable. The commission disagreed with the plaintiffs' reliance on § 5-155a-2 (d) of the regulations of Connecticut State Agencies to support their position. The commission concluded that the language of the regulation, providing that "[t]he time period for filing an application for disability retirement benefits . . . shall begin on the day after the applicant's last day of paid employment," simply provides a time frame in which the appli-

[4] Tier IIA of SERS applies to members who joined SERS from July 1, 1997, through June 30, 2011. See Office of the State Comptroller, Retirement Services Division, Tier II/IIA Retirement Basics, available at https://www.osc.ct.gov/empret/tier2summ/workshop/tierprint22a.htm (last visited January 31, 2022).

[5] The petition was brought by the plaintiffs, Jeremy Wiganowske, Stephanie Hawthorne, Paula Mitchell, Leslie Cavanagh, Pedro Rodriguez and Michael Gardner. Only the plaintiffs remain as parties to this case. See footnote 1 of this opinion.

cant must apply and does not prescribe the day that payment begins. The commission also observed that normal retirement benefits for Tier II members become payable on the first day of any future month named in the application.[6] See, e.g., General Statutes § 5-192*l* (a) ("[e]ach member of tier II who has attained age sixty-five and has completed ten or more years of vesting service may retire on his own application on the first day of any future month named in the application").

In addition, the commission pointed out that, in 1981, it had sought an opinion from the attorney general on the issue of whether disability retirement benefits are payable retroactive to the date of the employee's termination of employment under Tier I of SERS.[7] In that opinion, the attorney general concluded that the legislature intended that Tier I "retirement benefits are to flow prospectively from the time of making application." Opinions, Conn. Atty. Gen. No. 1981-50 (July 30, 1981) p. 1 (1981 attorney general opinion). This is because "[a]xiomatic to the granting of such benefits is the requirement that a member of [SERS] apply for retirement, be it regular, disability or service-connected disability." Id., pp. 1–2. Emphasizing that it "is the filing of the application for retirement, and its subsequent approval by the [c]ommission [that] triggers a member's entitlement to benefits"; id., p. 2; the 1981 attorney general opinion concluded that "service-connected disability retirement benefits are not to be given retroactive effect when the application [therefor] is submitted subsequent to the date of termination." Id., p. 3.

[6] None of the parties contends that, for purposes of the issue before us in this appeal, Tier IIA disability retirement benefits differ in any material way from Tier II benefits.

[7] General Statutes §§ 5-157 through 5-192d govern Tier I of SERS. See General Statutes § 5-192f (e). Tier I applies to most employees who joined SERS on or before July 1, 1984. See Connecticut State Employees Retirement System, Tier I: Summary Plan Description, available at https://www.osc.ct.gov/empret/tier1summ/tier1summ.htm (last visited January 31, 2022)

The commission further reasoned in its declaratory ruling that "the [plaintiffs'] request to use the day after their last day of paid employment as the date on which benefits become payable is less of a bright-line rule [than the practice of commencing payment of benefits on the first day of the month after the application is received] since, often, in cases of disability retirement, members . . . take some form of a leave of absence while they evaluate whether they will recover from their injury or in fact are permanently disabled from the job so as to qualify for a disability retirement. Sometimes such leave is paid, and sometimes it is unpaid, depending on the types of leave accrued pursuant to sick time, vacation, family and medical leave, and workers' compensation laws and policies." Moreover, the commission noted that "some of the petitioners"; see footnote 5 of this opinion; "claimed service credit for certain types of leave, and the statutes do not permit an employee to receive service credit and a retirement benefit for the same period of employment."

Finally, the commission observed that it had implemented the foregoing interpretation of the act in a number of cases since 1981 and that the legislature had not overruled that interpretation, despite making multiple changes to SERS.[8] The commission further pointed out that the act is a creature of collective bargaining and was approved and codified by the legislature pursuant to General Statutes (Rev. to 2017) § 5-278 (b),[9] and that

[8] The commission attached to its ruling an exhibit that is identified in the index to the return of record that was filed in the trial court as a "selection of the commission's past decisions relating to the effective date of payment of disability retirement benefits." Three of the decisions appear to involve applications for disability retirement benefits.

[9] General Statutes (Rev. to 2017) § 5-278 (b) provides in relevant part: "Any agreement reached by the negotiators shall be reduced to writing. The agreement, together with a request for funds necessary to fully implement such agreement and for approval of any provisions of the agreement which are in conflict with any statute or any regulation of any state agency . . . shall be filed by the bargaining representative of the employer with the clerks of the House of Representatives and the Senate within ten days after

the parties charged with negotiating the terms of SERS had not made any attempt to amend the act in light of the commission's interpretation. Accordingly, the commission concluded in its declaratory ruling that disability retirement benefits are payable on the first day of the month following the division's receipt of an approved application for benefits.

Thereafter, the plaintiffs[10] filed an administrative appeal from the commission's declaratory ruling with the trial court. The trial court concluded that the commission's ruling was time-tested and reasonable and, therefore, was entitled to substantial deference. In addition, the trial court observed that neither the legislature nor the parties that had negotiated the terms of SERS had taken steps to change those terms as a result of the commission's interpretation. Moreover, the court reasoned that the commission's interpretation provides an incentive for members to apply promptly for disability retirement benefits, thereby minimizing the need for retroactive payments and maximizing the predictability of the state's financial liability. The court rejected the plaintiffs' reliance on General Statutes § 5-169 (j),[11] which provides in relevant part that "[a] member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable," concluding that that provision merely defines the member's

the date on which such agreement is reached . . . . The General Assembly may approve any such agreement as a whole by a majority vote of each house or may reject such agreement as a whole by a majority vote of either house. . . ."

[10] See footnote 1 of this opinion.

[11] General Statutes § 5-169 (j) provides: "A member whose date of disability occurs prior to January 1, 1984, shall have his benefits calculated in accordance with the provisions of law in effect at the time of such occurrence. A member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable, whichever is earlier. A leave of absence for medical reasons shall not be deemed to be active employment."

date of disability for purposes of calculating benefits and does not specify the date that benefits first become payable. The court also rejected the plaintiffs' contention that the act should be liberally construed because it is remedial in nature, concluding that it merely sets forth contractual obligations negotiated by the unions and the state. Accordingly, the trial court rendered judgment dismissing the administrative appeal. This appeal followed.

On appeal, the plaintiffs claim that the trial court incorrectly concluded that the commission's interpretation of the act was entitled to deference because that interpretation is neither time-tested nor reasonable. They further claim that, as a fiduciary of SERS and its members, the commission had the burden of proving fair dealing with the plaintiffs by clear and convincing evidence. We address each claim in turn.

I

We begin our analysis with the plaintiffs' claims that the trial court improperly deferred to the commission's interpretation of the act because that interpretation was neither time-tested nor reasonable in that the applicable statutes clearly and unambiguously provide that benefits become payable on the day after the employee's last day of paid employment. We disagree.

Before turning to the plaintiffs' specific claims, we note the following general principles that govern judicial review of an agency's interpretation of the statutory scheme that it administers. "This court reviews the trial court's judgment pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency]

has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 525–26, 93 A.3d 1142 (2014).

This court previously has recognized that "the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Conversely, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. . . . Deference is warranted in such circumstances because a time-tested interpretation, like judicial review, provides an opportunity for aggrieved parties to contest that interpretation. Moreover, in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute. . . . For these reasons, this court long has adhered to the principle that when a governmental agency's time-tested interpretation [of a statute] is reasonable it should be accorded great weight by the courts."[12] (Citations omitted; inter-

[12] The plaintiffs point out that, in *Bouchard* v. *State Employees Retirement Commission*, 328 Conn. 345, 178 A.3d 1023 (2018), this court stated, with respect to a number of issues involving the interpretation of the act, that, "[a]lthough substantial deference is given to factual and discretionary determinations of administrative agencies, each of these questions is a purely legal matter over which we exercise plenary review." Id., 358. There was no claim in *Bouchard*, however, that the commission's interpretation was entitled to deference because it was time-tested and reasonable. Accordingly, we cannot conclude that that case overruled the long-standing principle that deference is given to a time-tested and reasonable agency interpretation.

nal quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 309 Conn. 412, 422–23, 72 A.3d 13 (2013).

This court also has recognized that, in cases involving the interpretation of federal statutes, "[i]f the agency's reading fills a gap [in the statute] . . . we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." (Internal quotation marks omitted.) *Ahern* v. *Thomas*, 248 Conn. 708, 718, 733 A.2d 756 (1999). Other courts have applied the same principle to the interpretation of state statutes. For example, in *Hama Hama Co.* v. *Shorelines Hearings Board*, 85 Wn. 2d 441, 536 P.2d 157 (1975), the Washington Supreme Court reasoned that, "when a statute is ambiguous . . . there is the well known rule of statutory interpretation that the construction placed [on] a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling [on] the courts, should be given great weight in determining legislative intent. . . . The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment.

"At times, administrative interpretation of a statute may approach lawmaking, but we have heretofore recognized that *it is an appropriate function for administrative agencies to fill in the gaps where necessary to the effectuation of a general statutory scheme. . . . It is likewise valid for an administrative agency to fill*

See, e.g., *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 319, 258 A.3d 1 (2021) (court gives deference to agency's interpretation of statute if it is time-tested and reasonable).

in the gaps via statutory construction—as long as the agency does not purport to amend the statute." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 448.

Similarly, in *Silver Lining Group EIC Morrow County.* v. *Ohio Dept. of Education Autism Scholarship Program*, 85 N.E.3d 789 (Ohio App. 2017), appeal denied, 152 Ohio St. 3d 1424, 93 N.E.3d 1005 (2018), the Ohio Court of Appeals held that, "[i]f a statute provides an administrative agency authority to perform a specified act but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based [on] a reasonable construction of the statutory scheme. . . . An agency's reading that fills a gap or defines a term in a reasonable way in light of the [l]egislature's design controls, even if it is not the answer the court would have reached in the first instance. . . .

"Thus, a legislative gap is not equivalent to a lack of authority for the agency to act. . . . Rather, the power of an administrative agency to administer a . . . program *necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly*, by the legislature." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 801; see also *Division of Justice & Community Services* v. *Fairmont State University*, 242 W. Va. 489, 496, 836 S.E.2d 456 (2019) ("a court is obligated to defer to an agency's view only when there is a statutory gap or ambiguity" (internal quotation marks omitted)).

A

We begin with the plaintiffs' claim that the commission's interpretation of the act is not time-tested because it "was neither formally articulated nor adopted pursuant to formal rule-making or adjudicatory procedures and because the agency . . . relied [only] on private corre-

spondence and internal documents . . . .”[13] In support of this claim, the plaintiffs rely on two of this court’s decisions. See *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, 317 Conn. 628, 651, 119 A.3d 1158 (2015) (agency’s interpretation of statute is not time-tested if it has “been neither formally articulated nor adopted pursuant to formal rule-making or adjudicatory procedures”); *Hasselt* v. *Lufthansa German Airlines*, 262 Conn. 416, 432, 815 A.2d 94 (2003) (noting that, under United States Supreme Court’s decision in *Christensen* v. *Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), “opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant . . . deference” (internal quotation marks omitted)); see also *Christensen* v. *Harris County*, supra, 587 (United States Department of Labor’s interpretation contained in opinion letter was not entitled to deference because it was “not one arrived at after, for example, a formal adjudication or [notice and comment rule making],” and “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant . . . deference” under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).[14]

[13] The plaintiffs also contend that the commission’s interpretation is not time-tested because the 1981 attorney general opinion, on which the commission heavily relies, conflicts with later amendments to the act that, according to the plaintiffs, clearly show that the payment of disability retirement benefits commences on the day after the member’s last day of paid employment. Because that claim goes more properly to the plaintiffs’ claim that the commission’s interpretation is unreasonable, we address it in part I B of this opinion.

[14] Under *Chevron*, “[s]tatutory ambiguities will be resolved . . . not by the courts but by the administering agency.” *Arlington* v. *Federal Communications Commission*, 569 U.S. 290, 296, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); see id. (“if the statute is silent or ambiguous with respect to the

We conclude that neither *Hasselt* nor *Tilcon Connecticut, Inc.*, supports the plaintiffs' position. In *Hasselt*, the defendant, the Second Injury Fund, contended that this court should give deference to a memorandum written by Jesse M. Frankl, the chairman of the Workers' Compensation Commission, in which Frankl gave his interpretation of General Statutes § 31-307a (c). See *Hasselt* v. *Lufthansa German Airlines*, supra, 262 Conn. 421. This court noted that it "previously [had] not determined whether a commissioner's policy directive, which contains an interpretation [of a state statute] not adopted pursuant to formal rule-making or adjudicatory procedures, is entitled to deference," or, instead, this court should adopt the *Christenson* rule applicable to policy directives interpreting federal statutes. Id., 432. This court did not resolve that issue, however, because it concluded that, even if such policy directives may be entitled to deference in appropriate circumstances, Frankl's memorandum was not because it was neither time-tested nor reasonable.[15] Id.

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (internal quotation marks omitted)).

[15] We recognize that, in *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 89 A.3d 841 (2014), this court cited *Hasselt* for the proposition that an agency's interpretation of a statute is not entitled to deference when it "was not promulgated pursuant to any formal rule-making procedures or articulated pursuant to any adjudicatory procedures . . . ." Id., 611; see *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 421, 94 A.3d 588 (2014) (citing *Sarrazin* for proposition that "an agency interpretation, whether of its own regulations or of a statute that the agency is charged with enforcing, is not accorded deference by the court when it has not been promulgated pursuant to any formal rule-making procedures or articulated pursuant to any adjudicatory procedures" (internal quotation marks omitted)); *State* v. *Drupals*, 306 Conn. 149, 169, 49 A.3d 962 (2012) (citing *Hasselt* for proposition that "[a]n agency form, to the extent it contains an interpretation not adopted pursuant to formal rule-making or adjudicatory procedures," is not entitled to deference (internal quotation marks omitted)). As we have explained, however, this court did not hold in *Hasselt* that an agency's interpretation of the statute that was not adopted pursuant to formal rule-making or adjudicatory procedures is not entitled to deference, and in none of these cases did the court independently analyze the issue.

We further note that, in *Christensen* v. *Harris County*, supra, 529 U.S. 576, on which this court relied in *Hasselt*, the United States Supreme Court recognized that, although interpretations contained in opinion letters "do not warrant *Chevron*-style deference," they are "entitled to respect under [its] decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 [65 S. Ct. 161, 89 L. Ed. 124] (1944) . . . to the extent that those interpretations have the power to persuade . . . ." (Internal quotation marks omitted.) *Christensen* v. *Harris County*, supra, 587; see *Skidmore* v. *Swift & Co.*, supra, 140 ("We consider that the rulings, interpretations and opinions of the [a]dministrator under [the Fair Labor Standards] Act, while not controlling [on] the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend [on] the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). This formulation seems consistent with our jurisprudence holding that, although an agency's interpretation of a statute is not binding, it is entitled to deference when it is time-tested and reasonable.[16] The same is true of an opinion of the attorney general. See *Connecticut Hospital Assn., Inc.* v. *Commission on Hospitals & Health Care*, 200 Conn. 133, 143, 509 A.2d 1050 (1986) ("[a]lthough an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive").

In any event, even if the plaintiffs were correct that an agency's interpretation of a state statute is entitled

[16] We acknowledge that it is arguable that the "respect" given to informal but persuasive policy directives interpreting federal statutes under *Christensen* may be somewhat weaker than the deference that we afford to time-tested and reasonable agency interpretations.

to *no* deference if it was not adopted pursuant to formal rule-making or adjudicatory procedures, the commission attached to its ruling an exhibit showing that, on a number of occasions since 1986, the commission has issued decisions in specific cases applying the rule that disability retirement benefits commence on the first day of the month after the application is received.[17] See footnote 8 of this opinion. The plaintiffs have not explained why these specific cases were not issued pursuant to adjudicatory procedures. Cf. *United States* v. *Independent Bulk Transport, Inc.*, 480 F. Supp. 474, 478 (S.D.N.Y. 1979) (under federal administrative law, "[a]djudicatory proceedings, unlike [rule-making] proceedings, involve determinations of contested facts in applying rules to specific circumstances"). This court has repeatedly afforded deference to an agency's interpretation of a statute, as reflected in the agency's rulings in specific cases. See, e.g., *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 309 Conn. 430–31 (giving deference to interpretation of statute by Board of Review of Employment Security Appeals Division, as reflected in that board's decisions); *Stec* v. *Raymark Industries, Inc.*, 299 Conn. 346, 357, 10 A.3d 1 (2010) ("[i]n light of the [Compensation Review] [B]oard's numerous decisions from 1980 to 2010, a period of thirty years, we conclude that the board's construction of [General Statutes] § 31-301 (a) constitutes a time-tested interpretation" entitled to deference); *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 268, 788 A.2d 60 (2002) (giving deference to agency's interpretation when agency "con-

[17] The commission also recognized exceptions to the rule that payment of retirement benefits commences on the first day of the month after receipt of the application when receipt of the application by the division was delayed through no fault of the applicant, when an agency, through its error, continued a member on sick leave when he should have been retired, and when the applicant failed to apply for retirement in a timely manner because the state misinformed her regarding her retirement rights.

sistently [had] interpreted the statute for more than twenty-five years" in its rulings); *Savings Bank of Rockville* v. *Wilcox*, 117 Conn. 188, 194, 167 A. 709 (1933) ("The interpretation [that] we have given this statute conforms to the practice of the tax commissioner's office and the bank in computing the deductions previously accorded as shown by the stipulation and exhibits. It is a familiar rule of statutory and constitutional construction that such usage, while not absolutely binding [on] the courts, is entitled to great weight." (Internal quotation marks omitted.)).

The plaintiffs contend that the commission's decisions are not entitled to deference because they merely indicate that the commission applied the rule that payment of disability retirement benefits commences on the first day of the month after receipt of the application, not that it "evaluated" that rule. In one of the cases, however, the applicant claimed that, as the result of a settlement with a workers' compensation carrier, the applicant was eligible for disability retirement benefits on a date considerably earlier than the settlement date and the date on which the applicant applied for benefits. The exhibit states that "[t]he [c]ommission *decided* that the retirement benefits could not commence until the first of the month after the [m]ember applied for retirement benefits . . . ." (Emphasis added.) Although the exhibit does not expressly indicate that the commission engaged in a thorough reexamination of its interpretation of the act, the commission presumably considered arguments why that interpretation was incorrect. In any event, the plaintiffs have cited no authority for the proposition that, for an agency's interpretation to be considered time-tested, every application of the interpretation in an adjudicatory proceeding must be subject to a challenge. An agency's interpretation of a statute is time-tested if it "has been formally articulated and applied for an extended period of time . . . ." (Internal

quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 309 Conn. 422.

For similar reasons, we also conclude that *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, supra, 317 Conn. 628, does not support the plaintiff's claim that the commission's interpretation is not entitled to deference because it is not time-tested. In that case, the defendant, the Commissioner of Environmental Protection, claimed that the interpretation of the Department of Environmental Protection (department) of the Connecticut Water Diversion Policy Act, General Statutes § 22a-365 et seq., was entitled to deference because it had "(1) consistently required information from other applicants for water diversion permits that was similar to the category and extent of information [requested of the plaintiff]; and (2) consistently evaluated the direct *and indirect* effects of proposed diversions in acting on diversion permit applications. In support of this claim, the department submitted excerpts from various permit review processes, including correspondence and other internal memoranda, for a variety of applicants seeking diversion permits from the department." (Emphasis in original.) Id., 650. This court concluded that the department's interpretation was not entitled to deference because an interpretation that is set forth only in "private correspondence and internal documents" has not been formally articulated.[18] Id., 651. We conclude that the present case is distinguishable because the commission has formally articu-

[18] We note that, in *Tilcon Connecticut, Inc.*, this court stated that the interpretations of the Department of Environmental Protection were not entitled to deference "because they have been neither formally articulated *nor adopted pursuant to formal rule-making or adjudicatory procedures* . . . ." (Emphasis added.) *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, supra, 317 Conn. 651. As we explained, however, this court had not previously held that no deference is given to an agency's interpretation unless it was adopted pursuant to formal rule-making or adjudicatory procedures.

lated its interpretation of the act in adjudicatory procedures. Moreover, after the commission obtained the formal opinion from the attorney general on the question of when payments of disability retirement benefits become payable under the act, the Office of the State Comptroller distributed the opinion to the heads of all state agencies.[19] It is reasonable to conclude that one reason that the Office of the State Comptroller disseminated the memorandum was so that agencies could make the substance of the opinion known to any SERS member who inquired about the date on which disability retirement benefits become payable. Thus, the 1981 attorney general opinion is distinguishable from the "private correspondence and internal documents" to which deference was not afforded in *Tilcon Connecticut, Inc.* Id. We conclude, therefore, that the commission's interpretation of the act is time-tested.

B

We next address the plaintiffs' claim that the trial court incorrectly determined that the commission's interpretation of the act is reasonable. In support of this claim, the plaintiffs contend that the 1981 attorney general opinion, on which the commission's interpretation is premised, conflicts with certain provisions of the 1983 amendments to the act adopting Tier II of SERS, specifically, General Statutes §§ 5-169 (j), 5-192*l* (c) and 5-192p. See Public Acts 1983, No. 83-533, §§ 16, 28 and 32. For the following reasons, we disagree.

In reaching the conclusion that retirement disability benefits are not retroactive to the day following the last date of paid employment, the attorney general relied on the provisions of General Statutes (Rev. to 1981)

[19] We note that the commission is "within the Retirement Division of the office of the Comptroller for administrative purposes . . . ." General Statutes § 5-155a (a). Under General Statutes § 4-38f (b), "[t]he department to which an agency is assigned for administrative purposes only shall . . . (2) disseminate for the agency any required notices, rules or orders adopted . . . by the agency . . . ."

§ 5-162 (c), (d) and (e),[20] General Statutes (Rev. to 1981) § 5-163a (a), (b) and (c),[21] and General Statutes (Rev. to 1981) § 5-169 (c).[22] See Opinions, Conn. Atty. Gen. No. 1981-50, supra, pp. 1–3. On the basis of the provisions of General Statutes (Rev. to 1981) §§ 5-162 (c) and (d), and 5-163a (a), (b) and (c), the attorney general determined that, because a member seeking normal retirement is retired following the member's application, the application is a prerequisite for retirement. In addition,

[20] General Statutes (Rev. to 1981) § 5-162 provides in relevant part: "(c) . . . (1) Except as provided in section 5-163a, each member who has completed twenty-five or more years of state service shall be retired on his own application on the first day of the month named in the application, and on or after the member's fifty-fifth birthday.

* * *

"(d) . . . (1) Except as provided in section 5-163a, each member who has completed less than twenty-five years of state service shall be retired on his own application, on the first day of the month following his application, if the member has completed ten years of state service and reached his sixtieth birthday.

* * *

"(e) Each retirement application shall be made to the retirement commission and, upon its approval, shall be forwarded to the comptroller, who shall draw his orders upon the treasurer for any amounts the applicant is entitled to receive."

[21] General Statutes (Rev. to 1981) § 5-163a provides in relevant part: "(a) Any member who has completed twenty-five years of state service and has reached the age of fifty prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subdivision (3) of subsection (c) of section 5-162, provided such member so elects prior to June 30, 1980.

"(b) Any member who has completed at least ten but less than twenty-five years of state service and reached the age of fifty-five prior to June 30, 1980, may elect to be retired on the first day of the month following his application and receive retirement benefits in accordance with subsection (d) of this section, provided such member so elects prior to June 30, 1980.

"(c) Any member who has completed at least five but less than ten years of state service and has reached the age of sixty-five prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subsection (d) of this section, provided such member so elects prior to June 30, 1980. . . ."

[22] General Statutes (Rev. to 1981) § 5-169 (c) provides in relevant part: "The governor shall appoint a board of seven physicians, each of whom is a state employee and two of whom shall be experienced in psychiatry, to

under General Statutes (Rev. to 1981) § 5-162 (e), which authorizes the comptroller to "draw his orders upon the treasurer for any amounts the *applicant* is entitled to receive"; (emphasis added); it is the retirement application that triggers retirement payments. With respect to retirement disability benefits, the attorney general determined that the provision of General Statutes (Rev. to 1981) § 5-169 (c) authorizing the board "to determine whether each *applicant* for disability retirement is entitled thereto"; (emphasis added); indicated that an application for retirement is a precondition for retirement.[23] See Opinions, Conn. Atty. Gen. No. 1981-50, supra, p. 2. The attorney general concluded that, because "the disability retirement income is an incident of retirement, it does not begin to accrue prior to retirement." Id., p. 3.

The plaintiffs first contend that the legislature's enactment of §§ 5-169 (j) and 5-192*l* (c) makes it clear that the attorney general's interpretation of the act was incorrect. Specifically, the plaintiffs point out that § 5-169 (j) provides in relevant part that "[a] member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable, whichever is earlier. . . ." Section 5-192*l* (c) provides in relevant part: "Notwithstanding any other provision of sections 5-192e to 5-192x, inclusive, to the contrary, if a member's date of retirement, disability, death or termination occurs in the first six months of any calendar year, his monthly retirement income shall in no event be less than that which would have been payable had his date of retirement, disability, death or termination occurred as of December thirty-first of the prior year, and had his final average earnings, credited service, and breakpoint been determined as of that date.

serve at his pleasure as a medical examining board to determine whether each applicant for disability retirement is entitled thereto. . . ."

[23] On October 5, 1981, the Office of the Comptroller distributed the 1981 attorney general opinion to the heads of all state agencies.

No retroactive payments shall be paid because of such minimum, and *his actual date of retirement, disability, death or termination shall be utilized for all other purposes of the tier II plan.*" (Emphasis added.) The plaintiffs contend that these provisions clearly establish that, for purposes of determining when payment of disability retirement benefits commences, a member's date of disability retirement is the day after the member's "last date of active employment by the state prior to such disability," at the latest.[24] General Statutes § 5-169 (j).

We are not persuaded. As the trial court observed, § 5-169 (j) specifies the provisions of the act that govern the calculation of the *amount* of retirement disability benefits that the member will receive, based on the date of disability.[25] See General Statutes § 5-169 (j) ("[a] member whose date of disability occurs prior to January 1, 1984, shall have his benefits calculated in accordance with the provisions of law in effect at the time of such occurrence"). Section 5-169 (j) does not specify the date that payment of such benefits will commence. Section 5-192*l* (c) provides that, if a member's date of disability occurs in the first six months of the year and the calcula-

[24] The commission contends that, because the plaintiffs did not rely on these specific statutory provisions before the trial court, this claim is not preserved for review. We have some doubt as to whether a party's failure to cite a specific statute in support of its interpretation of a related statute before the trial court precludes the party from arguing that the previously uncited statute supports its interpretation on appeal. We conclude that we need not determine whether this claim was preserved, however, because the plaintiffs cannot prevail on it. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014) ("[r]eview of an unpreserved claim may be appropriate . . . when the minimal requirements for review are met and . . . the party who raised the unpreserved claim cannot prevail" (citation omitted; emphasis omitted; footnote omitted)).

[25] In their reply brief, the plaintiffs contend that, in § 5-169 (j), "date of disability" is used to calculate the amount of the retirement disability benefit only with respect to Tier I, not Tier II. Section 5-169 (j) specifies, however, whether the provisions of Tier I or Tier II apply for purposes of calculating the amount of the benefit.

tion of the amount of the member's disability retirement benefit on the date of disability is less than it would have been if the date of disability had occurred before December 31 of the prior year, the amount will be calculated as of the latter date. Nothing about § 5-192*l* (c) suggests that the date of disability *is* the date of disability retirement or that the "other purposes" of the act to which the statute refers include the date that payment of disability retirement benefits commences. Indeed, both §§ 5-169 (j) and 5-192*l* (c) *distinguish* the date of retirement from the date of disability. See General Statutes § 5-169 (j) (referring separately to "date of disability" and "date as of which [disability retirement] benefits . . . are payable," thereby implying that dates are different); General Statutes § 5-192*l* (c) (referring separately to "date of retirement" and "date of . . . disability," thereby implying that dates are different). Moreover, if the legislature had intended to mandate the payment of disability retirement benefits commencing on the day after the last day of paid employment, we cannot conceive why it would have done so in this roundabout way instead of expressly stating the date that payment commences.

The plaintiffs further contend that § 5-192p (a) implies that disability retirement benefits become payable on the day after the member's last day of paid employment. Section 5-192p (a) provides in relevant part that, "[i]f a member of tier II, while in state service, becomes disabled as defined in subsection (b) of this section, prior to age sixty-five, he is eligible for disability retirement if the member has completed at least ten years of vested service. . . ." We conclude that this statute merely sets forth the conditions for eligibility for disability retirement benefits; it does not provide that the date of eligibility and the date that benefits become payable are identical.

Finally, if the legislature had intended to overrule the 1981 attorney general opinion when it enacted the 1983

amendments adopting Tier II of SERS, it presumably would have amended the act to ensure that the same rule would apply to members subject to § 5-169, governing Tier I disability retirement benefits. The plaintiffs have made no claim that that is the case. We conclude, therefore, that the 1983 amendments do not clearly indicate that the attorney general's interpretation of the act was incorrect. Rather, the act is silent on the question of when disability retirement benefits commence.[26]

In light of this silence, we acknowledge that the express provisions of the act do not *compel* the interpretation set forth in the attorney general's opinion and adopted by the commission. We agree with the plaintiffs, for example, that the fact that an application is a prerequisite for payment of disability retirement benefits—which the plaintiffs have never denied—does not, ipso facto, compel the conclusion that retroactive payment of the benefits is prohibited. Nevertheless, we conclude, for the following reasons, that the commission's position that disability retirement benefits are payable on the first day of the month following application is reasonable.

First, the express terms of the act provide that, for normal retirement,[27] early retire-

[26] In reaching this conclusion, we acknowledge that the act is complex and hardly a model of clarity. For example, § 5-169 (j) provides in relevant part that "[a] member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable, *whichever is earlier*. . . ." (Emphasis added.) It is unclear to us how a member's disability retirement benefits could be payable earlier than his last date of active employment (which, according to the plaintiffs, means last date of *paid* employment) when the parties in the present case agree that a member cannot receive employment compensation and retirement benefits at the same time. See footnote 32 of this opinion. We note that the plaintiffs contend that, for purposes of § 5-169 (j), the phrase "date as of which [a member's] benefits . . . are payable" means the date that the member filed his application for benefits. They cite no authority in support of this claim, which would be inconsistent with their claim that disability retirement benefits are payable the day after the last day of paid employment. They also do not explain how a member could file an application for disability retirement benefits earlier than his last day of paid employment.

[27] General Statutes § 5-162 (c), governing Tier I normal retirement for members with twenty-five or more years of service, provides in relevant

ment[28] and hazardous duty retirement,[29] retirement

part: "(1) Except as provided in section 5-163a, each member who has completed twenty-five or more years of state service shall be retired on his own application on the first day of the month named in the application, and on or after the member's fifty-fifth birthday.

"(2) Each member who has completed twenty-five or more years of state service and has reached his seventieth birthday and who is in an appointive position shall continue in service and shall be retired on the first day of the month on or after his seventieth birthday, upon notice from the Retirement Commission to the member, to the executive head of his agency and the Comptroller.

"(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date . . . ."

Although § 5-162 (c) does not specify that the "day of the month named in the application" must be *after* the date of the application, the 1981 attorney general opinion presumes that that is the case, and neither the plaintiffs nor the commission has suggested otherwise.

General Statutes § 5-162 (d), governing Tier I normal retirement for members with fewer than twenty-five years of service, provides in relevant part: "(1) Except as provided in section 5-163a, each member who has completed less than twenty-five years of state service shall be retired on his own application, on the first day of the month following his application, if the member has completed ten years of state service and reached his fifty-fifth birthday.

"(2) Each such member in an appointive position who has reached his seventieth birthday shall continue in service and shall be retired on the first day of the month on or after his seventieth birthday, upon notice from the Retirement Commission to the member, the executive head of his agency and the Comptroller.

"(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date . . . ."

General Statutes § 5-192*l*, governing Tier II normal retirement, provides in relevant part: "(a) Each member of tier II who has attained age sixty-five and has completed ten or more years of vesting service may retire on his own application on the first day of any future month named in the application. Benefits shall be payable from that date provided the member is no longer in state employment.

"(b) Each member of tier II who has attained age seventy and has completed five or more years of vesting service shall be retired on the first day of the month coincident with or, otherwise, immediately following his seventieth birthday, except as provided in subsection (e) of this section.

"(c) Each member of tier II referred to in subsections (a) and (b) of this section shall receive a monthly retirement income beginning on his retirement date . . . ."

[28] General Statutes § 5-192m (a), governing Tier II early retirement, provides: "Each member of tier II who has attained age fifty-five and has completed ten or more years of vesting service, shall be retired on his own application on the first day of any future month named in the application. Benefits shall be payable from that date provided the member is no longer in state employment."

[29] General Statutes § 5-192n provides in relevant part: "(a) Each 'hazardous duty member' who has completed twenty-five years of credited service while a hazardous duty member may be retired on his own application on the first day of any future month named in the application. . . .

occurs after the date that an application is filed, and payment of retirement benefits commences on the day of retirement. Although the act does not expressly state when disability retirement occurs or when payment of disability retirement benefits commences, it is reasonable for the commission to treat disability retirement consistently with these other forms of retirement.[30]

Second, the provisions of the act were negotiated by the state and representatives of the state employee unions pursuant to collective bargaining and were submitted to the legislature for approval and codification pursuant to § 5-278 (b). State employers and the unions have presumably been aware of the 1981 attorney general opinion, which was distributed to the heads of all state agencies, as well as the commission's decisions applying its interpretation of the act with respect to the date that normal and disability retirement benefits become payable, and neither party has sought to renegotiate the agreement or to amend the provisions of the act to reflect a different understanding. In addition, the legislature is presumed to be aware of the interpretation given to statutes by the attorney general and administrative agencies, and it has not given any indication that it had a different understanding of the agreement

"(b) Each member referred to in subsection (a) of this section shall receive a monthly retirement income beginning on his retirement date . . . ."

[30] The plaintiffs suggest that the fact that the provisions governing disability retirement, unlike the provisions governing normal retirement, early retirement and hazardous duty retirement, do not expressly specify the date of retirement and the date that payment of retirement benefits commences shows that the intent of the act was to treat disability retirement differently. If that were the case, however, we cannot conceive why the parties who negotiated the provisions of the act and the 1983 amendments adopting Tier II would have chosen to remain *silent* on the question of when disability retirement occurs and when benefits become payable instead of specifying when those events occur. It is more reasonable to conclude that this silence was a legislative oversight than to conclude that the legislature differentiated disability retirement from the other forms of retirement by intentionally remaining silent on this issue, thereby giving rise to the present uncertainty and confusion.

that the parties submitted to it for approval, even though the legislature has amended the act several times since 1981. See *Berkley* v. *Gavin*, 253 Conn. 761, 776 n.11, 756 A.2d 248 (2000) ("we have applied [the] doctrine of legislative acquiescence to administrative interpretations of statutes"); *Housing Authority* v. *Dorsey*, 164 Conn. 247, 253, 320 A.2d 820 ("[w]e . . . construe the legislature's failure to amend [General Statutes (Rev. to 1973)] § 8-42 after the attorney general's opinion that the statute barred tenants from being commissioners as an indication of legislative intent that tenants should not be placed in a position [in which] they could control housing authorities in whose properties they were tenants"), cert. denied, 414 U.S. 1043, 94 S. Ct. 548, 38 L. Ed. 2d 335 (1973); see also *State* v. *Salamon*, 287 Conn. 509, 525, 949 A.2d 1092 (2008) ("[l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute" (internal quotation marks omitted)).

Third, we are not persuaded by the plaintiffs' argument that the commission's interpretation of the act "punishes injured members who attempt to recover." The plaintiffs posit "two employees, one [A] who [after his last day of paid employment] attempts rehabilitation through physical therapy or other treatment before sending in the application for disability retirement. Another employee [B] leaves work and immediately files for benefits, making no attempt to regain the ability to work. The second employee will receive more in state retirement benefits because there will be no gap between initial injury or sickness and application for pension benefits." The reason that employees A and B are treated differently in this scenario, however, is that A believed that he could not establish that he was entitled to disability retirement benefits immediately after his last date of paid employment, whereas B was in

fact able to do so.[31] If B *could* continue the service for which he was employed, he would not qualify for disability retirement benefits at any time, notwithstanding the fact that he filed an application for disability retirement benefits immediately after his last day of paid employment. If A believed as of his last day of paid employment that it was unlikely that he would be able to return to work but was uncertain whether he had sufficient information to establish that fact, that uncertainty would not prevent him from submitting an application the next day, if he so chose.[32] See Regs.,

[31] Under § 5-192p (b), which governs Tier II disability retirement, "[a] member is disabled for the first twenty-four months [after retirement] if he is permanently unable to continue to render the service in which he has been employed. Disability retirement continues thereafter only if such member is totally disabled for any suitable and comparable job."

[32] The commission points out that SERS members are entitled to state service credit for certain forms of unpaid leave. It contends that, if the period during which a member was entitled to receive payment of disability retirement benefits overlapped with the period for which the member was entitled to receive state service credit, as a general rule, the member could not both receive payment of the benefits and credit for state service during the period of overlap, a practice known as "double dipping." Cf. General Statutes § 5-192*l* (a) ("[b]enefits [for normal retirement] shall be payable from [the first day of any future month named in the application] provided the member is no longer in state employment"); General Statutes § 5-192v (b) ("[n]o [retired] member reemployed [by the state on a permanent basis] . . . shall receive a retirement income during such member's reemployment or other state service," with certain exceptions); see also General Statutes § 5-192i (f) ("[i]f an employee is absent from the service of the state due to a work-related injury or disease for which periodic workers' compensation cash benefits are payable, the period of such absence shall not count as a break in service and shall be considered vesting service"). According to the commission, § 5-192p (h) provides an exception to this rule. See General Statutes § 5-192p (h) ("if the member recovers from such disability prior to reaching what would have been his normal retirement date . . . such member shall receive credit for both vesting and credited service purposes for the years he was disabled").

The commission claims that the plaintiffs' position that disability retirement benefits are payable commencing on the day after the last day of paid employment would be unworkable because it would result in double dipping whenever a member took an unpaid leave for which he received state service credit after his last day of paid employment and later filed an application for retirement disability benefits that was granted. It is unclear to us, how-

Conn. State Agencies § 5-155a-2 (d).[33] If the board ever, that starting payment of retirement disability benefits on the first day of the month after receipt of the application would be the only way to avoid double dipping under these circumstances. If the plaintiffs were correct that payment of disability retirement benefits commences on the day after the last day of paid employment, the commission might adopt a rule that would give the member a choice between (1) receiving state service credit for the leave period and payment of retirement benefits starting the day after the last day of leave, or (2) receiving payment of retirement benefits starting the day after his last day of paid employment, but no state service credit. Alternatively, the commission might adopt a blanket rule barring either receipt of state service credit or payment of retirement benefits during the period of overlap.

Indeed, under the rule that payment of disability retirement benefits commences on the first day of the month after receipt of the application, the commission's suggestion that a member cannot file an application for retirement benefits and simultaneously take an unpaid leave that entitles the member to service credit creates a dilemma for a SERS member who, as of his last day of paid employment, is uncertain whether he qualifies for disability retirement benefits. Although the commission's position that retirement disability benefits are payable commencing on the first day of the month after receipt of the application creates an incentive for the member to file an application for disability retirement benefits as soon as possible after the last day of paid employment to maximize benefits if the application is ultimately granted, applying early in lieu of taking an unpaid leave would potentially deprive the member of state service credit to which he would otherwise have been entitled if the application is ultimately denied.

We note that the plaintiff's claim that the statutes cited by the commission prohibit only the simultaneous receipt of *employment compensation* and retirement benefits, not the simultaneous receipt of state service credit and retirement benefits. In support of this claim, they rely only on § 5-192p (h), which, according to the commission, provides an *exception* to the general rule that a member cannot receive state service credit and retirement benefits for the same period. Because we would conclude that the commission's position that disability retirement benefits become payable on the first day of the month after receipt of the application is reasonable regardless of which of these positions on the double dipping question is correct, and because the parties have not comprehensively briefed these issues, we decline to resolve them here.

[33] Section 5-155a-2 (d) of the Regulations of Connecticut State Agencies provides in relevant part: "The time period for filing an application for disability retirement benefits or petition for service connected disability retirement shall begin on the day after the applicant's last day of paid employment by the State of Connecticut and shall end at close of business on the date that is twenty-four months after the applicant's last day of paid employment."

denied the application, the member would have one year in which to file a motion for reconsideration. See id., § 5-155a-2 (f).[34] The member would then have one year from the date that he sought reconsideration to submit additional information to the board about his medical condition on the last day of employment and an explanation as to why the information was not available at the time of the original application. See id., § 5-155a-2 (g).[35] Thus, a member who filed an application the day after his last day of paid employment, even though he was not certain at that time that he could establish that he was qualified to receive disability retirement benefits, would have up to two years after his application was denied to obtain additional information to support the application. Although the member would admittedly have less time to obtain information supporting his application than a member who waited for two years after his last date of paid employment to file an application would have, we are not persuaded that that fact renders the commission's interpretation unreasonable.[36] We further note that an employee who

[34] Section 5-155a-2 (f) of the Regulations of Connecticut State Agencies provides: "The member shall have one (1) calendar year from the date of the Board's decision of denial to seek reconsideration of said decision. If the member does not seek reconsideration of the Board's decision of denial within said one (1) calendar year, the Board's initial decision of denial shall stand. The decision of denial shall be brought before the Commission for its approval as administratively denied."

[35] Section 5-155a-2 (g) of the Regulations of Connecticut State Agencies provides: "The member shall have one year from the date he or she sought reconsideration to: (1) submit the requested records (if any); and (2) submit additional material facts concerning his or her medical condition at the date of termination of employment; and (3) explain in writing why such material facts were not available to the member at the time of his or her original application to the Board. If the member does not provide the above information within one (1) calendar year of the date of seeking reconsideration, the Board's initial decision of denial shall stand. The decision of denial shall be brought before the Commission for its approval as administratively denied."

[36] We acknowledge that a member who sits on his rights and, without good reason, fails to file an application for disability retirement benefits, even though he clearly qualifies for them, would lose benefits for the period

takes an unpaid leave before filing an application because he is uncertain whether he will be able to return to work and who ultimately receives disability retirement benefits is in no worse a position than an employee who takes an unpaid leave and ultimately returns to work. Both will be unpaid during the period they are on leave. Finally, we note that an uncodified addendum to the SERS agreement governing disability retirement benefits provides that, if the board ultimately denies the member's application, the agency in which the member was last actively employed is required to return the applicant to employment. Thus, the member is not punished for filing an application that is denied.

Fourth, making disability retirement benefits payable on the first day of the month after an application is received allows the state to predict at any given time its potential liability for payment of such benefits. If a member could be paid benefits retroactively to a date up to two years before receipt of the application, the state could be subject to sudden, unforeseen increases in liability.[37] Moreover, if the rule were now changed,

of delay. We cannot conclude, however, that that fact renders the commission's interpretation unreasonable. We also note that the commission has recognized certain exceptions to the rule that benefits are payable on the first day of the month after receipt of the application when the application is delayed through no fault of the member. See footnote 17 of this opinion.

[37] The commission further contends that, under the plaintiff's interpretation, "there would be no incentive for the employing agency to work with the member to determine if [he] could return to work [because] the member will claim disability retirement benefits from the last day [he was] physically on the job." The commission points out that, during many types of leave, "the member's job is protected as [he attempts] to recover from a temporary disability and return to work." See, e.g., 29 U.S.C. § 2614 (2018) (providing certain protections to employees who takes leave because of health condition); General States § 31-51nn (a) (providing certain protections to employees who takes medical leave). According to the commission, if the member were entitled to disability benefits from the day after the last day of paid employment, the employing agency would receive no benefit from waiting to see if the employee would return to work and, therefore, would simply "separate" the member immediately, thereby depriving the member of his protected status. We are not persuaded. First, the commission has not

the state could be subject to claims for retroactive payments from members who are already retired.

Finally, and perhaps most significant, it is appropriate for this court to give great deference to the commission's reasonable interpretation in light of the gap that the legislature left in the act on this issue: the statute does not specify the date on which an employee's disability retirement benefits will begin. See *Silver Lining Group EIC Morrow County* v. *Ohio Dept. of Education Autism Scholarship Program*, supra, 85 N.E.3d 801 ("[a]n agency's reading that fills a gap . . . in a reasonable way in light of the [l]egislature's design controls" (internal quotation marks omitted)). Even if the commission reasonably *could have* adopted the plaintiffs' position, nothing in the act required it to do so, and we ought not substitute our judgment as to which of two reasonable positions is preferable for the judgment of the commission. Accordingly, we conclude that the trial court properly gave substantial deference to the commission's position that disability retirement benefits become payable on the first day of the month after the application is received.

II

We next address the plaintiffs' claim that, as a fiduciary of the plaintiffs, the commission has the burden

explained how the employing agency would know whether a member who takes a leave of absence for health reasons would later file an application for disability retirement benefits. Second, the commission has not explained how an employing agency could prevent an employee from taking a medical leave to which he is entitled by law or why it could simply ignore the laws that are intended to protect such employees. Third, the benefit from not terminating the member immediately would be that the state might not have to pay any disability retirement benefits if the member were able to return to work. Finally, this argument assumes that this issue could not arise under the commission's interpretation of the act because a member cannot file an application for retirement disability benefits on the day after the member's last day of paid employment if the member also takes an unpaid leave of absence. As we already indicated, it is unclear to us whether that is the case. See footnote 32 of this opinion.

of proving fair dealing by clear and convincing evidence and that it has failed to do so.[38] The commission contends that, because this is an administrative appeal, not a civil action for breach of fiduciary duty, the burden is on the plaintiffs to demonstrate that the commission's interpretation of the act is incorrect. We conclude that the commission did not have the burden of proving fair dealing by clear and convincing evidence.

We begin with a review of the governing law. General Statutes § 5-155a (c) provides in relevant part that the commission "shall have general supervision of the operation of the retirement system, shall conduct the business and activities of the system, in accordance with this chapter and applicable law and each trustee shall be a fiduciary with respect to the retirement system and its members. . . ." "This court has instructed that . . . [a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 800, 99 A.3d 1145 (2014). "Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence."

[38] We note that, although the plaintiffs raised this claim in their briefs to the trial court, the trial court did not address it. The commission contends that the claim is not reviewable because the plaintiffs did not allege a breach of fiduciary duty in their initial appeal to the trial court. We conclude that we need not determine whether the plaintiffs' claim is reviewable because they cannot prevail. See footnote 24 of this opinion.

(Internal quotation marks omitted.) *Murphy* v. *Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998).

"[I]t is only when the confidential relationship is shown together with suspicious circumstances, or [when] there is a transaction, contract, or transfer betweenpersons in a confidential or fiduciary relationship, *and* [*when*] *the dominant party is the beneficiary of the transaction*, *contract*, *or transfer*, that the burden shifts to the fiduciary to prove fair dealing." (Emphasis added; internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 456, 844 A.2d 836 (2004); see id. ("*if the superior party obtains a possible benefit*, equity raises a presumption against the validity of the transaction or contract, and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction or contract" (emphasis in original; internal quotation marks omitted)); id., 457 ("when a breach of fiduciary duty is alleged, and the allegations concern fraud, self-dealing or a conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence").

The plaintiffs in the present case appear to claim that the commission was required to prove by clear and convincing evidence that its use of "an unwritten practice . . . to set a start date for disability benefits" was fair to the plaintiffs. The plaintiffs contend that "[a]n unwritten policy could lead to inconsistent and arbitrary decisions" and "does not give fair notice to employees who are contemplating disability retirement." The plaintiffs also claim that the substance of the commission's rule is unfair insofar as it punishes SERS members who do not file an application for disability retirement benefits immediately after their last day of paid employment because they are uncertain whether they can establish that they qualify. Even if we were to assume, however, that the plaintiffs established a prima facie

case with respect to these issues,[39] the plaintiffs have not claimed that the commission took advantage of its fiduciary relationship with SERS members to benefit itself. We conclude, therefore, that the burden did not shift to the commission to prove fair dealing by clear and convincing evidence.[40] See, e.g., *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 456–57 (fiduciary is required to prove fair dealing by clear and convincing evidence only if plaintiff alleges that fiduciary obtained benefit from alleged wrongdoing). We further note that, even if we were to conclude that it was unfair of the commission to apply its interpretation of the act to the plaintiffs because it was not expressly set forth in the act or any regulation, it is unclear to us what the remedy would be. It would be anomalous to conclude that the commission must apply the plaintiffs' interpretation, which also is not expressly set forth in the act or regulations. Accordingly, even if we were to assume, without deciding, that the commission's application of a time-tested and reasonable rule that fills a gap in the act could conceivably constitute an abuse of its fiduciary relationship

[39] As we explained, the Office of the Comptroller distributed the 1981 attorney general opinion, which provides the basis of the commission's interpretation, to the heads of all state agencies, presumably so that the agencies can provide this information to any SERS member who inquires about the issue. Moreover, there is no evidence that the commission has applied this interpretation inconsistently. Indeed, the only evidence is to the contrary. We also concluded that the plaintiffs have failed to establish that the commission's rule is punitive to SERS members who do not file an application for disability retirement benefits immediately after their last day of paid employment.

[40] We are aware of no authority for the proposition that a different rule applies when a fiduciary is administering a pension or healthcare plan and the benefit to the fiduciary may be somewhat attenuated. See, e.g., *Roth* v. *Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994) (under Employee Retirement Income Security Act of 1974, "plaintiffs bear the burden of proving a breach of fiduciary duty and a prima facie case of loss to the plan"); *Rodrigues* v. *United Public Workers, AFSCME Local 646, AFL-CIO*, 135 Haw. 316, 319, 349 P.3d 1171 (2015) (plaintiffs demonstrated by preponderance of evidence that administrator of union's healthcare benefit plan breached his fiduciary duty to participants).

with SERS members, and that a claim of breach of fiduciary duty may be raised in an administrative appeal, we conclude that the plaintiffs have not made a colorable claim that that is the case here.

The judgment is affirmed.

In this opinion the other justices concurred.

DELORES PEEK *v.* MANCHESTER MEMORIAL HOSPITAL ET AL.
(SC 20414)

Robinson, C. J., and McDonald, Mullins, Kahn and Ecker, Js.*

Syllabus

Pursuant to the statute ((Rev. to 2015) § 52-584) setting forth the limitation period for actions brought against hospitals for negligence or medical malpractice, among other actions, such actions may not be "brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ."

The plaintiff sought to recover damages from the defendant hospital and its holding company for negligence for injuries she sustained while admitted to the hospital. On February 10, 2015, the plaintiff, while on fall prevention protocol, fell while using the restroom and sustained injuries to her shoulder and neck. She was discharged from the hospital two days later. On April 6, 2015, while receiving follow-up care at her physician's office, a staff member in that office informed the plaintiff that a nurse or nurse's aide should have been responsible for her safety while she was an inpatient at the hospital. On May 22, 2017, the plaintiff delivered the present action to the state marshal for service of process. Subsequently, the defendants filed a motion for summary judgment, claiming that the plaintiff's action was barred by the two year statute of limitations set forth in § 52-584. The trial court granted the defendants' motion, reasoning that the plaintiff suffered actionable harm from the fall and injuries on February 10, 2015, and, having received a statutory ((Rev. to 2015) § 52-190a (b)) ninety day extension of the two year limitation period set forth in § 52-584, should have commenced her action on or before May 10, 2017. The trial court thus determined that

* This case was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Kahn and Ecker. Justice D'Auria has since been removed from the panel.

the plaintiff's action was time barred insofar as she commenced her action on May 22, 2017. The plaintiff appealed from the trial court's judgment in favor of the defendants, and the Appellate Court reversed the trial court's judgment. The Appellate Court, relying on this court's decision in *Lagassey* v. *State* (268 Conn. 723), construed the term "injury," for purposes of § 52-584, as synonymous with "actionable harm," which occurs when the plaintiff discovers or should have discovered that the harm complained of was caused by the negligence of the defendant. The Appellate Court concluded that the trial court should not have granted the defendants' motion for summary judgment because the evidence demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584. On the granting of certification, the defendants appealed to this court. *Held* that the Appellate Court correctly concluded that, viewing the facts in the light most favorable to the plaintiff, there was a genuine issue of material fact regarding whether the plaintiff commenced her action within two years from the date of her "injury," as that term is understood in the context of § 52-584, and, accordingly, the Appellate Court properly reversed the trial court's judgment: Connecticut case law was clear that the term "injury," as used in § 52-584, means "actionable harm," which occurs when the plaintiff discovers or should have discovered that the harm complained of was caused by the negligence of the defendant, and the fact that the plaintiff averred that she did not know the cause of her fall or that the defendants were responsible for her safety while she was an inpatient at the hospital until April 6, 2015, was sufficient to create a genuine issue of material fact regarding when her actionable harm occurred; moreover, there was no merit to the defendants' claim that, because the plaintiff's physical injuries from her fall were obvious, the Appellate Court improperly applied failure to diagnose or latent injury cases to the facts of this case, as the definition of "actionable harm" established in *Lagassey* and its progeny was applicable to all actions subject to § 52-584, regardless of whether the physical harm was obvious or latent; furthermore, the defendants could not prevail on their claim that the Appellate Court should have relied on this court's decision in *Burns* v. *Hartford Hospital* (192 Conn. 451), in which the plaintiff sustained obvious injuries, like the plaintiff in the present case, and in which the court determined that the limitation period set forth in § 52-584 began to run when the plaintiff sustained his injuries, as the plaintiff in *Burns*, unlike the plaintiff in the present case, became aware of the connection between his injuries and the defendants' negligence at the time that the injuries were sustained; in addition, contrary to the defendants' claim that, because *Lagassey* was decided after the statute (§ 1-2z) embodying the plain meaning rule became effective, the court in *Lagassey* improperly neglected to apply that rule and, pursuant to that rule, should have interpreted the term "injury" in § 52-584 to mean "hurt, damage, or loss sustained," the court in *Lagassey* simply restated

and followed this court's long-standing interpretation of "injury" for purposes of § 52-584 as actionable harm, this court saw no reason to abandon that long-standing interpretation in the present case, as the legislature, in enacting § 1-2z, did not intend for this court to overrule its prior interpretations of statutory language in cases decided prior to the enactment of § 1-2z, and the doctrine of stare decisis and the tenet of statutory interpretation that cautions against overruling case law involving this court's construction of a statute, if the legislature reasonably may be deemed to have acquiesced in that construction, as in the present case, counseled against accepting the defendants' invitation to revisit *Lagassey*'s interpretation of § 52-584.

Argued November 17, 2020—officially released February 2, 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 Hartford, where the court, *Cobb*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed; thereafter, the Appellate Court, *Alvord*, *Moll* and *Bear*, *Js.*, reversed the trial court's judgment and remanded the case for further proceedings, and the defendants, on the granting of certification, appealed to this court. *Affirmed.*

Sean R. Caruthers, with whom, on the brief, was *Michael D. Neubert*, for the appellants (defendants).

Neil Johnson, for the appellee (plaintiff).

Opinion

MULLINS, J. The defendants, Manchester Memorial Hospital and Prospect Medical Holdings, Inc., appeal from the judgment of the Appellate Court, which reversed the judgment of the trial court and concluded that a genuine issue of material fact exists as to whether the action of the plaintiff, Delores Peek, was barred by the two year statute of limitations set forth in General

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

Statutes (Rev. to 2015) § 52-584.[1] We conclude that a genuine issue of material fact exists regarding whether the plaintiff initiated her action within two years from the date of her injury, as that term is understood in the context of § 52-584. Therefore, we affirm the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following relevant facts from the record, viewed in the light most favorable to the plaintiff as the nonmoving party. "On January 30, 2015, the plaintiff was admitted to Manchester Memorial Hospital with a medical diagnosis of [C. diff] diarrhea. On or about that date, she was assessed at the hospital and found to be at risk for falling. She was placed on 'fall prevention protocol' and required assistance to leave her hospital bed. On February 10, 2015, the plaintiff fell while using the restroom and sustained injuries to her shoulder and neck, for which she received medication and treatment. She 'was unaware,' on the date of her fall, 'what was the cause of [her] fall.' The plaintiff left the hospital on February 12, 2015, and received follow-up care through December 10, 2015, on which date she underwent neck surgery. On or about April 6, 2015, staff at the office of the plaintiff's doctor informed the plaintiff that 'a nurse or nurse's aide should have been responsible for [her] safety while inpatient at [the hospital].'

"On November 22, 2016, the plaintiff received an automatic ninety day extension of the statute of limitations pursuant to General Statutes [Rev. to 2015] § 52-190a

[1] General Statutes (Rev. to 2015) § 52-584 provides in relevant part that "[n]o action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ."

Hereinafter, unless otherwise indicated, all references to § 52-584 in this opinion are to the 2015 revision of the statute.

(b).[2] The plaintiff delivered the action to the state marshal for service of process on May 22, 2017. In her one count complaint, the plaintiff alleges that her fall resulted from the defendants' negligence in 'fail[ing] to exercise the degree of care, skill, and diligence ordinarily exercised by hospitals engaged in the treat[ment] of patients . . . on . . . fall prevention protocol . . . .' On July 26, 2017, the defendants filed an answer and a special defense alleging that the plaintiff's claim was barred by the statute of limitations in § 52-584. On July 31, 2017, the plaintiff filed her reply to the special defense, stating therein: 'The plaintiff . . . denies any and all allegations of the defendants' special defense in its entirety . . . .'

"On September 13, 2017, the defendants filed a motion for summary judgment, maintaining that the plaintiff's action was barred by the statute of limitations in § 52-584. The documents submitted with the defendants' motion and memorandum of law in support of their motion were the plaintiff's certificate of good faith pursuant to § 52-190a and attached written opinion letter, the plaintiff's request for an extension of the statute of limitations, the state marshal's return of service, the defendants' answer and special defense, and the plaintiff's reply thereto.

"On December 29, 2017, the plaintiff objected to the motion for summary judgment, arguing . . . [inter alia, that] the statute of limitations did not begin [to run] until April 6, 2015, on which date she claimed that she 'learned that she was on fall risk protocol and that while

[2] General Statutes (Rev. to 2015) § 52-190a (b) provides in relevant part: "Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted . . . ."

Hereinafter, all references to § 52-190a in this opinion are to the 2015 revision of the statute.

on fall risk protocol that the hospital was required to provide her assistance whenever she left her bed.' She argued that she 'was not aware that the defendants' conduct or lack thereof was the cause of her injury until she was informed by the defendant provider on or about April 6, 2015.' The plaintiff attached to her opposition memorandum her affidavit averring that she 'was unaware,' on the date of her fall, 'what was the cause of [her] fall.' She further averred that staff at her doctor's office informed her on April 6, 2015, that 'a nurse or nurse's aide should have been responsible for [her] safety while inpatient at [the hospital].' The defendants did not file a reply memorandum.

"On January 2, 2018, the court granted the defendants' motion for summary judgment [and rendered judgment for the defendants], stating that 'the plaintiff did not place the action in the hands of the marshal until May 22, 2017. Because the plaintiff suffered actionable harm—the fall and injuries—on February 10, 2015, she should have brought the action on or before February 10, 2017. Having received a ninety day extension . . . the suit should have been initiated on or before May 10, 2017. Having failed to initiate this action within the applicable statute of limitations, the action is time barred.' " (Footnote added; footnotes omitted.) *Peek* v. *Manchester Memorial Hospital*, 193 Conn. App. 337, 339–41, 219 A.3d 421 (2019).

The plaintiff appealed from the judgment of the trial court. On appeal to the Appellate Court, the plaintiff asserted "that she submitted evidence in opposition to the defendants' motion for summary judgment that show[ed] that she did not discover her 'injury' for purposes of § 52-584 until April 6, 2015. She argue[d] that actionable harm occurred on April 6 when she learned that the defendants' negligence had caused her injury." Id., 345.

The Appellate Court reversed the judgment of the trial court. Id., 348. In doing so, the Appellate Court construed the term "injury" for purposes of § 52-584 consistent with this court's decision in *Lagassey* v. *State*, 268 Conn. 723, 747–49, 846 A.2d 831 (2004). The Appellate Court noted that, in *Lagassey*, this court explained that, as used in § 52-584, "the term 'injury' is synonymous with 'legal injury' or 'actionable harm.' 'Actionable harm' occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action." Id., 748; see *Peek* v. *Manchester Memorial Hospital*, supra, 193 Conn. App. 345 (quoting *Lagassey*). This court also explained that "actionable harm does not occur until the plaintiff discovers or should have discovered that the harm complained of *was caused by the negligence of the defendant*." (Emphasis in original.) *Lagassey* v. *State*, supra, 747; accord *Peek* v. *Manchester Memorial Hospital*, supra, 346 (quoting *Lagassey*).

Applying this court's interpretation of § 52-584 from *Lagassey*, the Appellate Court concluded that "the evidence before the trial court demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584 . . . ." *Peek* v. *Manchester Memorial Hospital*, supra, 193 Conn. App. 339. Accordingly, the Appellate Court concluded that the trial court should not have granted the defendants' motion for summary judgment, and it reversed the judgment of the trial court. Id., 348.

Thereafter, the defendants sought certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that there existed a genuine issue of material fact as to whether the plaintiff's action was barred by the two year statute of limitations set forth in . . . § 52-584?" *Peek* v. *Manchester Memorial Hospital*, 334 Conn. 906, 220 A.3d 801 (2019).

On appeal to this court, the defendants assert that the Appellate Court misapplied this court's precedent under § 52-584 to the facts of the present case and relied on the immaterial fact of when the plaintiff became aware that the defendants were responsible for her safety. They further argue that this court should construe § 52-584 consistent with the plain meaning rule of General Statutes § 1-2z, and that such a construction would require reversal of the judgment of the Appellate Court. We disagree and, accordingly, affirm the judgment of the Appellate Court.

"The scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 389, 54 A.3d 532 (2012). In the present case, the trial court granted the defendants' motion for summary judgment on the ground that the plaintiff failed to demonstrate a genuine issue of material fact regarding whether she initiated this action within two years of suffering an "injury," as required by § 52-584. To the extent that determining whether summary judgment was appropriate in this case is based on interpreting § 52-584, our review is plenary. See, e.g., *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 410, 246 A.3d 470 (2020).

Before addressing the defendants' specific arguments, we lay out this court's long-standing interpretation of the term "injury" for purposes of § 52-584. We begin with the statutory language. General Statutes (Rev. to 2015) § 52-584 provides in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice

of a . . . hospital . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . .''

In considering the meaning of the term ''injury'' for purposes of § 52-584, however, we do not write on a clean slate. In 2004, in *Lagassey*, this court took the ''opportunity to *restate* the correct legal standard by which to evaluate the timeliness of causes of action in negligence.'' (Emphasis added.) *Lagassey* v. *State*, supra, 268 Conn. 748. Relying on a case that dated back to 1986, this court explained that ''[t]he limitation period for actions in negligence begins to run on the date when the injury is first discovered or in the exercise of reasonable care should have been discovered. See General Statutes §§ 4-148 (a)[3] and 52-584. In this regard, the term 'injury' is synonymous with 'legal injury' or 'actionable harm.' 'Actionable harm' occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action. . . . A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence; they are therefore necessary ingredients for ' ''actionable harm.'' ' . . . Furthermore, 'actionable harm' may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another.'' (Citations omitted; footnote added.) *Lagassey* v. *State*, supra, 748–49, quoting *Catz* v. *Rubenstein*, 201 Conn. 39, 44, 47, 513 A.2d 98 (1986). In discussing the term ''injury,'' this

[3] Although § 4-148 (a) was the subject of a technical amendment in 2016; see Public Acts 2016, No. 16-127, § 7; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

court further explained that it has "repeatedly stated that 'an injury occurs when a party suffers some form of actionable harm.' . . . This court first used the term 'actionable harm' in 1984, in *Burns* v. *Hartford Hospital*, [192 Conn. 451, 460, 472 A.2d 1257 (1984)]." (Citations omitted.) *Lagassey* v. *State*, supra, 739.

After *Lagassey*, this court has uniformly reaffirmed the definition of "actionable harm." See, e.g., *Kelly* v. *University of Connecticut Health Center*, 290 Conn. 245, 255, 963 A.2d 1 (2009) ("The discovery of the presence of a foreign object in the body of a person who recently has undergone a medical procedure presupposes discovery of the 'essential elements of a cause of action in negligence,' as required by the standard this court articulated in *Lagassey* v. *State*, supra, 268 Conn. 748. Thus, when the plaintiff discovered the presence of the laser fibers sometime in 2000, he became aware of actionable harm within the meaning of § 4-148 and the one year limitation period began to run."); *Tarnowsky* v. *Socci*, 271 Conn. 284, 297, 856 A.2d 408 (2004) (relying on definition of "actionable harm" from *Lagassey* and concluding that "the two year statute of limitations set forth in § 52-584 does not begin to run until a plaintiff knows, or reasonably should have known, the identity of the tortfeasor"). Our case law is thus quite clear that "injury," as used in § 52-584, means actionable harm, i.e., when the plaintiff discovers or should have discovered that the harm complained of was caused by the negligence of the defendant.

Understanding that this court has consistently construed the term "injury" to mean "actionable harm," we turn to the facts of the present case. Here, it is undisputed that the plaintiff fell on February 10, 2015, while a patient at Manchester Memorial Hospital. It is also undisputed that she knew that she fell and that she knew she suffered some physical harm as a result of that fall. On the basis of those facts, the defendants

filed a motion for summary judgment, claiming that the plaintiff's claims were barred by the statute of limitations set forth in § 52-584. Specifically, the defendants asserted that "the plaintiff claims that she suffered injuries as a result of a fall that occurred on February 10, 2015, when she was a patient at [Manchester Memorial Hospital]. Because there is no issue of material fact that the plaintiff delivered the writ, summons and complaint to the state marshal for service on May 22, 2017, beyond the applicable statute of limitations set forth in . . . § 52-584, the plaintiff is barred from bringing these claims as a matter of law."

In response, the plaintiff submitted an opposition to the defendants' motion for summary judgment, asserting that she "was not aware that the defendants' conduct or lack thereof was the cause of her injury until . . . April 6, 2015." In support of her opposition, the plaintiff submitted an affidavit. In that affidavit, the plaintiff averred that "I was unaware [on February 10, 2015], what was the cause of my fall." The plaintiff further averred that, "[o]n or about April 6, 2015, staff at the . . . doctor's office informed me [that] a nurse or nurse's aide should have been responsible for my safety while inpatient at [Manchester Memorial Hospital]."

In considering the plaintiff's claim, it is important to note that "the determination of when a plaintiff in the exercise of reasonable care should have discovered 'actionable harm' is ordinarily a question reserved for the trier of fact." *Lagassey* v. *State*, supra, 268 Conn. 749; see, e.g., *Taylor* v. *Winsted Memorial Hospital*, 262 Conn. 797, 810, 817 A.2d 619 (2003) ("because the determination of reasonable care is a question of fact, it was up to the jury to determine whether the plaintiff exercised reasonable care in the discovery of his injury").

Furthermore, as we explained previously in this opinion, "actionable harm does not occur until the plaintiff

discovers or should have discovered that the harm complained of *was caused by the negligence of the defendant*." (Emphasis in original.) *Lagassey* v. *State*, supra, 268 Conn. 747. Bearing in mind that a court, in deciding a motion for summary judgment, must view the facts in the light most favorable to the nonmoving party, the fact that the plaintiff averred that she did not know the cause of her fall or that the defendants were responsible for her safety while she was inpatient at Manchester Memorial Hospital until April 6, 2015, is sufficient to create a genuine issue of material fact regarding when her actionable harm occurred.

The defendants did not submit any evidence in support of their motion for summary judgment establishing that the plaintiff's representation in this regard could not have been credited by a reasonable fact finder. Indeed, the defendants submitted no evidence to contradict her representation on this point. Because the determination of when a plaintiff in the exercise of reasonable care should have discovered actionable harm is ordinarily a question reserved for the trier of fact, we cannot conclude that the Appellate Court incorrectly determined that there was a genuine issue of material fact. In other words, at this early stage of the proceedings, and without other evidence from the defendants, we cannot conclude that the plaintiff's statement that she did not know the causal connection between her physical harm and the negligence of the defendants until April 6, 2015, was unreasonable as a matter of law.

With this background in mind, we now turn to the defendants' specific claims in the present case. The defendants first assert that the Appellate Court "relied on an immaterial fact," namely, the fact that "the plaintiff was told on April 6, 2015, that [the defendants] were responsible for her safety." The defendants assert that

this is not a material fact, but a specific legal theory. We disagree.

As we explained in this opinion, this court has consistently concluded that the plaintiff's knowledge of the causal connection between the defendants' alleged negligence and her physical harm is a material fact because it begins the accrual of the statute of limitations under § 52-584. Therefore, without knowledge of the causal connection to the defendants' negligence, the plaintiff did not experience any actionable harm. Accordingly, we conclude that the Appellate Court properly relied on the fact that there was a genuine issue of material fact regarding when the plaintiff knew that her physical harm was a result of the defendants' negligence.

The defendants next claim that the Appellate Court misapplied this court's precedent to the facts of this case. Specifically, the defendants claim that the Appellate Court improperly applied what the defendants call failure to diagnose or latent injury cases to the facts of this case because the plaintiff's physical injuries were obvious. We disagree.

Nothing in *Lagassey* or its progeny indicates that *Lagassey*'s definition of "actionable harm" is only applicable to some actions for negligence. To the contrary, that definition is applicable to all actions subject to § 52-584, regardless of whether the physical harm is obvious or latent. As we have explained, the statute of limitations begins to run, not when the plaintiff knows that she has suffered a physical harm, but when she knows that the physical harm suffered "was caused by the negligent conduct of another." *Lagassey* v. *State*, supra, 268 Conn. 749. There may be many instances in which a plaintiff's actual or constructive knowledge of causation and negligence will arise at the same time as her knowledge that she has sustained physical harm. In those cases, the statute of limitations begins to run

immediately, not because the injury is obvious but, rather, because the plaintiff is aware of both the injury and the defendant's negligence.

Nevertheless, there are also times when a plaintiff may know that she has suffered physical harm, but she may not know that the harm was caused by the negligent conduct of another. In those cases, the statute of limitations does not begin to run until the plaintiff discovers or reasonably should have discovered that the defendant's negligence was the cause of her harm. The definition of "actionable harm" is applicable to both scenarios.

A review of *Catz* v. *Rubenstein*, supra, 201 Conn. 39, exemplifies this principle. *Catz* involved a medical malpractice action in which the coexecutors of the estate of the decedent, Elaine S. Foster, claimed that the defendant physician, Stephen R. Rubenstein, failed to properly diagnose Foster's breast cancer. See id., 40, 41. The trial court granted Rubenstein's motion for summary judgment on the ground that the action was time barred under the applicable statute of limitations because Foster did not initiate it within two years of her cancer diagnosis. See id., 40–41.

In that case, Foster "consulted . . . Rubenstein, a physician who practiced general internal medicine," in July, 1979. Id., 40. During a physical exam, Rubenstein noted a lump in Foster's breast and ordered a mammogram. Id. Thereafter, "[i]n early August, 1979, [Rubenstein] informed Foster that the mammogram was negative for cancer . . . ." Id.

In January, 1980, Foster discovered another lump and spoke to Rubenstein on the telephone, and Rubenstein told her "she had a propensity to fatty tissue, that he did not think it was anything serious, and that there was no cause for concern." Id., 40–41. In April, 1980, Foster again contacted Rubenstein because one of the

lumps had become larger. Id., 41. On April 21, 1980, Rubenstein examined Foster for the second time and ordered another mammogram, which indicated a malignancy. Id. By May, 1980, Foster was diagnosed with cancer. See id.

In April, 1982, Foster sought treatment from Horace Stansel of the Yale Medical School. See id., 42. At that point, Stansel informed Foster that, at the time she was examined by Rubenstein in August, 1979, she had cancer in her left breast. See id.

Thereafter, Foster commenced an action for medical malpractice on June 11, 1982. Id., 41. Specifically, she claimed that Rubenstein "negligently failed to prescribe or recommend further diagnostic tests or treatment for Foster and negligently failed to obtain the opinion of or refer her to a physician who specialized in the recognition and treatment of potential malignancies." Id. Rubenstein filed a motion for summary judgment, asserting that the claims were barred under § 52-584 because they were not brought within two years from the date Foster was diagnosed with cancer. See id., 40– 41. The trial court granted Rubenstein's motion for summary judgment, and the coexecutors, who were substituted as plaintiffs after Foster died, appealed. See id.

The coexecutors conceded that Foster became aware of her cancer diagnosis in May, 1980. See id., 41–42. Nevertheless, they asserted "that there was no evidence submitted with [Rubenstein's] motion for summary judgment and no facts established that showed when Foster discovered or in the exercise of reasonable care should have discovered that she had cancer in her left breast when she was initially examined and diagnosed by Rubenstein or that her condition at that time was related to the cancer discovered on May 1, 1980. The [coexecutors] claim[ed], on appeal, that Foster first

became aware of that possibility when she was advised to that effect by . . . Stansel . . . in April, 1982, and that she did not therefore discover her 'injury' until that date." Id., 42.

This court agreed with the coexecutors, explaining that "[Rubenstein's] affidavit and the other documents submitted in support of his motion for summary judgment pinpoint when [Rubenstein] examined Foster and initially diagnosed her condition and when she became aware that she had cancer. They do not, however, disclose when Foster discovered or in the exercise of reasonable care should have discovered that [Rubenstein] was negligent in his examination, diagnosis, and treatment and the causal nexus, if any, between his alleged negligence and the metastasis of her cancer. [Thus, there remained] a genuine issue of material fact [that] was not resolved and the trial court erred in granting [Rubenstein's] motion for summary judgment." Id., 44.

Similar to *Catz*, in the present case, although the plaintiff knew that she suffered physical harm when she fell on February 10, 2015, it was not until April 6, 2015, that she discovered the causal nexus between the defendants' alleged negligence and her injuries from the fall. At this preliminary, summary judgment stage, we do not know whether this delay in discovering actionable harm was reasonable, but, considering the facts in the light most favorable to the nonmoving party, we conclude that the Appellate Court properly applied this court's precedent and the "actionable harm" standard to the facts of this case.

The defendants assert that the present case is more similar to *Burns* v. *Hartford Hospital*, supra, 192 Conn. 451, and that the Appellate Court should have applied *Burns* to the facts of the present case. We disagree. *Burns* is distinguishable based on the pivotal fact that,

in that case, the minor plaintiff, Bryan Burns, and his mother, Barbara Burns, who brought the action on Bryan's behalf, were made aware of the connection between the physical harm and the defendants' negligence approximately three years before the action was commenced. See id., 456–57.

Bryan had been admitted to the defendant hospital on October 23, 1975, for treatment of injuries to his upper body and torso that he had suffered in an automobile accident. Id., 452. While in the hospital, he required intravenous fluids, which were administered through intravenous tubes that were inserted in his lower legs. Id.

During his hospital stay, Bryan began to experience pain, redness and swelling in one of his legs, near the area where the intravenous tubes were inserted. See id. On or about November 10, 1975, Ronald W. Cooke, Bryan's physician, diagnosed Bryan with a streptococcus infection and told his mother, Barbara Burns, that the infection was caused by the use of contaminated intravenous tubes. Id., 452–53. Cooke informed Barbara that Bryan's infection "had probably reached the muscle and had possibly reached the bone as well." Id., 453. Cooke also told Barbara that the infection could be treated with antibiotics and would heal fully in time. See id., 453, 459.

After Bryan was released from the hospital and began walking again, his gait progressively worsened, and his left foot and calf were not growing properly. See id., 453. Eventually, in August, 1977, Barbara took Bryan to another physician, who diagnosed him as having a buildup of scar tissue caused by the streptococcus infection, which was impeding muscle development. Id.

Thereafter, in November, 1978, Barbara, on behalf of Bryan, brought an action against Hartford Hospital and Cooke, alleging that they acted negligently in failing to

diagnose accurately and treat properly the infection in his leg. See id., 452–53. The defendants moved for summary judgment, claiming that the action was barred by the statute of limitations set forth in § 52-584 because it was brought more than two years after Barbara became aware that Bryan suffered an infection from the contaminated intravenous tubes and that the buildup of scar tissue was just a manifestation of that infection. See id., 453–54.

The trial court rendered summary judgment in favor of both Hartford Hospital and Cooke on the ground that the action was barred by the statute of limitations. See id., 454. The only issue on appeal to this court was whether the claim against Hartford Hospital—for its negligence in causing the infection—was barred by the statute of limitations. Id.

On appeal, this court considered Barbara's assertion, in her affidavit in opposition to Hartford Hospital's motion for summary judgment, that she did not discover Bryan's injury until August, 1977, because it was not until then that she was informed that there was muscle damage in his leg. Id., 456. It also considered Barbara's assertion, during her deposition, that "she delayed bringing suit against Hartford Hospital because she relied on [Cooke's] prognosis of complete recovery from the infection." Id., 458.

This court rejected Barbara's claims, explaining that "Cooke's alleged misdiagnosis . . . did not toll the statute of limitations as it applied to Hartford Hospital. The injury that [Barbara] attributes to the hospital's negligence, i.e., the streptococcus infection, was inflicted and discovered in November, 1975. At that point the hospital's alleged breach of duty was complete. [Barbara] has not alleged that the hospital staff in any way concealed the extent of the injury or misled her about its cause. The act of an independent interven-

ing third party, who may have misled [Barbara] about the injury's seriousness or even compounded the harm by failing to render effective treatment, cannot extend the hospital's liability beyond the statutory limitation period." (Footnote omitted.) Id., 459.

This court further explained that § 52-584 "requires that the injured party bring suit within two years of discovering the injury. . . . In this context an injury occurs when a party suffers some form of actionable harm. The harm need not have reached its fullest manifestation before the statute begins to run. Because [Barbara] did not bring suit within two years of discovering the injury, the trial court correctly ruled that the action was barred by the statute of limitations." (Citation omitted.) *Burns* v. *Hartford Hospital*, supra, 192 Conn. 460.

The defendants in the present case attempt to liken the facts of the present case to the facts of *Burns*, claiming that, in both cases, there were "obvious injuries," and, therefore, that the statute of limitations begins to run at the time the physical harm is sustained. We disagree. *Burns* is distinguishable from the present case because, in *Burns*, Barbara knew of both the physical harm and the causal connection to the defendants' negligence more than two years prior to initiating the action. As this court explained, "[b]y about November 10, 1975, [Barbara] became fully aware not only of Bryan's injury but also of its cause. She testified in her deposition that on or about November 10 [1975], [Cooke] told her that [one of Bryan's legs] was infected and that the infection was caused by contaminated intravenous tubes that hospital staff had placed in the leg . . . ." *Burns* v. *Hartford Hospital*, supra, 192 Conn. 456. Therefore, Barbara was informed that the physical harm to Bryan—the streptococcus infection—was caused by the defendants' negligence—use of contaminated intravenous tubes—on November 10, 1975, but the action

in *Burns* was not brought until November, 1978. See id., 452, 456.

In *Burns*, Barbara admitted that she was informed of the hospital's negligence on November 10, 1975, which was more than two years before the action was commenced. Unlike in *Burns*, the plaintiff in the present case alleged in her affidavit that she did not become aware of the defendants' alleged negligence until April 6, 2015, which—after factoring in the ninety day extension—was less than two years before she brought her medical malpractice action.

We reject the defendants' contention that there are two separate standards for negligence claims, depending on whether the harm is latent or obvious. Instead, we agree with the Appellate Court that this court has consistently defined "injury" as actionable harm for purposes of § 52-584, and that actionable harm requires both knowledge of the physical harm and knowledge of its connection to the defendants' negligence. Accordingly, we conclude that the Appellate Court properly applied this court's precedent to the facts of the present case.

Finally, the defendants assert that the plain meaning of § 52-584 supports the judgment of the trial court in the present case. The defendants claim that, when this court decided *Lagassey*, it failed to follow the plain meaning rule codified in § 1-2z. Specifically, the defendants claimed that, because § 1-2z became effective on October, 1, 2003, and *Lagassey* was decided thereafter, on May 4, 2004, the court was required to, but improperly neglected to, apply the plain meaning rule of § 1-2z when it interpreted the language in § 52-584. Accordingly, the defendants assert that this court should abandon the interpretation of "injury" adopted in *Lagassey* in favor of a new interpretation of the term "injury," in which this court would follow the plain meaning rule

of § 1-2z. They contend that the plain meaning rule would dictate that we interpret the term "injury" in § 52-584 to mean " 'hurt, damage, or loss sustained,' " as it is defined in the dictionary. We disagree.

In *Lagassey*, this court was interpreting the statute of limitations set forth in § 4-148 (a), and it recognized that our interpretation of "injury" for purposes of § 52-584 was relevant to that interpretation.[4] At the time this court decided *Lagassey*, this court already had a rich history of interpreting "injury" for purposes of both §§ 4-148 (a) and 52-584. Indeed, this court had repeatedly addressed the commencement of the statutes of limitations contained in §§ 4-148 (a) and 52-584 well before § 1-2z came to be. Thus, in point of fact, the court in *Lagassey* was not interpreting the term "injury" anew in 2004.

In fact, *Lagassey* transparently explained that "we have repeatedly stated that an injury occurs when a party suffers some form of actionable harm"; (internal quotation marks omitted) *Lagassey* v. *State*, supra, 268 Conn. 739; see id. (citing cases); meaning "the plaintiff discovers an injury *and* causation." (Emphasis in original.) Id., 743; see, e.g., *Burns* v. *Hartford Hospital*, supra, 192 Conn. 460 ("[i]n [the context of § 52-584] an injury occurs when a party suffers some form of actionable harm"); see also, e.g., *Catz* v. *Rubenstein*, supra, 201 Conn. 44 (limitation period accrues on date plaintiff discovered or should have discovered "causal nexus" between alleged negligence and subsequent

[4] "A plain reading of §§ 4-148 (a) and 52-584 reveals that the statutes are alike in most material respects. Both statutes provide that the limitation period begins to run when a plaintiff either sustains or discovers the injury or, in the exercise of reasonable care, should have discovered the injury, and both statutes contain a three year period of repose. The only material differences in the two statutes are that § 4-148 (a) allows for a one year limitation period [whereas] § 52-584 allows for a two year limitation period, and § 4-148 (a) relates only to actions against the state brought under chapter 53 of the General Statutes." *Lagassey* v. *State*, supra, 268 Conn. 738–39.

injury). Indeed, *Lagassey* merely reaffirmed this court's interpretation of "injury" for purposes of §§ 4-148 (a) and 52-584 as "actionable harm" by reviewing this court's prior cases in which the term "injury" had been interpreted.

We see no reason to abandon this court's long held interpretation of the term "injury," which dates back to 1984, simply because the legislature later enacted § 1-2z. We previously have addressed the issue of whether the passage of § 1-2z required us to abandon prior interpretations of statutes in order to comply with § 1-2z. In addressing that question, we have determined that we do not abandon prior interpretations of statutory language. Rather, even after the passage of § 1-2z, it is customary for us to begin with this court's prior interpretations of statutes in previous cases. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007). To be sure, in *Hummel*, we explained: "There is nothing in the legislative history [of § 1-2z] to suggest that the legislature also intended to overrule every other case in which our courts, prior to the passage of § 1-2z, had interpreted a statute in a manner inconsistent with the plain meaning rule, as that rule is articulated in § 1-2z. We are unwilling to impute to the legislature such a sweeping purpose in the absence of convincing evidence of that purpose. Because neither the language nor the legislative history of § 1-2z provides any such evidence, we conclude that § 1-2z does not overrule our prior case law . . . ." Id.

In other words, after the passage of § 1-2z in 2003, our courts were directed to interpret statutes in accordance with the plain meaning rule embodied in § 1-2z, unless the statute being interpreted had been interpreted previously by this court prior to the passage of § 1-2z.[5] The

[5] Of course, if the statutory language has been amended since this court's prior interpretation, or if the portion of the statute that is at issue has not already been subject to this court's interpretation prior to the passage of § 1-2z, then § 1-2z must be applied.

term "injury" in § 52-584 had already been interpreted well before the passage of § 1-2z.

As the court noted in *Lagassey*, prior to that case, this court had "repeatedly stated that 'an injury occurs when a party suffers some form of actionable harm.' . . . This court first used the term 'actionable harm' in 1984, in *Burns* v. *Hartford Hospital*, supra, [192 Conn.] 460." (Citations omitted.) *Lagassey* v. *State*, supra, 268 Conn. 739. We elaborated further on the meaning of actionable harm two years later, in 1986, when we decided *Catz*. See *Catz* v. *Rubenstein*, supra, 201 Conn. 45–47.

Accordingly, in *Lagassey*, this court did not reach a new interpretation of the meaning of "injury" for purposes of §§ 4-148 (a) and 52-584. This court already had construed § 52-584 in its previous cases, and, in *Lagassey*, it simply restated and followed that long held construction. In fact, any doubt on this point is extinguished by this court's decision in *Lagassey* itself, in which this court explicitly stated that "we take this opportunity to *restate the correct legal standard* by which to evaluate the timeliness of causes of action in negligence." (Emphasis added.) *Lagassey* v. *State*, supra, 268 Conn. 748. That standard is actionable harm.

It has been more than thirty-five years since the term "injury" was first defined as actionable harm by this court in *Burns* v. *Hartford Hospital*, supra, 192 Conn. 460, and approximately eighteen years since this court reaffirmed the construction in *Lagassey* v. *State*, supra, 268 Conn. 739. During that time, our courts, including this court, have repeatedly relied on the interpretation of the term "injury" as actionable harm, and the legislature has not sought to correct that construction of §§ 4-148 (a) and 52-584. Thus, the doctrine of stare decisis and the tenet of statutory interpretation that cautions against overruling case law involving our construction

of a statute, if the legislature reasonably may be deemed to have acquiesced in that construction, counsel against accepting the defendants' invitation to revisit *Lagassey*'s interpretation of §§ 4-148 (a) and 52-584. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 494–95 ("[o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision" (internal quotation marks omitted)). Accordingly, we reject the defendants' invitation to implicitly overrule *Lagassey* in order to apply the plain meaning rule.

Even if we agreed with the defendants that we should not rely on *Lagassey* but should instead interpret § 52-584 consistent with § 1-2z, we would reach the same result. The term "injury" in § 52-584 is used within the phrase "when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ." General Statutes (Rev. to 2015) § 52-584. Thus, we would conclude that, as used within that statutory phrase, the term "injury" is not clear and unambiguous. There are two plausible interpretations. On one hand, the term could mean "actionable harm," as this court has previously interpreted the term for purposes of § 52-584. On the other hand, injury could mean "hurt, damage, or loss," as the defendants assert. (Internal quotation marks omitted.) Accordingly, we would need to turn to the legislative history of the statute and to engage in much of the same analysis that this court did in *Catz*. See *Catz* v. *Rubenstein*, supra, 201 Conn. 45–47. After reviewing the legislative history, the court in *Catz* concluded that the term "injury," in this context, means "actionable harm . . . ." (Internal quotation marks omitted.) Id., 49. We agree with that conclusion.

Prior to 1957, the statutory predecessor to § 52-584 provided: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, chiropodist, chiropractor, hospital or sanatorium, shall be brought but within one year from the date of the act or omission complained of, except that a counter-claim may be interposed in an action which has been brought within the year at any time before the pleadings in such action are finally closed." General Statutes (1949 Rev.) § 8324.

In 1957, the legislature enacted No. 467 of the 1957 Public Acts, which replaced the language "of the act or omission complained of" with "when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ." In *Catz*, this court explained: "The testimony in 1957 before the General Law Committee of the legislature, which considered the predecessor to § 52-584, indicates that the use of the term 'injury' was a conscious reaction to, and an attempt to alleviate the draconian effect of, two cases, *Dincher* v. *Marlin Firearms Co.*, 198 F.2d 821 (2d Cir. 1952), and *Vilcinskas* v. *Sears, Roebuck & Co.*, 144 Conn. 170, 174, 127 A.2d 814 (1956). In those cases, the United States [Court of Appeals for the Second Circuit] and this court concluded that the language 'act or omission complained of' in [the statutory predecessor to § 52-584] required a holding that the statute of limitations began running on the date of the defendant's negligence and that a plaintiff's cause of action could be barred before the plaintiff suffered any harm and therefore before a cause of action had accrued." (Footnote omitted.) *Catz* v. *Rubenstein*, supra, 201 Conn. 46.

The legislative history of § 52-584 also reveals that, when testifying in favor of the passage of No. 467 of the 1957 Public Acts before the General Law Committee, Attorney Charles Hunt testified that the act, "[i]t seems to me in keeping with the traditional thinking of [s]tatutes of [l]imitation[s], the time ought to begin to run at the time that the injured person acquires his right of action . . . ." Conn. Joint Standing Committee Hearings, General Law, Pt. 1, 1957 Sess., p. 145. Therefore, the legislative history of § 52-584 supports this court's prior conclusion that "injury," as used in § 52-584, was intended to mean a legally recognized injury, not just physical hurt or loss, as the defendants assert.

Moreover, the fact that the legislature removed the "act or omission complained of" language from the statute of limitations, but not from the three year statute of repose portion of the statute, is further evidence that the legislature intended for the starting point of the statute of limitations to be something other than the "hurt, damage, or loss." (Internal quotation marks omitted.) Accordingly, even if we ignore *Lagassey* and, instead, apply § 1-2z to § 52-584, we would reach the same interpretation of § 52-584 as this court reached in *Lagassey*.

On the basis of the foregoing, we conclude that the Appellate Court correctly concluded that, viewing the facts in the light most favorable to the plaintiff, there is a genuine issue of material fact. Therefore, the Appellate Court properly reversed the judgment of the trial court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 210

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TOWN OF STRATFORD *v.* 500 NORTH AVENUE, LLC, ET AL.
(AC 44905)

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

Syllabus

The plaintiff town sought to foreclose municipal tax liens assessed against certain real property that had been owned by the defendant N Co. until shortly before this action was commenced. The parties agreed that title to the property vested in another company prior to the commencement

of the action. The trial court granted the plaintiff's motion for summary judgment as to liability, and thereafter rendered a judgment of foreclosure by sale, from which N Co. appealed to this court. The plaintiff moved to dismiss the appeal for lack of subject matter jurisdiction on the ground that N Co. lacked standing to maintain the appeal because it no longer owned the property and, therefore, was not aggrieved by the judgment. *Held* that the plaintiff's motion to dismiss was granted and the appeal was dismissed because N Co. lacked standing to challenge the foreclosure judgment on appeal: because N Co. was divested of its ownership interest in the property by the time the judgment of foreclosure by sale was rendered, it did not have a specific personal and legal interest in the transfer of title to the property through the foreclosure sale, and, even if the foreclosure sale proceeds were insufficient to satisfy N Co.'s alleged tax obligations, the plaintiff could not pursue a deficiency judgment against N Co.; moreover, because N Co. lacked standing, it would not suffer any collateral consequences from the foreclosure judgment, and, therefore, was not aggrieved by the judgment because the plaintiff could not use the judgment as a basis for invoking the doctrine of collateral estoppel to preclude N Co. from relitigating any issues resolved by the judgment, including its alleged tax liabilities.

Considered October 6, 2021—officially released February 22, 2022

Procedural History

Action to foreclose municipal tax liens on certain real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Rose-Tiso & Co., LLC, et al. were defaulted for failure to appear; thereafter, the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability; subsequently, the court, *Stevens*, *J.*, rendered judgment of foreclosure by sale, from which the named defendant appealed to this court; subsequently, the plaintiff moved to dismiss the appeal. *Motion granted*; *appeal dismissed.*

Bryan L. LeClerc, in support of the motion.

Kenneth A. Votre, in opposition to the motion.

Opinion

CLARK, J. This is an appeal by the defendant 500 North Avenue, LLC,[1] from a judgment of foreclosure

[1] The complaint also named as defendants Roger K. Colacurcio; Mamie M. Colacurcio; American Tax Funding, LLC; Albina Pires; Dahill Donofrio; Joseph Regensburger; Robin Cummings; Red Buff Rita, Inc.; EBay Wanted,

rendered in favor of the plaintiff, the town of Stratford. The plaintiff has moved to dismiss the appeal for lack of subject matter jurisdiction on the ground that the defendant lacks standing to maintain the appeal because it no longer owns the property at issue and, therefore, is not aggrieved by the judgment. Although the defendant concedes that it has no ownership interest in the property, it opposes the motion on the ground that it is aggrieved by the possible collateral consequences of the judgment. Specifically, the defendant argues that the judgment establishes its underlying tax obligations to the plaintiff and could be used by the plaintiff to establish the defendant's liability in a future, independent action by the plaintiff to collect unpaid taxes not satisfied by a judgment in this case. For the reasons that follow, we conclude that the defendant is not aggrieved by the judgment and, therefore, lacks standing to pursue this appeal. As a result, we grant the motion to dismiss and dismiss the appeal for lack of subject matter jurisdiction.

On May 29, 2019, the plaintiff commenced this action pursuant to General Statutes § 12-181[2] against the defendant and others to foreclose seven municipal tax liens assessed against certain real property located in Stratford (property). The property had been owned by the defendant until shortly before the action was commenced. The parties agree that title to the property vested in JRB Holding Co., LLC (JRB Holding), prior to the commencement of the present case.[3] The plaintiff

Inc.; United States of America, Department of the Treasury—Internal Revenue Service; As Peleus, LLC; Rose-Tiso & Co., LLC; and JRB Holding Co., LLC.

This appeal was filed only by the defendant 500 North Avenue, LLC. All references herein to the defendant are to 500 North Avenue, LLC.

[2] General Statutes § 12-181 provides in relevant part: "The tax collector of any municipality may bring suit for the foreclosure of tax liens in the name of the municipality by which the tax was laid . . . ."

[3] The parties do not specify in their submissions to this court how JRB Holding obtained title to the property. It appears that the defendant was divested of its title to the property on May 28, 2019, by a judgment of strict

filed a revised complaint on October 3, 2019, and the defendant filed an answer and special defenses on November 15, 2019.

In June, 2020, the plaintiff filed a motion for summary judgment as to liability against the defendant and JRB Holding. The defendant objected, and, on October 20, 2020, the trial court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment. On November 5, 2020, the court denied the defendant's motion to reargue the decision granting the motion for summary judgment.

The plaintiff then moved for a judgment of strict foreclosure. Two defendants who are not parties to the present appeal, Mamie M. Colacurcio and Roger K. Colacurcio, moved for a judgment of foreclosure by sale, on the grounds that there was substantial equity in the property and because the United States was a party to the action. See 28 U.S.C. § 2410 (c) (2018) ("an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale"). On August 2, 2021, the trial court, *Stevens*, *J.*, rendered a judgment of foreclosure by sale. The court found the amount of the debt to be $179,293.32 and the fair market value of the property to be $500,000, and ordered the foreclosure sale to take place on October 16, 2021. The defendant filed the present appeal on August 19, 2021, challenging the judgment of foreclosure by sale. The plaintiff moved to dismiss this appeal on August 30, 2021, and the defendant objected.[4]

foreclosure rendered in a separate action to foreclose a mechanic's lien on the property. *Rose-Tiso & Co., LLC* v. *500 North Avenue, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-18-6081558-S (April 8, 2019). The original plaintiff in that case, Rose-Tiso & Co., LLC, asserted that it assigned its mechanic's lien to JRB Holding by an assignment dated February 5, 2019, and the trial court granted a motion to substitute JRB Holding as the plaintiff on the same day that it rendered the judgment of strict foreclosure.

[4] The present appeal was filed solely by the defendant. After the plaintiff filed its motion to dismiss this appeal, the defendant and JRB Holding filed

In its motion to dismiss, the plaintiff argues that the defendant lacks standing to bring this appeal because it is not aggrieved by the judgment of foreclosure by sale. Specifically, the plaintiff contends that the defendant has no interest in the property, and that, if a deficiency exists after the foreclosure sale, the plaintiff may not pursue a deficiency judgment against the defendant. The defendant counters that it is aggrieved because the judgment establishes its tax liability to the plaintiff and would operate to collaterally estop it from contesting that liability in any future, independent action brought by the plaintiff pursuant to General Statutes § 12-161.[5] For the reasons that follow, we conclude that the defendant is not aggrieved by the judgment.

"A threshold inquiry of this court upon every appeal presented to it is the question of appellate jurisdiction. . . . It is well established that the subject matter jurisdiction of the Appellate Court and of [our Supreme Court] is governed by [General Statutes] § 52-263, which provides that an aggrieved party may appeal to the court having jurisdiction from the final judgment of the court. . . . [O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case. . . . If it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." (Citation

a "motion to change party designation," in which they sought to add JRB Holding as an appellant in this appeal. In a separate order issued simultaneously with this opinion, this court denied that motion without prejudice to JRB Holding filing within twenty days a motion for permission to file a late appeal. See Practice Book § 60-2 (5).

[5] General Statutes § 12-161 provides: "All taxes properly assessed shall become a debt due from the person, persons or corporation against whom they are respectively assessed to the town, city, district or community in whose favor they are assessed, and may be, in addition to the other remedies provided by law, recovered by any proper action in the name of the community in whose favor they are assessed."

omitted; emphasis omitted; internal quotation marks omitted.) *Trumbull* v. *Palmer*, 123 Conn. App. 244, 249–50, 1 A.3d 1121, cert. denied, 299 Conn. 907, 10 A.3d 526 (2010).

"Standing is established by showing that the party . . . is authorized by statute to bring an action, in other words statutorily aggrieved, or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) *Cimmino* v. *Household Realty Corp.*, 104 Conn. App. 392, 395, 933 A.2d 1226 (2007), cert. denied, 285 Conn. 912, 943 A.3d 470 (2008).

Because the defendant was divested of its ownership interest in the property at the time the judgment of foreclosure by sale was rendered, it did not have a specific personal and legal interest in the transfer of title to the property through the foreclosure sale. See *Trumbull* v. *Palmer*, supra, 123 Conn. App. 251–53 (proposed intervenor who had no interest in property lacked direct and substantial interest in subject matter of foreclosure litigation). Moreover, even if the foreclosure sale proceeds are insufficient to satisfy the full amount of the defendant's alleged tax obligations, the plaintiff may not pursue a deficiency judgment against the defendant in the present action pursuant to General Statutes § 49-14. See *Winchester* v. *Northwest Associates*, 255 Conn. 379, 386–87, 767 A.2d 687 (2001).

As the defendant correctly observes, however, the plaintiff conceivably could pursue an independent action against it pursuant to § 12-161 to recover any unpaid taxes for the years during which the defendant owned the property, if the foreclosure sale fails to generate sufficient proceeds to satisfy all of those alleged tax liabilities; see id., 387–88 ("a plaintiff who forecloses on a tax lien is not without a remedy to recover the balance of any taxes owed by a defendant: the plaintiff is free to commence a second action against the defendant for that purpose"); and the liens are not extinguished by virtue of the plaintiff obtaining title to the property. Cf. *American Tax Funding, LLC* v. *First Eagle Corp.*, 196 Conn. App. 298, 306, 229 A.3d 1218 (assignee of tax liens lost right to collect liens upon taking title to property), cert. denied, 335 Conn. 942, 237 A.3d 729 (2020). The defendant argues that it is therefore aggrieved by the judgment in the present case because the judgment establishes its liability to the plaintiff with respect to its outstanding tax obligations and could have collateral consequences in any future, independent action to collect that debt pursuant to § 12-161. Specifically, the defendant argues that the plaintiff could use the judgment in the present case to invoke the doctrine of collateral estoppel in any such action to preclude it from contesting the liability that it seeks to challenge in the present appeal. We are not persuaded.

Our Supreme Court has adopted the view expressed in § 28 (1) of the Restatement (Second) of Judgments that, "[a]lthough an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [when the] party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action . . . ." (Internal quotation marks omitted.) *Water Pollution*

Control Authority v. *Keeney*, 234 Conn. 488, 494–95, 662 A.2d 124 (1995); see also *Commissioner of Motor Vehicles* v. *DeMilo & Co.*, 233 Conn. 254, 268–69, 659 A.2d 148 (1995); *Iacurci* v. *Wells*, 108 Conn. App. 274, 281, 947 A.2d 1034 (2008). Because the defendant has no ownership interest in the property, it lacks standing to appeal the judgment of foreclosure by sale and consequently may not, as a matter of law, obtain judicial review of that judgment. The plaintiff, therefore, could not use the foreclosure judgment as a basis for invoking the doctrine of collateral estoppel to preclude the defendant from relitigating any issues resolved by the foreclosure judgment, including the defendant's alleged tax liabilities, in a subsequent action brought pursuant to § 12-161. Accordingly, the defendant is not aggrieved by the judgment in the present case because it will not suffer any collateral consequences from it.

As a result, we conclude that, because the defendant is not aggrieved by the judgment, it lacks standing to pursue this appeal.

The plaintiff's motion to dismiss the appeal is granted, and the appeal is dismissed.

In this opinion the other judges concurred.

CELIA WHEELER ET AL. *v.* BEACHCROFT, LLC, ET AL.
(AC 44348)

Moll, Alexander and Suarez, Js.

Syllabus

The defendant B Co., which owned a portion of a residential housing development adjacent to Long Island Sound, appealed to this court from the judgment of the trial court summarily enforcing a settlement agreement among the parties to resolve a dispute over access to the shore. The plaintiffs, who owned interior lots in the development, had brought an action to quiet title to an avenue that ran through the development as

well as to a lawn that abuts the sound at the end of the avenue. After most of the parties' claims were resolved during the course of the litigation, counsel for some of the parties informed the trial court that all of the parties had reached a settlement agreement and, thereafter, entered two interrelated agreements on the record during a pretrial hearing. The settlement agreement required, inter alia, that B Co. would quitclaim the avenue to the town of Branford and P Co., a municipal subdivision of the town, and grant the town an easement for the repair, maintenance and replacement of a certain drainpipe at the end of the avenue that ran toward the sound. After the court ordered that the case had been reported settled, B Co. claimed that the defendants J and E, who owned a waterfront lot in the development, had interfered with the execution of the settlement agreement. B Co. filed a motion seeking an order that J and E were bound by the agreement and had no right to interfere with its implementation but later withdrew its motions for order and to bind. J and E claimed that they were not bound by the agreement. At a later hearing on motions to enforce the agreement that were filed by the plaintiffs, the town and P Co., in which they asserted that J and E were not bound by the agreement, the plaintiffs' counsel did not represent that J and E had signed off on the agreement. The court then ordered the plaintiffs' counsel to file a proposed order regarding enforcement of the agreement. The court thereafter granted the plaintiffs' motions to enforce the agreement, concluding that J and E were not parties to the agreement and entering certain orders to implement the agreement. *Held*:

1. B Co. could not prevail on its claim that the trial court erred in finding that J and E were not parties to the settlement agreement, which was based on B Co.'s assertions that whether they were parties to the agreement was not before the court, that the record did not support the court's finding and that the court failed to conduct an evidentiary hearing on the matter:

   a. In determining that J and E were not parties to the settlement agreement, the trial court addressed a question that was relevant to its adjudication of the motions to enforce the agreement, and, notwithstanding B Co.'s claim that the issue of whether J and E were parties to the agreement was not before the court as a result of its withdrawal of prior motions it filed to bind them to the agreement, the status of J and E was squarely before the court vis--vis the parties' motions to enforce the agreement.

   b. The trial court did not abuse its discretion in finding that J and E were not parties to the settlement agreement: during the pretrial hearing, counsel for J and E unequivocally conveyed to the court that J and E were not in agreement with the terms of the agreement, which no party disputed, and counsel for J and E was not present when the plaintiffs' counsel, without mentioning J and E, subsequently entered the agreement on the record; moreover, the agreement, which imposed no obligations

on J and E, provided that it was without prejudice as to any claims by or against them, and B Co.'s counsel did not identify J and E as parties, and thereafter took the position that B Co. had not required J and E to approve the agreement; furthermore, statements made by the plaintiffs' counsel when he entered the agreement on the record and during the subsequent hearing on the motions to enforce the agreement reasonably could be construed to indicate that J and E, although not joining the settlement agreement, were not objecting to the other parties' presenting the agreement to the court.

c. The trial court did not abuse its discretion by not conducting an evidentiary hearing as to whether J and E were parties to the settlement agreement: prior to and at the hearing on the motions to enforce the agreement, B Co. did not pursue opportunities it had to make a request to introduce evidence on that issue; moreover, at the hearing on the motions to enforce the agreement, B Co.'s counsel answered affirmatively when asked directly by the court to confirm that B Co. was no longer seeking an order binding J and E to the agreement, and B Co.'s counsel made no response to the court's statements that it did not believe it was necessary to hear evidence with respect to the motions to enforce.

2. Contrary to B Co.'s assertion, the trial court did not alter or omit material terms contained in the settlement agreement when it entered orders to implement the agreement, except for the court's failure to include notice and cooperation terms the agreement explicitly required:

a. This court determined that, under its case law, the abuse of discretion standard of review applied to its consideration of B Co.'s claims.

b. The trial court did not abuse its discretion in its orders implementing certain material terms of the settlement agreement in its enforcement decision, as the court reasonably determined that Long Island Sound was the southern boundary of a view easement contained in the settlement agreement, it did not fail to order that the settlement agreement was contingent on the execution of certain quitclaim deeds and releases, this court having perceived no appreciable difference between the parties' agreement that the settlement agreement was contingent on the execution of the documents at issue and the court's ordering that all settlement documents, which included those at issue, shall be executed, the enforcement decision did not create confusion in describing the area in which sitting and recreating was prohibited, as this court perceived no appreciable difference between the description of that area in the settlement agreement and the enforcement decision, the court's enforcement decision, read in its entirety, provided, contrary to B Co.'s claim, that the town may maintain, repair and replace the drainpipe, the court did not improperly omit, as B Co. claimed, a cooperation clause from its enforcement decision, as the agreement contained no sweeping cooperation clause but required the parties to cooperate as to the town's acquisition of the avenue and as to other necessary approvals, and the court

did not improperly omit an order requiring the withdrawal and release of claims by the parties in a related action.

c. The trial court improperly failed to include in its enforcement decision an order that the town was required to provide reasonable notice to and cooperate with B Co. in scheduling repair work on the drainpipe on B Co.'s property for which the town had an easement: the notice and cooperation terms were set forth explicitly in the settlement agreement, the court did not include or refer to them in its enforcement decision, and this court did not read them to be implicit in that decision; moreover, it was apparent that the court intended to have the enforcement decision encompass all material terms of the settlement agreement.

Argued November 9, 2021—officially released February 22, 2022

Procedural History

Action seeking, inter alia, a judgment declaring that certain real property is a public way, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Bright*, *J.*, granted the motions by James R. McBurney et al. to intervene as party defendants; thereafter, the court, *Shapiro*, *J.*, granted the motion of Peter Paquin et al. to intervene as party plaintiffs and to file an intervening complaint; subsequently, count one of the plaintiffs' and the intervening plaintiffs' complaints were tried to the court, *Bright*, *J.*; judgment for the named defendant on count one of the plaintiffs' and intervening plaintiffs' amended complaints; thereafter, the court, *Bright*, *J.*, granted in part the motions for summary judgment filed by the named defendant and the intervening defendants on the remaining counts of the plaintiffs' amended complaint and rendered partial judgment thereon, from which the named defendant and the intervening defendants filed separate appeals with the Supreme Court, which affirmed the trial court's judgment; subsequently, the named defendant filed a cross claim as against the defendant James R. McBurney et al.; thereafter, the court, *Moukawsher*, *J.*, denied the motion for sanctions filed by the defendant James R. McBurney et al., and granted the motions filed by the

named plaintiff et al. to enforce the parties' settlement agreement and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed in part*; *judgment directed.*

Richard P. Colbert, with whom were *Matthew J. Letten* and *Gerald L. Garlick*, for the appellant (named defendant).

Joel Z. Green, with whom, on the brief, was *Linda Pesce Laske*, for the appellees (named plaintiff et al.).

Peter J. Berdon, for the appellee (plaintiff Pine Hill Orchard Association, Inc.).

Thomas J. Donlon, for the appellee (defendant town of Branford).

Michael S. Taylor, with whom were *Brendon P. Levesque* and, on the brief, *Peter J. Zarella*, for the appellees (defendant James R. McBurney et al.).

Opinion

MOLL, J. This appeal is the latest episode in what our Supreme Court has described as "a nearly century old dispute among neighbors in a housing development along the Long Island Sound (sound) over access to the shore."[1] *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 148, 129 A.3d 677 (2016). The defendant Beachcroft, LLC,[2] appeals from the judgment of the trial court summarily enforcing a settlement agreement entered on the

[1] This dispute has spawned several appeals, including a prior appeal filed in the present case. See *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 129 A.3d 677 (2016); see also *McBurney* v. *Paquin*, 302 Conn. 359, 28 A.3d 272 (2011); *McBurney* v. *Cirillo*, 276 Conn. 782, 889 A.2d 759 (2006), overruled in part on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 914 A.2d 996 (2007); *Fisk* v. *Ley*, 76 Conn. 295, 56 A. 559 (1903). Additionally, there is an appeal pending in this court in a different matter relating to this dispute. See *Wheeler* v. *Cosgrove*, Connecticut Appellate Court, Docket No. AC 42547 (appeal filed January 31, 2019).

[2] The original plaintiffs who filed this matter are Celia W. Wheeler, Charles L. Dimmler III, Angela Rossetti, Dean Leone, Tina Mannarino, Lori P. Callahan, Harold D. Sessa, and Sheryl Lee Sessa. Additionally, the following parties intervened as plaintiffs: Peter Paquin, Suzanne Paquin, Frank Cirillo,

record on the eve of trial. On appeal, the defendant claims that the court (1) committed error in making a finding that two intervening defendants, the McBurneys, were not parties to the settlement agreement, and (2) improperly altered or omitted material terms of the settlement agreement in summarily enforcing the settlement agreement.[3] We reverse the judgment of the trial court only insofar as the court's decision summarily enforcing the settlement agreement omitted certain terms of the settlement agreement, and we affirm the judgment in all other respects.

The following facts, as drawn from a previous decision of our Supreme Court, and procedural history are relevant to our resolution of this appeal. The dispute in this matter centers on "a housing development (development) that is located adjacent to the sound on Crescent Bluff Avenue (avenue) in the town of Branford. . . . The development consists of thirty-five lots in a long and narrow five acre tract of land. The narrow end of the development borders the sound to the south, with the avenue running north to south through the

Susan Cirillo, James Baldwin, Joann Baldwin, Antoinette Verderame, Leslie Carothers, and Ann Harrison. Before this appeal was filed, Callahan, Harold D. Sessa, Sheryl Lee Sessa, Harrison, and Carothers withdrew their respective claims. We refer in this opinion to (1) Wheeler, Dimmler, Rossetti, Leone, and Mannarino collectively as the plaintiffs, and (2) Peter Paquin, Suzanne Paquin, Frank Cirillo, Susan Cirillo, James Baldwin, Joann Baldwin, and Verderame collectively as the intervening plaintiffs.

Beachcroft, LLC, was the only defendant named in the plaintiffs' original complaint. Subsequently, the town of Branford (town) and Pine Orchard Association, Inc., were cited in as defendants. Additionally, the following parties intervened as defendants: James R. McBurney, Erin E. McBurney, Roger A. Lowlicht, and Kay A. Haedicke. We refer in this opinion to (1) Beachcroft, LLC, as the defendant, (2) the town, Pine Orchard Association, Inc., Lowlicht, and Haedicke individually by name or by surname, and (3) James R. McBurney and Erin E. McBurney collectively as the McBurneys.

[3] On March 15, 2021, the McBurneys filed a motion to dismiss this appeal in part as moot, which this court denied on April 21, 2021. In their appellate brief, the McBurneys reasserted their mootness claim; however, the McBurneys' counsel withdrew this claim during oral argument before this court.

development and perpendicular to the sound. Thirty-one lots line the avenue in the interior of the development. The avenue runs between the four waterfront lots, with two lots on each side. The avenue ends at a small strip of land (lawn) directly abutting the sound . . . .'' (Citation omitted.) Id., 150. The plaintiffs own interior lots in the development, the McBurneys and Lowlicht and Haedicke[4] own waterfront lots in the development, and the defendant owns the avenue and part of the lawn in the development. Id. In addition, there appears to be no dispute that the intervening plaintiffs also own interior lots in the development.

In 2009, pursuant to General Statutes § 47-31,[5] the plaintiffs commenced the present quiet title action. The plaintiffs' third amended complaint, their operative complaint filed on October 9, 2018, contained eleven counts asserting various rights with respect to the avenue and the lawn that were adverse to any interests claimed by the defendant, the town, Pine Orchard Association, Inc., the intervening plaintiffs, the McBurneys, and/or Lowlicht and Haedicke. The intervening plaintiffs' amended complaint, their operative complaint filed on July 12, 2012, contained eleven counts that

[4] Lowlicht and Haedicke are joint property owners and have at all relevant times been represented by the same counsel. Accordingly, we treat them as a unit.

[5] General Statutes § 47-31 (a) provides: ''An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it, or to have any estate in it, either in fee, for years, for life or in reversion or remainder, or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff, or against any person in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property.''

substantively tracked the plaintiffs' claims.[6] Additionally, pursuant to § 47-31 (d),[7] the defendant, the town, Pine Orchard Association, Inc.,[8] and Lowlicht and Haedicke claimed interests in the avenue and the lawn. The McBurneys did not file an answer and made no statement pursuant to § 47-31 (d). Over the course of the litigation, either by way of summary judgment or following trial, the trial court ruled against the plaintiffs and the intervening plaintiffs with respect to most of their claims.[9] The remaining claims were scheduled to be tried on February 3, 2020.

On January 31, 2020, during a hearing conducted by the court, *Moukawsher*, *J.*, to address pretrial matters,

[6] We note that, unlike the plaintiffs' operative complaint, the intervening plaintiffs' operative complaint did not expressly refer to the McBurneys or to Lowlicht and Haedicke.

[7] General Statutes § 47-31 (d) provides: "Each defendant shall, in his answer, state whether or not he claims any estate or interest in, or encumbrance on, the property, or any part of it, and, if so, the nature and extent of the estate, interest or encumbrance which he claims, and he shall set out the manner in which the estate, interest or encumbrance is claimed to be derived."

[8] In a memorandum of decision issued on November 4, 2013, disposing of one of the claims raised by the plaintiffs and the intervening plaintiffs, the trial court, *Bright*, *J.*, found the following as to Pine Orchard Association, Inc.: "On June 13, 1903, [Pine Orchard Association, Inc.] was chartered by the state of Connecticut as an incorporated borough and municipal subdivision of the town . . . . It has taxing power and jurisdiction over land use and streets within its borders. . . . The purpose of [Pine Orchard Association, Inc.] 'is to provide for the improvement of the lands in said district and for the health, comfort, and convenience of persons living therein.' . . . All persons owning real property within the boundaries of the borough of Pine Orchard are members of [Pine Orchard Association, Inc.] by virtue of their residency. The area covered by [Pine Orchard Association, Inc.] includes both public and private roads. It is undisputed that [the avenue] is in Pine Orchard and subject to [Pine Orchard Association, Inc.'s] jurisdiction." (Citations omitted.)

[9] The court's decisions disposing of these claims are not at issue in this appeal. In the prior appeal filed in this matter, our Supreme Court affirmed the judgment of the court, *Bright*, *J.*, denying, in part, motions for summary judgment predicated on res judicata filed by the defendant, the McBurneys, and Lowlicht and Haedicke. See *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 148–50, 154–55.

the court granted an oral motion made by the plaintiffs' counsel to continue the trial to February 4, 2020, to provide the parties with additional time to continue ongoing settlement negotiations. On February 4, 2020, with counsel for some, but not all, of the parties present before the court, two interrelated settlement agreements were entered on the record. The plaintiffs' counsel recited the terms of the first settlement agreement, and the town's counsel set forth the terms of the second settlement agreement (collectively, settlement agreement).[10] The settlement agreement required, inter alia, (1) the defendant to quitclaim a portion of the lawn, along with an existing stairway and a triangular piece of property containing the stairway, which together provided access from the avenue to the shore, to Pine Orchard Association, Inc., (2) the parties to the settlement agreement to "exchange mutual general releases and . . . withdraw all pending claims and actions by them," (3) the defendant to quitclaim the avenue to the town and to grant the town an easement to repair, maintain, and replace a drainpipe, and (4) the town to pay the defendant $200,000. The same day, the court ordered that the case had been reported settled and that, unless withdrawn sooner, the case would be dismissed on May 19, 2020.

On March 2, 2020, the defendant filed a motion titled "Motion for Order (in Aid of Settlement)" (motion for order). The defendant asserted that, following the February 4, 2020 hearing, the McBurneys had engaged in conduct interfering with the execution of the settlement agreement. As relief, the defendant requested that the court order that the McBurneys (1) were bound by the settlement agreement and (2) "ha[d] no rights to take

[10] Although there were two settlement agreements entered on the record, the parties generally identify them together as a single settlement agreement. Accordingly, we refer in this opinion to the two settlement agreements collectively as the settlement agreement.

any action to interfere with the implementation of the settlement agreement."[11] On March 5, 2020, the McBurneys filed an objection, arguing, inter alia, that they were not parties to the settlement agreement. Additionally, the McBurneys requested that the court sanction the defendant for filing the motion for order in bad faith, vexatiously, wantonly, or oppressively.

On May 22, 2020, the plaintiffs, the town, and Pine Orchard Association, Inc., each filed a motion to summarily enforce the settlement agreement. In their respective motions, the movants asserted that the McBurneys were not parties to the settlement agreement. On the same day, the defendant filed a motion captioned "Motion to Bind McBurneys to Settlement Agreement" (motion to bind), requesting that the court order that the McBurneys (1) had no rights with respect to its property, (2) were estopped from claiming any right to interfere with the settlement agreement, and/or (3) had waived any right to interfere with the settlement agreement.

On June 12, 2020, the defendant withdrew the motion for order and the motion to bind. On the same day, the defendant filed a "response" to the motions to summarily enforce the settlement agreement, stating, inter alia, that it agreed that a global settlement had been reached, and that, therefore, the court did not need to adjudicate the pending motions.

On July 1, 2020, the court conducted a hearing on the motions to summarily enforce the settlement agreement and the McBurneys' request for sanctions against the defendant. No evidence was offered or admitted during the hearing. After hearing argument from the parties,

[11] On March 4, 2020, Lowlicht and Haedicke filed a separate motion by which they "join[ed] in [the defendant's] request for an order that [the McBurneys] be precluded from contesting or interfering with the settlement agreement . . . ."

the court ordered the plaintiffs' counsel to file a proposed order regarding enforcement of the settlement agreement. The court also reserved its ruling on the McBurneys' request for sanctions against the defendant.

On July 9, 2020, in accordance with the court's July 1, 2020 order, the plaintiffs filed a proposed order (original proposed order). On July 14, 2020, the defendant filed an objection to the original proposed order.

On July 14, 2020, the court denied the McBurneys' request for sanctions against the defendant. In its order, the court stated that "[the McBurneys] were not part of the settlement [agreement] . . . ."

On August 4, 2020, the court conducted a hearing to address the defendant's objections to the original proposed order. On August 5, 2020, the plaintiffs filed an amended proposed order (amended proposed order), to which the defendant filed an objection on August 6, 2020.

On August 11, 2020, the court issued a memorandum of decision granting the motions to summarily enforce the settlement agreement (enforcement decision). As part of the enforcement decision, the court found that the McBurneys had "declined to participate in the settlement agreement . . . ." In addition, the court entered orders to implement the terms of the settlement agreement. On August 31, 2020, the defendant filed a motion to reargue, which the court denied on October 9, 2020. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before we analyze the defendant's claims, we set forth the following general legal principles relevant to our resolution of this appeal. "In [*Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 626 A.2d 729 (1993) (*Audubon*)], our Supreme Court determined that a settlement agreement

resolving the issues in a pending case may be enforced prior to and without the necessity of a trial: A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit. A court's authority to enforce a settlement by entry of judgment in the underlying action is especially clear where the settlement is reported to the court during the course of a trial or other significant courtroom proceedings." (Internal quotation marks omitted.) *Commissioner of Transportation* v. *Lagosz*, 189 Conn. App. 828, 837, 209 A.3d 709, cert. denied, 333 Conn. 912, 215 A.3d 1210 (2019). "Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial." (Internal quotation marks omitted.) Id., 838. "Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. The key element with regard to the settlement agreement in *Audubon* . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement. . . . The rule of *Audubon* effects a delicate balance between concerns of judicial economy on the one hand and a party's constitutional rights to a jury and to a trial on the other hand. . . . To use the *Audubon* power outside of its proper context is to deny a party these fundamental rights and would work a

manifest injustice." (Citations omitted; internal quotation marks omitted.) *Reiner* v. *Reiner*, 190 Conn. App. 268, 277, 210 A.3d 668 (2019).

I

We first turn to the defendant's claim that the trial court improperly made a finding that the McBurneys had "declined to participate in the settlement agreement," which, in essence, is akin to a finding that the McBurneys were not parties to the settlement agreement. This claim is unavailing.

To put the defendant's claim in its proper context, we set forth the following additional facts and procedural history. On January 31, 2020, respective counsel for the plaintiffs, the defendant, the town, Pine Orchard Association, Inc., the McBurneys, and Lowlicht and Haedicke appeared before the court to discuss several pretrial matters.[12] During the hearing, the plaintiffs' counsel stated that "very substantial progress" was being made to settle the case and that a "tentative agreement" had been reached with respect to the plaintiffs. The defendant's counsel commented that, "[b]etween [the plaintiffs] and [the defendant] we have an understanding, subject to documentation, as to how we can resolve this case." The town's counsel indicated that the town was "prepared if there's a global resolution . . . ." Counsel for Lowlicht and Haedicke stated that Lowlicht and Haedicke "agree to that part of the settlement that affects them. [They] don't stand in the way of it. [They are] not really affected by it, but [they] don't stand in the way of it."

The McBurneys' counsel informed the court that "the settlement that's proposed has been circulated to [the McBurneys] as well, and they cannot buy in or agree

[12] None of the intervening plaintiffs, who were self-represented at the time, appeared at the January 31, 2020 hearing.

to those terms. I've articulated this to, I believe, all counsel. And I believe if this settlement is entered, that there would be continuing litigation concerning this property, although in a different facet." The McBurneys' counsel further stated that, although the proposed settlement would "extinguish this case," the "potential settlement may result in additional litigation unrelated to this particular matter, but directly related to the settlement." The plaintiffs' counsel responded that "the disposition of this case" would not be "affect[ed]." The defendant's counsel did not reply to the statements of the McBurneys' counsel.

On February 4, 2020, respective counsel for the plaintiffs, the defendant, the town, Pine Orchard Association, Inc., and the McBurneys appeared before the court. At the outset, the plaintiffs' counsel informed the court that "the plaintiffs have reached an agreement with [the defendant] and [the defendant's principal member] on terms and conditions of settlement, which we would like to recite for the record." Immediately thereafter, the court monitor began experiencing technological difficulties, and the court took a recess. Following the recess, respective counsel for the plaintiffs, the defendant, and the town reappeared before the court. The plaintiffs' counsel stated that counsel for Pine Orchard Association, Inc., and counsel for the McBurneys had left to attend to other matters. The plaintiffs' counsel continued: "However, we do have a—their consent. We have an agreement. We have . . . terms and conditions that all of the parties have agreed to in settlement of this claim."[13] The plaintiffs' counsel further noted that, although counsel for Lowlicht and Haedicke was not

[13] The plaintiffs' counsel represented that he had received written confirmation from "all of the interior lot owners who ha[d] not previously entered into arrangements with [the defendant] and [the defendant's principal member]" that they consented to the terms and conditions of the settlement agreement.

present, he was "familiar with the terms and conditions." In reciting the terms of the first of the two settlement agreements, the plaintiffs' counsel stated that "it is [the plaintiffs'] intention to withdraw without prejudice the claims against . . . the McBurneys . . . and Lowlicht and Haedicke with the understanding that the McBurneys and Lowlicht [and] Haedicke will similarly withdraw without prejudice . . . any pleadings, their defenses, and any statements of interest [pursuant to § 47-31 (d)] that they had filed in this case."

The defendant's counsel stated that the terms of the settlement agreement as recited were accurate, with the exception of one minor misstatement made by the plaintiffs' counsel. The following exchange then occurred:

"[The Defendant's Counsel]: . . . [J]ust to make it clear, these two settlements that were reported are interdependent. This is a global settlement. If one falls through, the other one doesn't happen.

"The Court: You mean the town's and the plaintiffs'?

"[The Defendant's Counsel]: And the plaintiffs'—

"The Court: Yeah.

"[The Defendant's Counsel]: —interior lot owners, [the defendant].

"The Court: Right.

"[The Defendant's Counsel]: It all has to happen or nothing happens."

In the defendant's motion for order, the defendant asserted that, following the February 4, 2020 hearing, the McBurneys had (1) threatened to file a lawsuit if the settlement agreement was effectuated, (2) contacted Pine Orchard Association, Inc., to try to "block the settlement [agreement]," and (3) claimed that the settlement agreement was " 'unenforceable.' " The defendant

contended that it had not "require[d] the McBurneys to approve the settlement [agreement]" because, as averred in an accompanying affidavit of the defendant's counsel, the McBurneys' counsel had advised the defendant's counsel on February 4, 2020, before the terms of the settlement agreement had been read into the record, that the McBurneys "were not going to do anything to interfere with the settlement [agreement]." The defendant asked the court to order that the McBurneys (1) were bound by the settlement agreement and (2) "ha[d] no rights to take any action to interfere with the implementation of the settlement agreement."

In their objection to the motion for order, the McBurneys maintained that they were not parties to the settlement agreement and denied making any assurance "to 'not interfere' with the settlement [agreement]." They stated, as averred in an accompanying affidavit of their counsel, that, on January 31, 2020, during settlement discussions and in open court, their counsel conveyed that they were not endorsing the terms of the settlement being negotiated, particularly insofar as the settlement would permit the defendant to erect a fence that the McBurneys believed violated their property rights. They further stated that (1) their counsel did not participate in settlement discussions following the January 31, 2020 hearing, (2) in an e-mail thread generated on February 3, 2020, notifying the clerk of the trial court that a settlement had been reached, the plaintiffs' counsel indicated that the plaintiffs would be withdrawing their claims as to the McBurneys such that it was the McBurneys' counsel's "choice" whether he wanted to appear before the court the next day, and (3) during the recess taken on February 4, 2020, their counsel left to attend another matter under the impression that all parties were aware that the McBurneys were not in agreement with the settlement terms.

On May 13, 2020, the court ordered, along with an attendant briefing schedule, that May 22, 2020, was the deadline by which the parties were permitted to file motions to summarily enforce the settlement agreement. On May 15, 2020, the defendant filed a motion seeking a court order requiring that any responses to discovery requests that it had served on the plaintiffs, the McBurneys, and Pine Orchard Association, Inc., dated May 15, 2020, be served on or before June 1, 2020. The defendant contended that the discovery requests sought the production of documents that were "relevant and material to the motions that will soon be filed with regard to the settlement agreement . . . ." In subsequent filings, the defendant clarified that the discovery would "be material and relevant to the issue of what interest the McBurneys are suddenly . . . claiming in [the defendant's] property." On June 4, 2020, the court denied the defendant's motion without prejudice, stating that "[t]he court's first obligation is to review the words the parties used without resort to unexpressed intentions. If the moving party claims the matter cannot be resolved without the documents at issue it should make this argument in its briefing." The same day, in denying a case flow request filed by the plaintiffs seeking an emergency status conference, the court stated that "[the defendant] has been ordered to make its case for the discovery in the briefing related to enforcement. Any party objecting to the need for this discovery should do the same. The court will determine whether discovery is needed when considering first whether enforcement may be considered without discovery. No party need comply with the [defendant's discovery] requests until further order of the court."

In their motion to summarily enforce the settlement agreement, the plaintiffs asserted that the defendant was refusing to abide by the settlement agreement on the basis of its insistence either that the McBurneys

were parties to the settlement agreement or that the settlement agreement was contingent on the McBurneys being or becoming parties thereto. The plaintiffs contended that the McBurneys were not parties to the settlement agreement, which, the plaintiffs posited, "[the defendant] was fully aware of when [it] agreed to the terms of the [settlement] agreement and knew when the [settlement] agreement was recited into the record." As relief, the plaintiffs asked the court to summarily enforce the settlement agreement "entered into by the parties and as presented to the court." In the town's motion, the town asserted that "[i]t was agreed to and reported that the settlement agreement . . . did not need to involve [the McBurneys and Lowlicht and Haedicke]; further, that these parties had been advised through their attorneys of record of the details of the settlement agreement, and that the plaintiffs would withdraw the claims against them. It was mutually acknowledged and understood by [respective] counsel that this withdrawal would moot the defenses and statements of interest [pursuant to § 47-31 (d)] that they had filed, allowing the case to be withdrawn, and leaving them to resolve, if they wished, their separate interests as waterfront property owners, either by discussion or by a separate action." As relief, the town requested that the court summarily enforce the settlement agreement "as between and among the parties to it . . . ." Pine Orchard Association, Inc., adopted and incorporated the town's arguments into its respective motion.

In the defendant's motion to bind, the defendant set forth several arguments supporting its claim that the "settlement agreement should be binding on the McBurneys." As relief, the defendant sought a court order providing that the McBurneys (1) had no rights in its property, (2) were estopped from claiming any right to interfere with the settlement agreement, and/or (3) had

waived any right to interfere with the settlement agreement.

In the defendant's so-called response to the motions to summarily enforce the settlement agreement, filed following the withdrawals of the motion for order and the motion to bind, the defendant stated that it "agree[d], as it ha[d] consistently claimed, that all parties entered into a global settlement agreement [and] that it is fully enforceable as [to] all parties." (Emphasis omitted.) The defendant argued that the court did not need to consider the motions to summarily enforce the settlement agreement because the defendant was prepared to "effectuat[e] the settlement [agreement] among all parties and then [enjoy] the benefits they bargained for under that agreement." The defendant further stated that it "maintain[ed] that the McBurneys ha[d] no rights over [its] property and what, if any, rights they had were waived and/or are estopped. Once the settlement agreement [was] fully implemented, [it] intend[ed] to fully exercise and enjoy any and all of its right[s] under the agreement. If that result[ed] in the McBurneys claiming some purported rights, [it would] dispense with those claims at that time."

The issue of whether the McBurneys were parties to the settlement agreement was addressed during the July 1, 2020 hearing on the motions to summarily enforce the settlement agreement and the McBurneys' request for sanctions against the defendant. To start, the court explained its understanding that, with respect to the McBurneys, all that was required under the settlement agreement was a withdrawal of the plaintiffs' claims against them. The court then questioned whether, to the extent that the McBurneys were seeking to claim rights that were inconsistent with the settlement agreement and to the extent that the defendant had arguments in defense against those claims, such claims and arguments were appropriate to raise in the present

action rather than in a separate proceeding. Relatedly, the court questioned whether the McBurneys were parties to the settlement agreement.

After several exchanges between the court and the defendant's counsel,[14] the court stated that, "here, as far as the McBurneys [go], it doesn't seem like . . . there's now, now anyway, a claim by [the defendant] that they're . . . bound by the settlement [agreement] because they agreed to it or some other legal argument that would affect them and say that they're bound by the settlement [agreement]. They're a party to the settlement [agreement]. That's not a claim now being pressed. Is that . . . a correct understanding?" The defendant's counsel did not respond directly to that question, instead indicating that the defendant had filed the motion for order "to try and keep [the settlement agreement] in place," that the defendant "want[ed] to go forward" with the settlement agreement, and that the defendant's "thought" was to pursue its claims against the McBurneys in a cross claim that it had filed against them approximately two months after the terms of the settlement agreement had been placed on the record.[15] The following colloquy then occurred:

[14] Between the January 31, 2020 hearing and June 12, 2020 (the date on which the defendant withdrew the motion for order and the motion to bind), the defendant was represented by Attorney Gerald L. Garlick of Seiger Gfeller Laurie LLP. On June 12, 2020, Attorney Richard P. Colbert of Day Pitney LLP appeared on behalf of the defendant as additional counsel. Both Attorney Colbert and Attorney Garlick attended the July 1, 2020 hearing; however, Attorney Colbert primarily spoke to the court on behalf of the defendant and exclusively addressed the court's questions regarding the McBurneys.

[15] On April 2, 2020, without requesting leave of the court, the defendant filed a cross claim against the McBurneys, seeking (1) to quiet title to its property or, alternatively, (2) damages for maintenance and repair costs in the event that the court determined that the McBurneys possessed an easement over its property. In its appellate briefs, the defendant represents that the cross claim has been withdrawn; however, the trial court file contains no such withdrawal.

"The Court: Let me just get one thing clear . . . . [I]t's now [the defendant's] position that it favors enforcement of the settlement agreement as filed by the other parties, that it is not seeking . . . to have any sort of order binding the McBurneys here, and that it wishes only that I deny the [McBurneys'] motion for sanctions. Is that a fair representation of [the defendant's] current position . . . ?

"[The Defendant's Counsel]: Yes."

After hearing argument from the plaintiffs' counsel, the court stated: "I want to make clear that in setting . . . this up, it seemed to me that what I was supposed to focus on is what happened in front of me. There was an agreement on the record in court, and if there was something for me to enforce it would be that. And that's why I took the position that . . . I have to determine whether there's some ambiguity or some other reason why I would go outside the terms that had been written down and were read on the record in court [on February 4, 2020] . . . . [I] wouldn't even get into testimony. It would not appear that . . . there's any reason for me to be concerned about that at all since [the defendant] . . . has changed its position about whether [the settlement agreement is] enforceable under these circumstances . . . ." The defendant's counsel did not object to those statements.

Later, the court again asked the defendant's counsel to address whether the McBurneys had "consciously join[ed]" the settlement agreement. The defendant's counsel responded that, prior to February 4, 2020, the defendant did not believe that the McBurneys were in agreement with the proposed settlement. However, he further stated that (1) in light of a purported representation made by the McBurneys' counsel to Attorney Gerald L. Garlick, counsel for the defendant, before the terms of the settlement agreement had been placed on

the record on February 4, 2020, (i.e., that the McBurneys would not "interfere" with the settlement agreement), and (2) upon hearing the plaintiffs' counsel state during the February 4, 2020 hearing, as paraphrased by the defendant's counsel, that he had "the consent of the McBurneys and . . . an agreement [by] all parties [as] to all terms," the defendant subsequently believed that the McBurneys were "joining in [the settlement] agreement . . . [and were] stamping their approval on it." In response, the court stated that "[what is] most concerning for me here is a suggestion that the McBurneys were affirmatively joining into th[e] settlement [agreement] rather than just saying, look, you can withdraw the action and we're out of it, and we'll do what we want later." The court further stated that the February 4, 2020 hearing transcript does not reflect that the plaintiffs' counsel had represented that "the McBurneys signed off on [the settlement agreement]. I know it doesn't say that."

The court then solicited comments from other counsel. The plaintiffs' counsel stated that "[t]he McBurneys absolutely did not sign on to the terms and conditions of the settlement [agreement]. They consented to my presenting the settlement [agreement] to the court and would not interfere and appear before the court to object to the entry of a settlement amongst the parties . . . who were signed onto th[e] [settlement] agreement . . . . That was the import of my—[the McBurneys] consent[ed] to our presenting the settlement [agreement], but they weren't going to appear and lodge an objection to the settlement [agreement] because they had absolutely nothing to do with [it]. . . . [T]he action was going to be withdrawn as to them." The McBurneys' counsel stated that "all the parties had a clear understanding . . . of the mechanics of the settlement [agreement] and that the McBurneys weren't part of that, that there was essentially a settlement around

them by withdrawing claims." The town's counsel likewise concurred that the McBurneys were not parties to the settlement agreement.

In discussing the motions to summarily enforce the settlement agreement, the court observed that none of the parties was opposing enforcement. The defendant's counsel stated that the defendant agreed that there was a settlement agreement and that it did not object to the motions to enforce it.

In the plaintiffs' original proposed order, the plaintiffs included a sentence providing that the McBurneys had "declined to participate in the settlement agreement . . . ." In its objection to the original proposed order, the defendant argued that the February 4, 2020 hearing transcript does not reflect that the McBurneys had " 'declined to participate in the settlement agreement.' "

Additionally, on July 13, 2020, the McBurneys objected to the original proposed order "to the extent it is construed in any way as a judgment of the court as to the McBurneys' rights in the subject matter thereof. Instead, the [original] proposed order should be understood as an order of the court limited to enforcement of the contractual rights between the parties to the settlement agreement (which does not include the McBurneys)." In an ensuing "response/objection" that the defendant filed on July 14, 2020, the defendant argued that the court should not adjudicate any settlement enforcement issues concerning the McBurneys, which would be "fully and fairly litigated in another forum."[16]

On July 14, 2020, in denying the McBurneys' request for sanctions against the defendant, the court stated

[16] On November 16, 2020, the defendant commenced a separate action against the McBurneys and Pine Orchard Association, Inc., in which the defendant, inter alia, is seeking to quiet title to its property. See *Beachcroft, LLC* v. *McBurney*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-6142650-S. That action remains pending.

in relevant part: "The court would not sanction [the defendant] for trying to get heard on its claim that, on various legal grounds, the [McBurneys] may not interfere with the settlement [agreement] that resolved this litigation. [The defendant] is accused, though, of misrepresenting to the court that the McBurneys agreed to be bound by th[e] settlement [agreement]. *The court knows from the proceedings in front of it and the parties' submissions that this is not true.* This is a motion for sanctions and not a matter of discerning the settlement terms, [s]o the court can look beyond the letter of the [settlement] agreement to the circumstances. [The defendant's] counsel has sworn that the McBurneys' lawyers said outside the courtroom [on February 4, 2020] that the McBurneys would not interfere with the settlement [agreement], and, indeed, the McBurneys' counsel was silent while in court [on February 4, 2020] and left court early. The McBurneys may contend with full justification that they did not give up by virtue of the settlement [agreement] any rights they had—*they are right that they were not part of the settlement* [*agreement*]—but that doesn't mean [the defendant] could only have asserted its beliefs in bad faith." (Emphasis added.)

The issue regarding the McBurneys' status with respect to the settlement agreement was addressed again during the August 4, 2020 hearing on the original proposed order. During the hearing, the defendant's counsel iterated that no issues regarding the McBurneys should be addressed in the court's summary enforcement of the settlement agreement. The defendant's counsel further asserted that the issue of whether the McBurneys had assented to the settlement agreement had not been adjudicated, as the defendant had withdrawn the motion for order and the motion to bind without any discovery being permitted or an evidentiary hearing being conducted relating to that issue. The defendant's counsel

maintained that the court "shouldn't take a position one way or the other as to whether the McBurneys ha[d] adopted the settlement [agreement], [were] part[ies] to it, or ha[d] agreed to do anything in connection with [it] [b]ecause we just haven't adjudicated the issue."

In response, the court stated that "what I believe happened was that [the plaintiffs' counsel] moved to enforce the settlement [agreement]. And I conducted a hearing about that, *and I concluded that the McBurneys were not part of the settlement* [*agreement*]. And that much is decided. . . . So, regardless of the motion that [the defendant] may have made . . . I was hearing the motion that [the plaintiffs' counsel] made to enforce th[e] settlement [agreement]. *And it was clear that the McBurneys were not part of it.* And that's going to be part of my order. But I'm not resolving the relationship between [the defendant] and [the] McBurney[s]. I'm just—*they were not . . . part*[*ies*] *to the settlement* [*agreement*]. That's what I concluded from the hearing. That's what I ordered [the plaintiffs' counsel] . . . to prepare a proposed order for." (Emphasis added.) The court permitted the defendant's counsel to comment, and the following colloquy occurred:

"[The Defendant's Counsel]: . . . [M]y final comment will be: We were not given an opportunity for discovery. We were not given an opportunity to present evidence at the [July 1, 2020] hearing. You had indicated that there would not be any evidence or testimony at that hearing. You cannot—

"The Court: Because I concluded I didn't need it.

"[The Defendant's Counsel]: Well, in my view, Judge—

"The Court: It was a question of law.

"[The Defendant's Counsel]: Yes, Judge. In all due respect, I think that testimony of people as to what

they said, what authority they had, and what effect those words that were spoken to [the defendant]—both [to Attorney Garlick] and to [the defendant] on the record and before and the effect that it had on them in relation to the settlement [agreement] is relevant testimony. And, you know, again, I'm just going to—

"The Court: I find that we discussed this already at the—at the hearing that I held on it. And that I concluded that discovery wasn't warranted. The question was simply: What was the agreement that was placed on the record before the court? And which didn't call for outside evidence. Because it was clear to me that my focus was on what was said on the record. And I'm not going to spend any more time debating it. Because I know what happened at the hearing. I know that I already considered that issue and indicated what I was doing. And this was solely about the fact that I imposed on [the plaintiffs' counsel] the obligation to give me a draft order that reflected what I had concluded on the record. So . . . this discussion is over with respect to that."

The next day, the plaintiffs filed the amended proposed order, which retained the language reflecting that the McBurneys had "declined to participate in the settlement agreement . . . ." In its objection to the amended proposed order, the defendant again argued that the February 4, 2020 hearing transcript does not reflect that the McBurneys had " 'declined to participate in the settlement agreement.' "

In the enforcement decision, the court noted that, on July 1, 2020, it conducted an *Audubon* hearing[17] and that, although the defendant had "requested discovery and a trial-type hearing on the terms [of the settlement

[17] "A hearing pursuant to *Audubon* . . . is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law." (Citation omitted; internal quotation marks omitted.) *Reiner* v. *Reiner*, supra, 190 Conn. App. 270 n.3.

agreement] . . . the court found no ambiguity in the recorded terms, thus rendering th[e] settlement [agreement] summarily enforceable with no need for discovery and testimony."

Additionally, the court stated: "The present action was scheduled for a trial of all issues on . . . February 4, 2020. At that time, counsel for the plaintiffs together with counsel for [the defendant] and [the town] appeared before the court and presented and stipulated to the terms and conditions of a settlement agreed to by those parties to the present action along with [Pine Orchard Association, Inc.] that disposed of any and all claims alleged by and between them in the above referenced matter . . . . The [self-represented] intervening plaintiffs . . . received notice of the scheduled hearing but declined to attend the hearing. The plaintiffs, however, represented to the court that the intervening plaintiffs had been advised of, and consented to, the terms and conditions of the settlement agreement presented to the court.

"[The McBurneys and Lowlicht and Haedicke] declined to participate in the settlement agreement, and it was represented to the court that any and all claims alleged against and/or by [them], if any, in the present action would be withdrawn upon implementation of the settlement agreement. The transcript [of the February 4, 2020 hearing] expressly reflects that while all parties agreed that this case was ending, the agreement was that it was ending for [the McBurneys and Lowlicht and Haedicke] 'without prejudice' to their claims or the claims against them."

In its motion to reargue, the defendant argued that the court resolved the issue of whether the McBurneys were parties to the settlement agreement without permitting discovery or conducting an evidentiary hearing notwithstanding that the issue was a disputed question

of fact. In denying the motion to reargue, the court stated that "[t]he court's ruling was based on the unambiguous recitation of the terms of the [settlement] agreement in court made in the presence of and with the agreement of counsel for [the defendant]. One plain term of the agreement was that the settlement of this case was without prejudice to the McBurney claims. Therefore, no testimony was required."

In addition, on September 8, 2020, the McBurneys filed a motion for clarification, requesting that the court clarify that the enforcement decision concerned "merely the court's enforcement of a settlement agreement amongst certain parties not including the McBurneys, that the [enforcement decision] should not be construed as making any determination of any of [the] McBurneys' claimed rights, or the rights of any other nonparty, in the easement at issue in the settlement agreement, and that the [enforcement decision] should not be construed as enforceable against anyone other than parties to the settlement agreement . . . ." (Emphasis omitted.) On September 17, 2020, the court denied the motion for clarification, stating that "[t]he court has already made clear that the termination of this lawsuit was without prejudice to any claims by or against the McBurneys."

In claiming that the court committed error in making a finding that the McBurneys were not parties to the settlement agreement, the defendant asserts that (1) the issue of whether the McBurneys were parties to the settlement agreement was not before the court for consideration, (2) the record does not support the court's finding, and (3) the court improperly failed to conduct an evidentiary hearing. We address, and reject, each of these contentions in turn.

A

We first address the defendant's assertion that the court improperly addressed the question of whether the

McBurneys were parties to the settlement agreement because that issue was not pending before it. The defendant contends that, following its withdrawals of the motion for order and the motion to bind, there was no motion before the court requiring a determination as to whether the McBurneys were parties to the settlement agreement. This claim fails.

"At the outset, we note that [p]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found but not averred cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . It is equally clear, however, that the court must decide those issues raised in the pleadings." (Citations omitted; internal quotation marks omitted.) *Shapero* v. *Mercede*, 77 Conn. App. 497, 503–504, 823 A.2d 1263 (2003). This rationale extends equally to motions. See, e.g., *Chang* v. *Chang*, 197 Conn. App. 733, 750–53, 232 A.3d 1186 (2020); *Breiter* v. *Breiter*, 80 Conn. App. 332, 335–36, 835 A.2d 111 (2003). "[A]n interpretation of the pleadings in the underlying action . . . presents a question of law and is subject to de novo review on appeal." (Internal quotation marks omitted.) *Breiter* v. *Breiter*, supra, 335.

Here, notwithstanding the defendant's withdrawals of the motion for order and the motion to bind, the McBurneys' status as to the settlement agreement was squarely before the court vis–vis the motions to summarily enforce the settlement agreement, in which all of the movants sought summary enforcement of the settlement agreement *with respect to the parties to the*

settlement agreement, which, as the movants claimed, did not include the McBurneys. Indeed, during the August 4, 2020 hearing, the court stated that the plaintiffs had "moved to enforce the settlement [agreement]. And I conducted a hearing about that and I concluded that the McBurneys were not part of the settlement [agreement]. . . . So regardless of the motion that [the defendant] may have made . . . I was hearing the motion that [the plaintiffs' counsel] made to enforce th[e] settlement [agreement]. . . . [The McBurneys] were not . . . part[ies] to the settlement [agreement]. That's what I concluded from the hearing." Accordingly, we conclude that, in determining that the McBurneys were not parties to the settlement agreement, the court addressed a question relevant to its adjudication of the motions to summarily enforce the settlement agreement.

B

We next turn to the defendant's assertion that the court's finding that the McBurneys were not parties to the settlement agreement is not supported by the record. We disagree.

"[T]o the extent that the defendant['s] claim implicates the court's factual findings, our review is limited to deciding whether such findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Commissioner of Transportation* v. *Lagosz*, supra, 189 Conn. App. 841.

On the basis of the record before the court, we conclude for the following reasons that the court's finding that the McBurneys were not parties to the settlement agreement is not clearly erroneous. First, during the January 31, 2020 hearing, the McBurneys' counsel unequivocally conveyed that the McBurneys were not in agreement with the terms of the settlement being negotiated, and no party disputed that representation. Second, during the February 4, 2020 hearing, with respective counsel for the plaintiffs, the defendant, the town, Pine Orchard Association, Inc., and the McBurneys present, the plaintiffs' counsel represented to the court that "the plaintiffs [had] reached an agreement with [the defendant] and [the defendant's principal member] on terms and conditions of settlement . . . ." The plaintiffs' counsel did not mention the McBurneys as being part of the settlement agreement. Third, during the February 4, 2020 hearing, the following colloquy occurred between the court and the defendant's counsel:

"[The Defendant's Counsel]: . . . [J]ust to make it clear, these two settlements that were reported are interdependent. This is a global settlement. If one falls through, the other one doesn't happen.

"The Court: You mean the town's and the plaintiffs'?

"[The Defendant's Counsel]: And the plaintiffs—

"The Court: Yeah.

"[The Defendant's Counsel]: —interior lot owners, [the defendant].

"The Court: Right.

"[The Defendant's Counsel]: It all has to happen or nothing happens."

The defendant's counsel did not identify the McBurneys as parties to the settlement agreement during that exchange. Fourth, the McBurneys' counsel was not

present at the time that the settlement agreement was read into the record, and at no time prior to his departure from the courtroom did the McBurneys' counsel state on the record that the McBurneys had changed their position as conveyed to the court during the January 31, 2020 hearing. Fifth, the settlement agreement, which imposed no obligations on the McBurneys, provided that it was without prejudice to any claims by or against them.[18] Sixth, the defendant itself, in its motion for order filed approximately one month after the February 4, 2020 hearing, took the position that it had "not require[d] the McBurneys to approve the settlement [agreement]."

The defendant stresses that the February 4, 2020 hearing transcript does not support the finding that the McBurneys were not parties to the settlement agreement because it demonstrates that, after noting that respective counsel for Pine Orchard Association, Inc., and the McBurneys were not present in the courtroom, the plaintiffs' counsel represented that "we do have a—their consent. We have an agreement. We have . . . terms and conditions that all of the parties have agreed to in settlement of this claim." In light of the contents of the record described in the preceding paragraph, however, we agree with the court's statement during the July 1, 2020 hearing that the plaintiffs' counsel did not represent that "the McBurneys signed off on [the settlement agreement]." Considered in context, the statements by the plaintiffs' counsel reasonably can be construed to indicate that the McBurneys, although not joining the settlement agreement, were not objecting to the other parties' presenting the settlement agreement to the court.[19]

[18] We note that the McBurneys did not file an answer, make a statement pursuant to § 47-31 (d), or raise any claim in the present action that would have to be withdrawn.

[19] We deem it notable that the defendant never filed a motion seeking summary enforcement of the settlement agreement predicated on an argument that the McBurneys were interfering with its implementation. Such a

In sum, we conclude that the court did not err in finding that the McBurneys were not parties to the settlement agreement.

C

Last, we address the defendant's assertion that the court improperly resolved the question of whether the McBurneys were parties to the settlement agreement without conducting an evidentiary hearing. We are not persuaded.

"We consistently have held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court." (Internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 797, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Internal quotation marks omitted.) *St. Denis-Lima* v. *St. Denis*, 190 Conn. App. 296, 304, 212 A.3d 242, cert. denied, 333 Conn. 910, 215 A.3d 734 (2019). The defendant does not argue that the court violated any statute, rule of practice, or rule of evidence

motion would have been appropriate if the McBurneys were, in fact, parties to the settlement agreement.

by not conducting an evidentiary hearing, and, therefore, we consider whether the court's inaction constituted an abuse of discretion.

Under the circumstances of this case, we conclude that the court did not abuse its discretion by not conducting an evidentiary hearing as to the issue of whether the McBurneys were parties to the settlement agreement. At no point prior to the July 1, 2020 hearing did the defendant request an opportunity to present evidence as to that specific issue, which, as we explained in part I A of this opinion, the plaintiffs, the town, and Pine Orchard Association, Inc., had placed before the court by way of their respective motions to summarily enforce the settlement agreement.[20] During the July 1, 2020 hearing, when asked directly by the court to confirm that the defendant was no longer seeking from the court an order binding the McBurneys to the settlement agreement, the defendant's counsel answered affirmatively. Furthermore, the defendant's counsel made no response to the court's statements that, on the basis of his representations, the court did not believe that it was necessary to hear evidence with respect to the motions to enforce the settlement agreement. Although the defendant's counsel made some comments suggesting that the defendant believed that the McBurneys were parties to the settlement agreement, those comments, at most, reflected that the defendant was not conceding that the

[20] In the enforcement decision, the court stated that the defendant had "requested discovery and a trial-type hearing on the terms [of the settlement agreement] . . . ." The discovery requests that the defendant served on the plaintiffs, the McBurneys, and Pine Orchard Association, Inc., in May, 2020, which the court prohibited without prejudice, sought, as the defendant described, documents "material and relevant to the issue of what interest the McBurneys are suddenly . . . claiming in [the defendant's] property." Those discovery requests did not seek materials concerning the McBurneys' status as either parties or nonparties to the settlement agreement. The record does not reflect a request by the defendant for discovery or an evidentiary hearing on that issue prior to July 1, 2020.

McBurneys were not parties to the settlement agreement. We do not, however, construe those comments as overriding the affirmation made by the defendant's counsel that the defendant was no longer seeking to bind the McBurneys to the settlement agreement or to reflect that the defendant was pressing for an evidentiary hearing. Thus, at the end of the July 1, 2020 hearing, it could be reasonably concluded that there was no need to hold an evidentiary hearing as to whether the McBurneys were parties to the settlement agreement.

After the July 1, 2020 hearing, the defendant argued that it was not given an opportunity to present evidence on the issue of whether the McBurneys were parties to the settlement agreement. As the court observed during the August 4, 2020 hearing, however, that issue was addressed and resolved at the July 1, 2020 hearing. The defendant had opportunities, both prior to and at the July 1, 2020 hearing, to make a request to introduce evidence on that issue; however, the defendant did not pursue those opportunities. We cannot fault the court for not conducting an evidentiary hearing in this situation.

In sum, in light of the foregoing circumstances, we conclude that the court did not abuse its discretion by not conducting an evidentiary hearing as to the question of whether the McBurneys were parties to the settlement agreement.

II

The defendant next claims that, in summarily enforcing the settlement agreement, the trial court improperly altered or omitted material terms of the settlement agreement. For the reasons that follow, we agree with the defendant only insofar as the court omitted one material set of terms of the settlement agreement from the enforcement decision; we otherwise reject the defendant's remaining contentions.

The following additional facts and procedural history are relevant to our resolution of this claim. During the July 1, 2020 hearing, the court ordered the plaintiffs to file a proposed order with regard to the motions to summarily enforce the settlement agreement. Of import, the court conveyed to the plaintiffs that it wanted "to have a single document that's an order of the court that lays out all the elements [of the settlement agreement]."

Both the original proposed order and the amended proposed order, as described by the plaintiffs, contained "orders to enforce the settlement agreement that [were] in conformity with the terms and conditions of the settlement agreement except as to the timing of the implementation of the settlement [agreement] . . . ."[21] In its objections to the original proposed order and the amended proposed order, the defendant argued that the plaintiffs had altered or omitted material terms of the settlement agreement.

In the enforcement decision, the court entered orders to implement the terms of the settlement agreement, which we will further discuss in part II B of this opinion. Before setting forth those orders, the court "found that the draft order submitted by the plaintiffs conformed to the unambiguous terms of the settlement [agreement] as recorded, with one exception [addressed by the court]. Having addressed that legitimate concern, this order reflects what the parties plainly agreed to when recording the settlement [agreement] and provides detail when needed, not to in any way change the agreement, but as a matter solely of enforcing what was unambiguously agreed." In its motion to reargue, the defendant

[21] On July 1, 2020, the court ordered the plaintiffs to file a separate proposed order setting forth a schedule to effectuate the terms of the settlement agreement. On July 9, 2020, in compliance with the court's order, the plaintiffs filed a proposed scheduling order, which the court approved on July 10, 2020. That order is not at issue in this appeal.

contended that the court's enforcement decision conflicted with the terms of the settlement agreement. In denying the motion to reargue, the court stated that "[t]he court's ruling was based on the unambiguous recitation of the terms of the [settlement] agreement in court made in the presence of and with the agreement of counsel for [the defendant]."

A

Before turning to the merits of the defendant's claim, we address the parties' dispute as to the applicable standard of review. The town and Pine Orchard Association, Inc., contend that the abuse of discretion standard applies. The plaintiffs argue in favor of a "deferential" standard of review. In contrast, the defendant asserts that we should apply plenary review. We conclude that the proper standard of review is the abuse of discretion standard.

In *Vance* v. *Tassmer*, 128 Conn. App. 101, 16 A.3d 782 (2011), appeal dismissed, 307 Conn. 635, 59 A.3d 170 (2013), this court considered whether, in summarily enforcing a settlement agreement, a trial court had exceeded the scope of the agreement by conveying certain real property to the plaintiffs. Id., 108–109, 117. In reviewing that claim, this court explained that "[i]t is axiomatic that courts do not rewrite contracts for the parties. *Herbert S. Newman & Partners, P.C.* v. *CFC Construction Ltd. Partnership*, 236 Conn. 750, 760, 674 A.2d 1313 (1996). In determining whether the court went beyond the scope of the settlement agreement . . . we review the court's decision for an abuse of discretion. See *Waldman* v. *Beck*, 101 Conn. App. 669, 673, 922 A.2d 340 (2007). '[T]he court's authority in such a circumstance is limited to enforcing the undisputed terms of the settlement agreement that are clearly and unambiguously before it, and the court has no discretion to impose terms that conflict with the agreement. See *Janus Films, Inc.* v. *Miller*, 801 F.2d 578,

582 (2d Cir. 1986) ("[i]n determining the details of relief [pursuant to a settlement agreement], the judge may not award whatever relief would have been appropriate after an adjudication on the merits, but only those precise forms of relief that are either agreed to by the parties . . . or fairly implied by their agreement" . . .).' *Waldman* v. *Beck*, supra, 673–74." *Vance* v. *Tassmer*, supra, 117. Similarly, in *Waldman*, this court applied the abuse of discretion standard in addressing whether, in summarily enforcing a settlement agreement, a trial court had exceeded the scope of the agreement by rendering judgment against the defendant. See *Waldman* v. *Beck*, supra, 673–74. As *Vance* and *Waldman* demonstrate, the abuse of discretion standard applies when the question before this court is whether, in summarily enforcing a settlement agreement, a trial court has exceeded the bounds of the agreement.

The defendant acknowledges the aforementioned language but, nevertheless, contends that plenary review applies. The defendant relies on *Aquarion Water Co. of Connecticut* v. *Beck Law Products & Forms, LLC*, 98 Conn. App. 234, 907 A.2d 1274 (2006) (*Aquarion*), to support its proposition. This reliance is misplaced. In *Aquarion*, the defendants claimed on appeal that the trial court, in summarily enforcing a settlement agreement, "went beyond the scope of the settlement agreement"; id., 243; by (1) rendering judgment of possession in the plaintiffs' favor and (2) awarding the plaintiffs attorney's fees and costs pursuant to a provision of the agreement. Id., 242–43. With respect to the first claim, this court applied the abuse of discretion standard and concluded that the trial court acted within the scope of the settlement agreement by rendering judgment of possession, agreeing with the plaintiffs' argument that the settlement agreement at issue was "the functional equivalent of a judgment of possession . . . ." (Internal quotation marks omitted.) Id., 242. With respect to the

second claim, this court determined that the defendants' contention—that the provision in the settlement agreement providing for attorney's fees and costs in any *future* actions did not permit an award of attorney's fees and costs in the underlying action—raised a question of law. See id., 243. Accordingly, this court applied plenary review; see id.; and concluded that the attorney's fees and costs award was improper, as a matter of law, "on the basis of the settlement agreement." Id., 244.

This court's treatment of the first claim in *Aquarion* aligns with the principle set forth in *Vance* and *Waldman* that the question of whether a court has exceeded the scope of a settlement agreement when summarily enforcing it is subject to the abuse of discretion standard.[22] In contrast, at its core, the second claim in *Aquarion* did not concern the trial court's enforcement of the settlement agreement but, rather, the court's award of attorney's fees and costs pursuant to the agreement on the basis of its interpretation of the agreement. This distinction explains the two separate standards of review applied by this court to the two different claims raised in *Aquarion*.

In sum, pursuant to *Vance*, *Waldman*, and *Aquarion*, the abuse of discretion standard applies to the defendant's claim that the court committed error in enforcing the settlement agreement by altering or omitting material terms of the settlement agreement.

B

The defendant raises seven issues as part of its claim that, in the enforcement decision, the court improperly altered or omitted material terms of the settlement agreement. We address each issue in turn.

[22] In fact, this court in *Waldman* cited *Aquarion* in stating that the abuse of discretion standard applied in that case. See *Waldman* v. *Beck*, supra, 101 Conn. App. 673.

1

First, the defendant asserts that the court improperly expanded the southern boundary of a view easement[23] that would encumber a portion of the defendant's property pursuant to the settlement agreement. We disagree.

The settlement agreement provides that a portion of the lawn owned by the defendant "shall be subject to a viewscape easement, prohibiting the erection or placement of any permanent structure that is taller than 30 inches and/or any landscaping that is taller than 30 inches, nor any personal property that unreasonably impairs or blocks this viewscape easement. [Certain] gardens at the top of . . . riprap[24] in the view easement area can remain at their current height. *The eastern line of the view easement shall be a straight line from the* [*avenue*] *to the riprap along the westernmost edge of* [*certain other*] *gardens* [*on the east side of the lawn*]." (Emphasis added; footnote added.) In the enforcement decision, the court ordered that the portion of the lawn at issue "shall be subject to a viewscape easement prohibiting the erection or placement of any permanent structure that is taller than thirty (30") inches and/or any landscaping that is taller than thirty (30") inches, nor any personal property that unreasonably impairs or blocks the view of [the sound] from the avenue (the 'viewscape easement'). The gardens at the top of the riprap in the viewscape easement area can remain at the height that existed during February of 2020. . . . *The eastern boundary line of the viewscape easement shall be a straight line that . . . shall extend from the southerly boundary line of the portion of the avenue*

[23] We intend our use of the term "view easement" to be interchangeable with the parties' and the trial court's use of the term "viewscape easement."

[24] "Riprap consists of large stones or chunks of concrete that are layered on an embankment slope to prevent erosion. Merriam Webster's Collegiate Dictionary (10th Ed. 1998)." *Johnson* v. *North Branford*, 64 Conn. App. 643, 646 n.8, 781 A.2d 346, cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001).

to be conveyed to the town . . . to [*the sound*] *and shall run along the westernmost edge of the existing gardens on the east side of the lawn. The viewscape easement shall be bounded to the south by* [*the sound*]."[25] (Emphasis added.)

The defendant asserts that, pursuant to the settlement agreement, the southern boundary of the view easement is coterminous with the edge of the riprap, meaning that neither the riprap nor the sound, which is located below the riprap, is subject to the view easement. We are not persuaded. The settlement agreement does not expressly define the southern boundary of the view easement, providing only that the eastern boundary of the easement extends from the southern boundary line of the avenue "to the riprap . . . ." Notably, in the preceding sentence, the settlement agreement refers to gardens located "at the top of the riprap . . . ." This belies the defendant's argument that the view easement extended only to the edge of the riprap, as the parties did not designate the "top" of the riprap as a boundary of the easement. Moreover, as the plaintiffs posit in their appellate brief, the plain purpose of the view easement is to permit a view of the sound. Under these circumstances, it is reasonable to determine that the settlement agreement fairly implied that the view easement extended to the sound. Accordingly, we conclude that the court did not abuse its discretion in designating the sound as the southern boundary of the view easement.

2

Second, the defendant argues that the court improperly omitted from the enforcement decision an order that the settlement agreement is "contingent" on the execution of quitclaim deeds and releases by the owners

[25] The court also described the northern and western boundaries of the view easement, which we need not detail.

of interior lots along the avenue who had not previously entered into agreements with the defendant. We are not persuaded.

The settlement agreement provides that "[t]he parties shall exchange mutual general releases and shall withdraw all pending claims and actions by them. The documents to be executed will include, but not be limited to, quitclaim deeds by all owners on the [avenue], who have not previously done so, and [Pine Orchard Association, Inc.], releasing any and all claims and rights to [the defendant's property and to [the] property [of the defendant's principal member] . . . . *Th*[*e*] *settlement* [*agreement*] *is subject to and contingent upon the execution of documents acceptable to the parties.*" (Emphasis added.) In the enforcement decision, the court ordered in relevant part that "[a]ll settlement documents shall be executed and exchanged by all parties, and the various property interests to be conveyed shall be completed and executed by September 4, 2020. In addition to general releases by and between the parties to the settlement agreement, the documents to be executed shall include, but not be limited to, quitclaim deeds by all owners of properties on [the] avenue who have not previously entered into an agreement with [the defendant] and, in addition, [Pine Orchard Association, Inc.], releasing any and all claims and rights to the properties . . . owned by [the defendant's principal member] and [the defendant] . . . ." The court did not explicitly order that the settlement agreement was "contingent" on the execution of any documents.

The defendant contends that the court committed error in failing to order that the settlement agreement was "contingent" on the execution of the documents at issue by the interior lot owners. The defendant maintains that portions of the settlement agreement will be unenforceable unless the interior lot owners execute the documents at issue, such that the inclusion of the

word "contingent" is critical to signify that the settlement agreement is untenable without the participation of the interior lot owners. We disagree. The court ordered that "[a]ll settlement documents shall be executed and exchanged by all parties" and that "the documents to be executed shall include . . . quitclaim deeds by all owners of properties on [the] avenue who have not previously entered into an agreement with [the defendant] . . . ." We perceive no appreciable difference between the parties agreeing that the settlement agreement is "contingent" on the execution of the documents at issue by the interior lot owners and the court ordering that all settlement documents, which "shall include" the documents at issue, "shall be executed . . . ." Thus, we conclude that the court did not abuse its discretion by not ordering that the settlement agreement was "contingent" on the execution of the documents at issue.

3

Third, the defendant contends that the court improperly delineated where sitting and recreating is prohibited on a portion of the lawn that Pine Orchard Association, Inc., is to acquire from the defendant pursuant to the settlement agreement. This assertion is unavailing.

The settlement agreement provides that the defendant "shall convey to Pine Orchard Association, [Inc.] . . . by quitclaim deed a strip of land that provides an 11 foot wide clear and unimpeded pedestrian access way from the end of the paved portion of [the avenue] to the stairway leading to [the sound] and then to [the sound], together with the stairs leading to [the sound]," along with the triangular piece of property containing the stairs. The parties refer to these segments collectively as "the path." The settlement agreement further provides that "the path shall be used for pedestrian access to the riprap, stairs, seawall, walkway, and the

waterfront. *Except as provided below, no sitting or recreating shall be permitted on the path above the top of the stairs, nor shall any permanent structures be installed there. Sitting and recreating shall be permitted on the stairs, riprap, and/or seawall upon the path in the area from the top of the stairs to* [*the sound*]." (Emphasis added.) In the enforcement decision, the court ordered that "[t]he path shall be used for pedestrian access to the riprap, stairs, seawall, walkway and the waterfront . . . . *Sitting and recreating shall be permitted on the stairs, riprap and/or seawall upon the path in the area from the top step of the stairs to* [*the sound*]. *No sitting or recreating shall be permitted on the path to the north and landward of the top step of the stairs nor shall any permanent structures be installed there.*" (Emphasis added.)

The defendant contends that the court improperly described the portion of the path where sitting and recreating is barred as "north and landward of the top step of the stairs" rather than " 'above the top of the stairs.' " The defendant posits that the court's order creates confusion as to whether sitting and recreating is permitted on a grassy area located in the path next to the stairs. We are not convinced. We perceive no appreciable difference between the phrases "north and landward of the top step of the stairs" and "above the top of the stairs." Accordingly, we conclude that the court did not abuse its discretion in describing the area where sitting and recreating is prohibited on the path.

4

Fourth, the defendant asserts that the court improperly omitted from the enforcement decision an order that an easement over the defendant's property that the town is to acquire from the defendant pursuant to the settlement agreement enables the town to replace a drainpipe. We reject this assertion.

The settlement agreement provides that it "is contingent upon the acquisition by the [town] of the [avenue] and the granting of an easement over the lawn area *to maintain and repair the drain line*." (Emphasis added.) The settlement agreement subsequently provides in relevant part that "[t]he town will receive from [the defendant] an easement *to maintain*, *repair*, *and replace a drainpipe* that runs from a catch basin in [a] cul-de-sac [at the end of the avenue] straight south . . . to empty into [the sound]. . . . [T]he easement would include the right of the town to pass over and use additional portions of the [defendant's] property to the east, and outside that easement, only as necessary *to perform maintenance and repairs and replacement of that drainpipe*." (Emphasis added.) In the enforcement decision, the court ordered that "[the defendant] shall grant to the town an easement and a license over the lawn *to maintain and repair a drain line* owned and operated by the town (the 'town easement'). . . . [T]he license shall grant the right to pass over and use additional portions of the lawn to the east, and outside the town easement, only as necessary *to perform maintenance and repairs and replacement of the drainpipe*." (Emphasis added.)

The defendant contends that the court improperly failed to order that the easement permits the town not only to repair and to maintain the drainpipe, but to replace the drainpipe. We do not agree that the court's enforcement decision omits that provision of the settlement agreement. Although one portion of the court's enforcement decision refers only to the town repairing and maintaining the drainpipe with no mention of the town replacing the drainpipe,[26] the court clearly recognized the town's ability to replace the drainpipe in subsequently ordering that the town could pass over and

[26] Similarly, one section of the settlement agreement refers to the town's being granted an easement "to maintain and repair the drain line," with no allusion to replacement of the drainpipe.

use portions of the lawn outside of the easement "only as necessary to perform maintenance and repairs and *replacement* of the drainpipe." (Emphasis added.) Read in its entirety, the court's enforcement decision provides that the town may maintain, repair, *and* replace the drainpipe. Accordingly, we conclude that the court did not abuse its discretion.

5

Fifth, the defendant argues that the court improperly omitted from the enforcement decision an order that, in the event that the town must remove a fence, yet to be erected by the defendant, to access the drainpipe discussed in part II B 4 of this opinion, the town must (1) provide reasonable notice to the defendant and (2) cooperate with the defendant in scheduling repair work. We agree.

The settlement agreement provides that, "[i]n the event that the town requires removal of [the defendant's] fence to access the drainpipe, *the town shall provide reasonable notice, and shall cooperate with* [*the defendant's principal member*] *in scheduling the repair work. Emergency repairs are excepted from this requirement* [(notice and cooperation terms)]. In the event the town must remove the fence, it shall have the obligation to restore or replace it." (Emphasis added.)In the enforcement decision, the court ordered that "[t]he town will restore or replace [the defendant's] fence(s) if the town needs to remove the fence to access the drainpipe." The court's enforcement decision did not contain the notice and cooperation terms.

The defendant contends that the court improperly failed to include in the enforcement decision the notice and cooperation terms, which the defendant represents that it insisted on inserting into the settlement agreement "[t]o limit the intrusion by the town for maintenance . . . ." We agree with the defendant. Although

the notice and cooperation terms are set forth explicitly in the settlement agreement, the court did not include or refer to them in the enforcement decision, and we do not read them to be implicit therein. Of note, the plaintiffs' amended proposed order included language attempting to incorporate the notice and cooperation terms.[27] Thus, on the basis of the record before us, we perceive no apparent basis for the court's omission of the notice and cooperation terms from the enforcement decision.

Ordinarily, a court's omission of a settlement term in a decision summarily enforcing a settlement agreement is not problematic, particularly when the court is focused on enforcing a discrete portion of the agreement. That is, the terms of a settlement agreement remain in full force and effect notwithstanding a court's failure to mention them in an enforcement decision. Here, however, it is evident that the court intended to have the enforcement decision encompass all material terms of the settlement agreement. The court described the enforcement decision as "reflect[ing] what the parties plainly agreed to when recording the settlement [agreement] . . . ." In addition, in ordering the plaintiffs to file a proposed order with regard to the motions to summarily enforce the settlement agreement, the court stated that it wanted "to have a single document that's an order of the court that lays out all the elements [of the settlement agreement]." Under these circumstances, we conclude that the court erred in failing to

[27] The amended proposed order provided in relevant part: "The town will restore or replace [the defendant's] fence(s) if the town needs to remove the fence while using the town easement or license for emergency repairs; otherwise, the town will give reasonable notice to [the defendant] of its need to repair the drain line and shall cooperate with [the defendant] in scheduling the repair work so that [the defendant] can remove (and thereafter replace) the fence(s) at [the defendant's] expense." We offer no opinion as to whether this language in the amended proposed order accurately encapsulates the notice and cooperation terms.

include the notice and cooperation terms in the enforcement decision.[28]

6

Sixth, the defendant contends that the court improperly omitted from the enforcement order a "cooperation clause." This contention is unavailing.

The settlement agreement provides that "[the] settlement [agreement] is contingent upon the acquisition by the [town] of the [avenue] and the granting of an easement over the lawn area to maintain and repair the drain line. Th[e] settlement [agreement] is also subject to the approval of the Pine Orchard Association, [Inc.], Executive Board. *The parties shall cooperate and actively support the acquisition by the town and approval by* [*Pine Orchard Association, Inc.*]." (Emphasis added.) A subsequent portion of the settlement agreement provides that "[t]he parties will actively cooperate in supporting the obtaining of . . . necessary approvals [by the town]." The court's enforcement decision does not utilize the term "cooperate."

The defendant posits that the settlement agreement requires the parties, in general, to cooperate with one another because the settlement agreement provides that " 'the parties shall cooperate . . . .' " The defendant ignores, however, that there is no sweeping "cooperation clause" in the settlement agreement; rather, the language that the defendant relies on concerns only the town's acquisition of the avenue and approvals needed

[28] As we explain elsewhere in part II B of this opinion, we reject the defendant's claims that the court omitted other material terms of the settlement agreement in the enforcement decision. Even if we were to assume that the enforcement decision omits other material terms of the settlement agreement, we iterate that the settlement agreement controls, such that the parties to the settlement agreement remain bound by any terms not addressed in the enforcement decision.

by the town and Pine Orchard Association, Inc. Additionally, the enforcement decision provides that "[a]ny party who fails, neglects or refuses to comply with [the enforcement decision] shall be subject to the imposition of sanctions and such other orders as are deemed reasonable and necessary by this court to implement the terms and conditions of the settlement agreement and of this order." Ostensibly, any party to the settlement agreement who acts to undermine the settlement agreement is subject to sanctions or other necessary and reasonable enforcement orders.[29] Accordingly, we conclude that the court did not abuse its discretion by not including a "cooperation clause" in the enforcement decision.

7

Last, the defendant claims that the court improperly omitted from the enforcement decision an order that withdrawals and releases of the claims raised in *Wheeler* v. *Cosgrove*, Superior Court, judicial district of New Haven, Docket No. CV-17-6074630-S (*Cosgrove* matter)—in which an application was filed by the plaintiffs, among others, in 2017 seeking to lay out the avenue as a highway pursuant to General Statutes § 13a-63—were required. We disagree.

During the February 4, 2020 hearing, in setting forth the terms of the settlement agreement, the plaintiffs' counsel stated that "[t]he parties shall exchange mutual general releases and shall withdraw all pending claims and actions by them. The documents to be executed will include, but not be limited to, quitclaim deeds by

[29] Furthermore, we note that "[i]mplicit in every contract is the common-law duty of good faith and fair dealing. [I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." (Internal quotation marks omitted.) *Vance* v. *Tassmer*, supra, 128 Conn. App. 111.

all owners on the [avenue], who have not previously done so, and [Pine Orchard Association, Inc.], releasing any and all claims and rights to [the defendant's] property and to . . . property [of the defendant's principal member] . . . ." Shortly thereafter, the plaintiffs' counsel continued: "[T]he plaintiffs will report the settlement of this case in the [*Cosgrove* matter], which is pending . . . . We'll ask that [a] hearing [in the *Cosgrove* matter] be suspended pending the final approval of and documentation of th[e] settlement [agreement]. And I suppose that the withdrawals by the various parties . . . would similarly be filed upon the satisfaction of that—of . . . approvals by the town and Pine Orchard Association, [Inc.]." In the enforcement decision, the court ordered in relevant part that "[a]ll parties shall file withdrawals of any and all claims alleged by them, without costs, on or before September 11, 2020." The court entered no orders in relation to the *Cosgrove* matter.

The defendant contends that the court improperly failed to order that the claims in the *Cosgrove* matter be withdrawn and released in accordance with the settlement agreement. The settlement agreement, however, does not mandate withdrawals and releases of claims with respect to the *Cosgrove* matter. Although the plaintiffs' counsel stated during the February 4, 2020 hearing that the parties had agreed to withdraw "all pending claims *and actions* by them," when read in context of the settlement agreement in its entirety, we are not persuaded that the term "actions" includes the *Cosgrove* matter. (Emphasis added.) At most, the plaintiffs agreed to report the settlement of the present action to the court in the *Cosgrove* matter and seek suspension of a hearing then-scheduled in the *Cosgrove* matter pending the finalization of the settlement agreement, which presumably would affect the continued

viability of the *Cosgrove* matter.[30] Accordingly, we conclude that the court did not abuse its discretion by not including in the enforcement decision an order requiring withdrawals and releases of the claims in the *Cosgrove* matter.

The judgment is reversed in part and the case is remanded with direction to incorporate into the trial court's August 11, 2020 enforcement decision the terms of the settlement agreement regarding the town of Branford's obligation, in the event that the town requires removal of the defendant's fence to access the drainpipe, to provide reasonable notice and to cooperate in scheduling repair work, except in situations involving emergency repairs; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[30] On February 5, 2020, the plaintiffs, among others, filed a case flow request in the *Cosgrove* matter informing the trial court of the settlement agreement reached in the present case and that the settlement agreement would satisfy their claims in the *Cosgrove* matter. The plaintiffs requested that the court order that (1) all further proceedings in the *Cosgrove* matter be suspended and (2) the *Cosgrove* matter be withdrawn on or before May 19, 2020, or be subject to dismissal, with the understanding that the proceedings would resume if the settlement agreement failed for any reason. On February 6, 2020, the court, *Ozalis*, *J.*, ordered that certain scheduled proceedings in the *Cosgrove* matter were suspended and that the *Cosgrove* matter had to be withdrawn on or before May 19, 2020, unless the settlement agreement failed for any reason. The court subsequently extended the deadline to withdraw the *Cosgrove* matter several times, with the most recent deadline set as March 1, 2021. To date, the *Cosgrove* matter has not been withdrawn, and the case remains unresolved. Additionally, there is an appeal from the denial of a motion for summary judgment predicated on res judicata and collateral estoppel filed in the *Cosgrove* matter that is pending in this court. See *Wheeler* v. *Cosgrove*, Connecticut Appellate Court, Docket No. AC 42547 (appeal filed January 31, 2019).

NATIONAL BANK TRUST *v.* ILYA YUROV ET AL. (AC 44329)

Cradle, Clark and Palmer, Js.

Syllabus

The plaintiff bank sought to enforce a foreign judgment against the defendant B, a shareholder of the plaintiff. The plaintiff had commenced an action in England against the defendant and various codefendants, seeking damages for moneys owed to it in connection with fraudulent loans or fraudulent transactions made by the defendant. The English court rendered judgment in favor of the plaintiff, finding that the plaintiff had suffered significant losses as a result of fraud perpetrated by the defendant and his codefendants. The plaintiff filed a certification of the foreign judgment, signed by the plaintiff's counsel, in the Superior Court pursuant to the applicable statutes (§§ 50a-33 and 52-605 (a)). The defendant filed a motion to open and either dismiss or stay the enforcement of the certified foreign judgment, arguing, inter alia, that the trial court improperly concluded that the certified judgment was a foreign judgment as defined by statute (§ 50a-31 (2)), and that the certification required by § 52-605 (a) may be signed by counsel rather than the judgment creditor. The defendant further argued that the contract between the plaintiff and the defendant required that all disputes be resolved in accordance with Russian law in Russian courts. Subsequently, the plaintiff filed an objection to the defendant's motion and attached exhibit A, an order by the English court with two schedules, which set forth transactions and monetary amounts that corresponded with the amounts set forth in the English court's judgment. The trial court denied the defendant's motion, from which the defendant appealed to this court. *Held*:

1. There was no merit to the defendant's claim that the trial court erred in concluding that the certified judgment was a foreign judgment as defined by § 50a-31 (2) because it did not grant the recovery of a sum of money: the plaintiff's claim against the defendant arose from financial losses that it suffered as a result of the defendant's fraudulent conduct, and the judgment of the English court was replete with references to and findings of those losses; moreover, although the defendant argued that the court improperly relied on exhibit A to support its conclusion that the certified judgment provided for a sum of money because it was not part of the English judgment, exhibit A was a part of the English judgment, and, therefore, this court was bound to consider that judgment in its entirety; furthermore, the defendant failed to challenge the authenticity of either the document that originally was filed by the plaintiff or exhibit A that was submitted with the plaintiff's opposition to the defendant's motion to open.

2. The defendant could not prevail on his claim that the trial court erred in holding that the plaintiff's counsel could sign the certification pursuant to § 52-605 (a): the defendant's argument that the applicable provisions (§§ 8-1 (3) and 8-2 (a)) of the Connecticut Code of Evidence require certification to be made by one with personal knowledge, and, therefore, the certification signed by the plaintiff's counsel who was not involved in the English proceedings was inadmissible hearsay was unavailing; moreover, the defendant did not provide authority that §§ 8-1 (3) and 8-2 (a) of the Connecticut Code of Evidence pertain to such certifications; furthermore, to the extent that the defendant's objection to the certification was evidentiary, even if the signature of the plaintiff's counsel rendered the English judgment inadmissible hearsay, the defendant's acknowledgment that he was not challenging the authenticity of the judgment rendered any evidentiary impairment harmless.

3. The defendant could not prevail on his claim that the trial court erred in denying his motion to open the judgment when the contract required that all disputes be resolved in accordance with Russian law in Russian courts: the defendant, having failed to brief his argument that the trial court failed to exercise its discretion in determining whether it would consider his claim that the underlying matter should have been heard in Russia and having raised it for the first time at oral argument, it was considered abandoned; moreover, the trial court considered the defendant's argument, concluding that, because the defendant failed to challenge the English court's jurisdiction over him during that proceeding, he had waived his right to challenge it; furthermore, because the trial court properly considered and rejected the defendant's personal jurisdiction argument, the record did not support the defendant's claim that it failed to exercise its discretion.

Argued November 29, 2021—officially released February 22, 2022

Procedural History

Action to enforce a foreign judgment, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Lynch, J.*, denied the defendant Sergey Belyaev's motion to open and dismiss or stay the enforcement of the certified foreign judgment, from which the defendant Sergey Belyaev appealed to this court. *Affirmed.*

Jeffrey Hellman, for the appellant (defendant Sergey Belyaev).

Joshua W. Cohen and *Andrew M. Ammirati*, for the appellee (plaintiff).

Opinion

CRADLE, J. In this action stemming from the alleged fraud against the plaintiff, National Bank Trust, by the defendant Sergey Belyaev,[1] the defendant appeals from the denial of his motion to open and dismiss or stay the enforcement of a certified foreign judgment filed by the plaintiff. On appeal, the defendant claims that the trial court improperly (1) concluded that the certified judgment was a foreign judgment as defined by General Statutes § 50a-31 (2) because it did not grant the recovery of a sum of money; (2) concluded that the certification required by General Statutes § 52-605 (a) may be signed by counsel rather than the judgment creditor; and (3) refused to open the judgment when the contract between the plaintiff and the defendant required that all disputes be resolved in accordance with Russian law in Russian courts. We affirm the judgment of the trial court.

The following procedural history is relevant to the resolution of the defendant's claims on appeal. On January 23, 2020, the Commercial Court of the Queen's Bench Division of the High Court of Justice of England and Wales (UK court) issued a judgment in favor of the plaintiff, finding that the plaintiff had suffered significant financial losses as a result of fraud perpetrated by the defendant and certain of his codefendants.[2] On June 30, 2020, the plaintiff filed a certification of the judgment in the Superior Court pursuant to General Statutes §§ 50a-33 and 52-605 (a).[3] In the certification, which

[1] Ilya Yurov, Nikolay Fetisov, Nataliya Yurova, Irina Belyaeva and Elena Pischulina are also named as defendants in this action, but they are not parties to this appeal. Accordingly, any reference herein to the defendant is to Sergey Belyaev only.

[2] The defendant and certain of the other defendants named in this case were shareholders of the plaintiff and also owned the companies to which they made fraudulent loans or conducted fraudulent transactions. The UK court found those defendants liable for the financial ruin of the plaintiff.

[3] General Statutes § 50a-33 provides: "Except as provided in section 50a-34, a foreign judgment meeting the requirements of section 50a-32 is conclusive

was signed by counsel for the plaintiff, the plaintiff alleged that the judgment had not been satisfied, that the enforcement of the judgment had not been stayed, and that the approximate amount due to the plaintiff, as of June 12, 2020, was $900 million. The certification also alleged that the defendant owns property located at 85 Bishop Lane in Avon.

On August 17, 2020, the defendant filed a motion to open and either dismiss or stay the enforcement of the certified judgment on the grounds that the foreign judgment was not entitled recognition because (1) it was not a judgment of a "foreign state granting or denying recovery of a sum of money" as required by § 50a-31 (2); (2) it was not a "final and conclusive" judgment under § 50a-32 because it was "in the process of being appealed"; (3) the certification was signed by counsel for the plaintiff, rather than the judgment creditor, as required by §§ 50a-33 and 52-605; (4) the defendant was entitled to a stay of the enforcement of the judgment because he was in the process of appealing it; and (5) the UK court did not have personal jurisdiction over the defendant. On September 29, 2020, the court summarily denied the defendant's motion. This appeal followed.

On November 2, 2020, the defendant filed a motion for articulation of the court's denial of his motion, followed by an amended motion for articulation filed on November 3, 2020. On November 23, 2020, the court filed an articulation of its denial of the defendant's

between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."

General Statutes § 52-605 (a) provides: "A judgment creditor shall file, with a certified copy of a foreign judgment, in the court in which enforcement of such judgment is sought, a certification that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid and that the enforcement of such judgment has not been stayed and setting forth the name and last-known address of the judgment debtor."

motion. In its articulation, the court indicated that it had considered and rejected all of the arguments raised by the defendant in his motion to open and either dismiss or stay the enforcement of the certified judgment. The court held that the certified judgment was a final and conclusive foreign judgment that granted the recovery of a sum of money, that the plaintiff's counsel was not prohibited from signing the certification of that judgment, that the defendant had waived the issue of personal jurisdiction when he appeared before the UK court, that the defendant did not dispute receiving a copy of the filed certification, and that there was no appeal pending of the certified judgment.

On appeal, the defendant claims that the court erred (1) in concluding that the certified judgment was a foreign judgment as defined by § 50a-31 (2) because it did not grant the recovery of a sum of money; (2) in holding that the plaintiff's counsel could sign the certification under § 52-605 (a); and (3) in denying the motion to open the judgment when the contract required that all disputes be resolved in accordance with Russian law in Russian courts.[4] We address each claim in turn.

I

The defendant first claims that the court erred in concluding that the certified judgment was a foreign judgment under § 50a-31 (2) because it is not a judgment "granting or denying recovery of a sum of money."[5] We disagree.

[4] The defendant also claimed that the court improperly denied a stay of the proceedings pursuant to General Statutes § 50a-36 (a) when the court was aware that the defendant had sought leave to appeal and sought a stay in the foreign court. While this appeal was pending, the U.K. Court of Appeal, Civil Division, denied the defendant's request for permission to appeal. Accordingly, the defendant conceded at oral argument before this court that this claim is moot, and he is not pursuing it.

[5] General Statutes § 50a-31 (2) defines "[f]oreign judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty or a judgment for support in matrimonial or family matters."

In order to address the defendant's claim, we must construe the judgment of the UK court. "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. 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 interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 821, 263 A.3d 972, cert. denied, 340 Conn. 905, 263 A.3d 821 (2021).

In rejecting the defendant's claim that the UK judgment was not a judgment granting or denying the recovery of a sum of money, the trial court reasoned, inter alia: "[T]he UK court issued the certified judgment finding that the [defendant] caused specific monetary losses to the plaintiff and that the plaintiff was entitled to recover those losses from the [defendant]. The [defendant's] contention that no sum of money was awarded [is] without merit and [flies] in the face of the lengthy certified judgment itself. . . .

"The [defendant] conceded that the certified judgment, which was hundreds of pages long, was described by the UK court as a judgment. The UK court found that the [defendant's] actions caused the plaintiff's financial collapse. The UK court set forth specific dollar amounts that the [defendant] and the two others were responsible for and the reasoning for its decision. The amounts set forth in its decision specifically corresponded with the amounts set forth in the exhibit A attached to [the] plaintiff's opposition. See certified judgment, ¶¶ 1, 1213, 1235, 1460, 1493, 1522, 1544, 1587, 1650, 1651, 1652,

1655, 1656, 1699, 1710, 1726, 1729, 1735, 1743, 1777, 1801, 1867, 1868, 1891 and 1892. It is readily apparent that in the certified judgment, the UK court awarded a sum of money to the plaintiff. . . .

"In the plaintiff's opposition, the plaintiff attached as exhibit A, a two page order dated January 23, 2020,[6] with two schedules setting forth transactions and monetary amounts. The UK court also noted in this order that other issues, such as pre[judgment] and postjudgment interest, would be determined later. (Exhibit A to plaintiff's opposition ¶ 3.). . . .

"The [defendant] stated that exhibit A, 'may be a valid judgment' but then argued that this matter should be dismissed, stayed or the judgment opened. The [defendant] argued that because the plaintiff provided this court with exhibit A in September, 2020, the certified judgment which was filed in June, 2020, was fatally flawed. This court disagrees. The certified judgment is a judgment granting the plaintiff a recovery of a sum of money. Indeed the monetary amounts set forth in the certified judgment mirror the amounts set forth in exhibit A, which the judgment debtor acknowledges may be a valid judgment." (Footnote omitted.) The court concluded: "A review of the 570 page certified judgment filed in this case shows that it is a judgment awarding the plaintiff a sum of money."

On the basis of the foregoing, the trial court concluded that the judgment of the UK court was a judgment granting the recovery of a sum of money in accordance with § 50a-31 (2). We agree. The plaintiff's claim against the defendant arose from financial losses that it suffered as a result of the defendant's fraudulent

[6] "This is the same date as the typewritten date on the certified judgment. Exhibit A was file stamped as having been filed with the UK court on January 23, 2020. The certified judgment was dated January 23, 2020, but file stamped as filed with the UK court on February 18, 2020."

conduct, and the judgment of the UK court is replete with references to and findings of those losses, some of which the trial court aptly cited in its articulation. The defendant argues that the UK judgment does not satisfy § 50a-31 (2) because "it does not specify the amount against [the defendant] and the amount cannot merely be mathematically calculated." He contends that, although the various sections of the judgment cited by the trial court set forth losses suffered by the plaintiff or amounts owed to the plaintiff, they do not grant the plaintiff a "specific sum against [the defendant]." The defendant further contends that the court improperly relied on exhibit A to support its conclusion that the certified judgment provided for the recovery of a sum of money because it "was not part of the judgment and is not properly before the trial court for purposes of determining the validity of the judgment." We are not persuaded.

The defendant ignores the trial court's explicit reference to several portions of the UK judgment that initially was filed by the plaintiff. It is clear from the face of exhibit A, that it is part of the UK judgment[7] and, in construing that judgment, we are bound, as noted herein, to consider it in its entirety. The defendant has provided no authority for his contention that the plaintiff's failure to file exhibit A with its original filing precluded the trial court from considering it as part of the UK judgment. Moreover, the defendant does not challenge the authenticity of either the document that originally was filed by the plaintiff or exhibit A that was submitted with the plaintiff's opposition to the defendant's motion to open. We therefore conclude that the defendant's claim is without merit.

[7] Exhibit A bears the same case caption and docket number of the document originally filed by the plaintiff, and is entitled "Order," effective "[u]pon the trial of the above [referenced] action [a]nd upon the handing down of [the] judgment herein on 23 January 2020 . . . ."

II

The defendant next claims that the court erred in holding that the plaintiff's counsel could sign the certification under § 52-605 (a). We disagree.

Section 52-605 (a) provides: "A judgment creditor shall file, with a certified copy of a foreign judgment, in the court in which enforcement of such judgment is sought, a certification that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid and that the enforcement of such judgment has not been stayed and setting forth the name and last-known address of the judgment debtor."

In his motion to open and either dismiss or stay the enforcement of the certified judgment, the defendant argued that § 52-605 "requires a certification signed by the judgment creditor, not its counsel, as representations of counsel are not evidence. *Despotovic* v. *Gavrilovic Holding Petrinja*, Docket No. CV-18-4086996-S, 2018 WL 6016710, *2 (Conn. Super. October 29, 2018)." In rejecting this argument, the trial court reasoned: "Here, a certified copy of the UK judgment was filed. Nothing prohibits the plaintiff's counsel from certifying that (1) the judgment was not obtained by default in appearance or confession of judgment, (2) it is unsatisfied, (3) its enforcement has not been stayed and (4) setting forth the name and last known address of the judgment debtor. Indeed, sister states have accepted counsel's certification. See *Boston College* v. *Grande*, Docket No. A-5663-06T2, 2009 WL 775101, *1 (N.J. Super. App. Div. March 26, 2009) (accepting New Jersey attorney's certification). Moreover, Connecticut courts have accepted affidavits of counsel attesting to the authenticity of court documents. See *Mac's Car City, Inc.* v. *American National Bank*, 205 Conn. 255, 258, 532 A.2d 1302 (1987); see also *Alcon Interactive Group*,

LLC v. *Gate Five, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-15-6024864-S (September 28, 2017).

"In claiming that [the] plaintiff's counsel could not certify the UK judgment, [the defendant] cited *Despotovic* v. *Gavrilovic Holding Petrinja*, [supra, 2018 WL 6016710] . . . . However, the matter before the court in *Despotovic* was different. At issue [in that case] was the plaintiff's failure to provide the court with any authority, other than the representation of the plaintiff's counsel, that the Croatian judgment was final, conclusive, and enforceable in Croatia. Here . . . English law provided this court with the authority to conclude that the certified judgment was final, conclusive, and enforceable in England. Accordingly, *Despotovic* is inapposite. The certification filed in this case by the plaintiff's counsel was proper and the judgment debtor's argument to the contrary was rejected."

On appeal, the defendant does not argue that the plaintiff's counsel was statutorily barred from signing the certification; nor does he dispute the plaintiff's compliance with the requirements of § 52-605 (a). Rather, the defendant argues that "[t]he certification by [the] plaintiff's U.S. counsel is inadmissible hearsay." He contends that "[s]ince [the] plaintiff's U.S. counsel was not involved in the UK proceedings, he has no personal knowledge of the proceedings upon which to base the certification and by definition is certifying based upon hearsay. By comparison, a factual representative of the plaintiff who was involved in the UK proceedings could actually attest to the results of the UK proceedings."

The defendant contends that the trial court's rejection of his argument "glosses over the critical evidentiary issue." He argues: "[Section] 52-605 (a) requires a certification. Connecticut Code of Evidence §§ 8-1 (3)[8] and

[8] Connecticut Code of Evidence § 8-1 (3) provides: " 'Hearsay' means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted."

8-2 (a)[9] require certification to be made by one with personal knowledge. Here, the plaintiff's counsel's certification is based upon hearsay and is insufficient." (Footnotes added.) We first note that the defendant did not challenge the signature of the plaintiff's counsel on hearsay grounds before the trial court. Additionally, both §§ 8-1 (3) and 8-2 (a) of the Connecticut Code of Evidence pertain to hearsay in general; neither refer to certifications by counsel, and the defendant has provided no authority that §§ 8-1 (3) and 8-2 (a) of the Connecticut Code of Evidence pertain to such certifications. Moreover, the defendant asserts that he "is challenging who signed the certification, not the authenticity of the document." To the extent the defendant's objection to the certification is evidentiary, even if the signature of the plaintiff's counsel rendered the UK judgment inadmissible hearsay, the defendant's acknowledgment that he is not challenging the authenticity of the judgment renders any evidentiary impairment harmless. Accordingly, the defendant cannot prevail on this claim. See *Ulanoff* v. *Becker Salon, LLC*, 208 Conn. App. 1, 14–15, 262 A.3d 863 (2021) ("even if a court has acted improperly in connection with the introduction of evidence, reversal of a judgment is not necessarily mandated because there must not only be an evidentiary [impropriety], there also must be harm" (internal quotation marks omitted)).

III

Finally, the defendant claims that the court erred in denying the motion to open the judgment "when the contract . . . required that all disputes be resolved in accordance with Russian law in Russian courts." In addressing this argument, the trial court explained:

[9] Connecticut Code of Evidence § 8-2 (a) provides: "Hearsay is inadmissible, except as provided in the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code."

"[T]he burden of proving that the UK lacked jurisdiction over the [defendant] was on the [defendant]. . . . If the personal jurisdictional issue was fully litigated and/or waived by the [defendant], in the foreign court, it cannot be raised in this court. . . .

"Here, the [defendant] did not dispute and could not dispute that his attorney filed an acknowledgement of service with the UK court and, although given the option to check a box contesting the UK court's jurisdiction, did not. . . . Rather, the [defendant's] attorney indicated that the [defendant] intended to defend the claim before the UK court. Because the [defendant] waived his right to contest personal jurisdiction in the UK court, he could not attack its judgment here by contesting personal jurisdiction through a belated enforcement of an arbitration clause." (Citations omitted.)

In his brief to this court, the defendant claims that the UK judgment "is not entitled to registration pursuant to General Statutes § 50a-34 (b) (5)," which provides that, "[a] foreign judgment need not be recognized if . . . [t]he proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court . . . ." At oral argument before this court, counsel for the defendant clarified his argument. He argued that the trial court failed to exercise its discretion in determining whether it would consider his claim that the underlying matter should have been heard in Russia.

Because the defendant did not set forth this argument in his brief to this court, and raised it for the first time at oral argument, it is not properly before us. *Rousseau* v. *Weinstein*, 204 Conn. App. 833, 855, 254 A.3d 984 (2021) ("It is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court. . . .

Claims that are inadequately briefed generally are considered abandoned." (Internal quotation marks omitted.)). Moreover, we disagree with the substance of the defendant's contention. After considering the defendant's argument, the trial court concluded that, because the defendant failed to challenge the UK court's jurisdiction over him during that proceeding, he had waived his right to challenge it here. Because the trial court properly considered and rejected the defendant's personal jurisdiction argument, the record does not support the defendant's claim that it failed to exercise its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

REGINA PICKARD *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES
(AC 44415)

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

Syllabus

The plaintiff, whose employment with the defendant had been terminated, appealed to this court from the trial court's judgment dismissing her application to vacate an arbitration award following the cancellation of an arbitration of a grievance relating to her termination. The Office of Labor Relations had denied a grievance by the plaintiff's union seeking her reinstatement. The plaintiff thereafter waived her right to union representation and sought independent counsel to represent her during the arbitration of that grievance. The plaintiff failed to deposit the required funds for her share of the arbitration costs in escrow, and the office cancelled the arbitration. The plaintiff filed an application to vacate an arbitration award pursuant to statute (§ 52-418 or § 52-420), and requested that the court issue a pendente lite order pursuant to statute (§ 52-422) to, inter alia, open the arbitration proceedings. The court granted the defendant's motion to dismiss for lack of subject matter jurisdiction. On the plaintiff's appeal to this court, *held* that the trial court lacked subject matter jurisdiction over the plaintiff's application to vacate an arbitration award and, thus, properly dismissed

it: no arbitration award was issued, thus, an essential condition of §§ 52-418 and 52-420 was not met; moreover, because no arbitration was pending, the trial court lacked jurisdiction to consider the plaintiff's petition for an order pendente lite.

Submitted on briefs December 2, 2021—officially released February 22, 2022

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Hartford, where the court, *Lynch*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Norman A. Pattis and *Kevin Smith* filed a brief for the appellant (plaintiff).

Maria C. Rodriguez, assistant attorney general, *William Tong*, attorney general, and *Philip M. Schulz*, deputy associate attorney general, filed a brief for the appellee (defendant).

Opinion

BISHOP, J. In this special statutory proceeding, the plaintiff, Regina Pickard, appeals from the judgment of the Superior Court granting the motion to dismiss filed by the defendant, the Department of Mental Health and Addiction Services, claiming that the court lacked subject matter jurisdiction over the plaintiff's application to vacate an arbitration award pursuant to General Statutes §§ 52-418, 52-420, and 52-422. On appeal, the plaintiff claims that the court erred in concluding that it lacked subject matter jurisdiction over her application to vacate an arbitration award.[1] We disagree and, accordingly, affirm the judgment of the court.

[1] The defendant also argues that sovereign immunity bars the plaintiff's claim. Because we conclude that the court lacked subject matter jurisdiction over the plaintiff's claim, we need not address the defendant's sovereign immunity argument.

The following undisputed facts and procedural history are relevant to our disposition of the plaintiff's claim on appeal. The plaintiff was an employee of the defendant and a member of the New England Health Care Employees Union District 1199 (union). On October 2, 2017, the defendant notified her that she was the subject of an investigation for allegedly assaulting her supervisor. During the investigation into the allegations, the plaintiff was represented by her union. On March 5, 2018, the plaintiff's employment with the defendant was terminated. In response to the plaintiff's termination, the union filed a grievance on the plaintiff's behalf with the Office of Labor Relations (office), pursuant to a collective bargaining agreement between the union and the state.[2] Multiple hearings on the grievance were held in which the plaintiff and her union representative presented evidence, seeking her reinstatement. However, on June 1, 2018, the office denied the plaintiff's grievance. The union then informed the office of its intent to arbitrate the plaintiff's grievance.

Subsequently, the plaintiff waived her right to union representation, instead opting to hire independent counsel to represent her during the arbitration. On May 8, 2019, the office advised the plaintiff that the costs associated with the arbitration would be split evenly between her and the state in accordance with the collective bargaining agreement,[3] and that the arbitrator required a deposit, in escrow, of $4000 for her share of the projected cost of the arbitration, a minimum of sixty

[2] Exhibit D, which was attached to the affidavit submitted by the defendant in support of its motion to dismiss, includes article 32 of the collective bargaining agreement between the union and the state, which sets forth the grievance and arbitration procedure.

[3] Article 32, § 7, of the collective bargaining agreement provides in relevant part: "The expenses for the arbitrator's service and for the hearing shall be shared equally by the [s]tate and the [u]nion. However, in dismissal or suspension cases where the [u]nion is not a party, one-half the cost shall be borne by the [s]tate and the half by the [e]mployee submitting to arbitration."

days prior to the first day of arbitration. The office informed the plaintiff that "[i]f the funds are not confirmed to be in escrow by the deposit deadline date, the [a]rbitration will be cancelled." On May 9, 2019, counsel for the plaintiff confirmed with the office that the plaintiff understood that a deposit was required.

The arbitration was scheduled to begin on October 16, 2019, and, accordingly, the deposit was due on August 16, 2019. The plaintiff, however, failed to meet the deposit deadline. On August 21, 2019, the office, not the arbitrator, notified the plaintiff that, because the arbitrator had not received his deposit by the due date, the arbitration had been cancelled and the office considered the case closed. In response, on August 23, 2019, counsel for the plaintiff requested that the deposit deadline be extended to October 30, 2019, and that the arbitration be rescheduled for January, 2020. The office denied the plaintiff's request and dismissed the plaintiff's request for arbitration.

On October 31, 2019, the plaintiff filed an application with the Superior Court to vacate an arbitration award pursuant to either § 52-418 or § 52-420, and requested that the court issue a pendente lite order pursuant to § 52-422 (1) to require the office and the defendant to appear and show cause for why the plaintiff's application to vacate should not be granted, (2) to open the arbitration proceedings, and (3) to afford her a reasonable opportunity to comply with the deposit requirement. The plaintiff essentially argued that the office deprived her of her right to due process when it, as opposed to the arbitrator, terminated the arbitration proceedings.

The defendant filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Practice Book

§ 10-30 (a),[4] along with a supporting affidavit. The defendant argued that the court lacked subject matter jurisdiction over the plaintiff's application "because no arbitration award has been issued, no arbitration is pending and as a result, the conditions prescribed by the statutes are not [met]." The plaintiff opposed the defendant's motion to dismiss arguing that, "while an arbitrator has not rendered an award in this case, the [office] prevented an arbitrator from even having the opportunity to make an award by arbitrarily elevating itself to the position of arbitrator and summarily dismissing [the plaintiff's] case. . . . In short, the state has made itself the arbitrator in this proceeding and has awarded itself a dismissal, thus allowing the court to vacate the dismissal." The court granted the defendant's motion to dismiss, concluding that it lacked jurisdiction because the office's dismissal of the plaintiff's request for arbitration did not constitute an award under §§ 52-418 and 52-420, and there was no pending arbitration as required by § 52-422. This appeal followed.

On appeal, the plaintiff claims that the court improperly granted the defendant's motion to dismiss for lack of subject matter jurisdiction over her application to vacate an arbitration award. Specifically, the plaintiff contends that the dismissal of the arbitration was the functional equivalent of an arbitration award, asserting that "the state has made itself the arbitrator in this proceeding and has awarded itself a dismissal, thus allowing the court to vacate the dismissal." We are not persuaded.

We begin by setting forth our standard of review. "The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-30 (a) (1)] is well settled. A motion to dismiss tests, inter alia,

[4] Practice Book § 10-30 (a) provides in relevant part: "A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter . . . ."

whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, 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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to § [10-30 (a) (1)] may encounter different situations, depending on the status of the record in the case. . . . [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. . . .

"[I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . 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 in original; footnotes omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 650–52, 974 A.2d 669 (2009).

Here, the plaintiff's application to vacate was supplemented by undisputed facts established by the affidavit submitted by the defendant in support of its motion to dismiss.[5] Therefore, in ruling on the defendant's motion to dismiss, we consider the supplementary, undisputed facts in the affidavit along with the well pleaded facts in the complaint. See id.

"[S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 338 Conn. 651, 658, 258 A.3d 1244 (2021). "It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Mehdi* v. *Commission on Human Rights & Opportunities*, 144 Conn. App. 861, 865, 74 A.3d 493 (2013); see also

[5] Attached to the affidavit is (1) a termination letter from the defendant to the plaintiff, (2) a dismissal notice of the plaintiff's grievance, (3) the plaintiff's notice of her intent to pursue arbitration, (4) a portion of the collective bargaining agreement between the state and the union, and (5) various correspondence between the plaintiff's attorney and the office.

Goodson v. *State*, 232 Conn. 175, 180, 653 A.2d 177 (1995) (Where a "statute confers a definite jurisdiction upon a judge and it defines the conditions under which such relief may be given . . . jurisdiction is only acquired if the essential conditions prescribed by statute are met. If they are not met, the lack of jurisdiction is over the subject-matter . . . ." (Internal quotation marks omitted.)).

We begin by clarifying a point we find has significant bearing on this appeal. The plaintiff claims that "[t]his is an appeal from the trial court's ruling dismissing an administrative appeal." This characterization is incorrect. In this matter, the plaintiff did not file an administrative appeal but, instead, chose to seek relief through a special statutory proceeding brought pursuant to §§ 52-418, 52-420, and 52-422. See *Goodson* v. *State*, supra, 232 Conn. 180 ("[a]n application for an order pendente lite pursuant to § 52-422 is a special statutory proceeding"); see also *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993) (explaining that application to vacate arbitration award brought pursuant to § 52-420 "is not a civil action, but is rather a special statutory proceeding"); *Middletown* v. *Police Local, No. 1361*, 187 Conn. 228, 231, 445 A.2d 322 (1982) (explaining that application to vacate arbitration award brought pursuant to § 52-418 "triggers special statutory proceedings that are not civil actions"). As the court aptly explained, §§ 52-418, 52-420, and 52-422 "[confer] a definite jurisdiction upon a judge and [define] the conditions under which such relief may be given . . . . [J]urisdiction is only acquired if the essential conditions prescribed by [the] statute are met." (Internal quotation marks omitted.) *Goodson* v. *State*, supra, 180.

As to the special statutory procedure, the defendant contends that the essential conditions prescribed by §§ 52-418, 52-420, and 52-422 were not met, and, therefore, the court lacked jurisdiction to hear the plaintiff's

claim. Specifically, the defendant asserts that (1) §§ 52-418 and 52-420 require the existence of an arbitration award, and here, no award was issued, and (2) § 52-422 requires a pending arbitration proceeding before an arbitrator, and here, there is no pending arbitration proceeding. We agree with the defendant.

We first review § 52-418. It provides in relevant part: "(a) Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating *the award* if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. . . ." (Emphasis added.) General Statutes § 52-418 (a). One of the essential conditions of § 52-418 is the existence of an award.

Section 52-420 likewise mandates the existence of an arbitration award. It provides in relevant part: "(b) No motion to vacate, modify or correct *an award* may be made after thirty days from the notice of the *award* to the party to the arbitration who makes the motion. (c) For the purpose of a motion to vacate, modify or correct *an award*, such an order staying any proceedings of the adverse party to enforce the *award* shall be made as may be deemed necessary. Upon the granting of an order confirming, modifying or correcting *an award*, a judgment or decree shall be entered in conformity

therewith by the court or judge granting the order."[6] (Emphasis added.) General Statutes § 52-420 (b) and (c).

Our Supreme Court has held that a dismissal of a request for arbitration does not constitute an arbitration award. See *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, 293 Conn. 582, 603, 980 A.2d 819 (2009) (*Coldwell*). In *Coldwell*, the plaintiff claimed that the trial court "improperly concluded that the . . . dismissal of its request for arbitration for untimeliness constituted an arbitration award for purposes of [General Statutes] § 52-417."[7] Id., 592. The court agreed and held that the "dismissal of [the plaintiff's] request for arbitration did not constitute an award . . . and that the trial court improperly granted [the plaintiff's] application to confirm the award [pursuant to § 52-417] because there was no award to confirm." Id., 604. The court explained that "[a]rbitration is [a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after . . . both parties have an opportunity to be heard. . . . The decision rendered by the arbitrator upon the controversy submitted for arbitration constitutes the arbitration award. The principal characteristic of an arbitration award is its finality as to the matters submitted so that the rights and obligations of the parties may be definitely fixed. . . . In other words, [a] final award is

[6] Although the plaintiff filed her application pursuant to §§ 52-418, 52-420, and 52-422, she states that she "does not cite [§ 52-420] for its substantive authority, but rather to show that her claim is not time barred."

[7] General Statutes § 52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

[o]ne [that] conclusively determines the matter submitted and leaves nothing to be done except to execute and carry out [its] terms . . . . The requirement that an award be mutual, final and definite as between the parties to the arbitration has been codified at . . . § 52-418 (a) (4)." (Citations omitted; internal quotation marks omitted.) Id., 594. The court concluded that the dismissal of the arbitration "did not satisfy the requirement of finality as to the matters submitted so that the rights and obligations of the parties [were] definitely fixed . . . and, therefore, was not a decision on the merits." (Citation omitted; internal quotation marks omitted.) Id., 600.

Our Supreme Court also has held that a determination on the issue of arbitrability does not constitute an award under § 52-418 because it is not a final resolution of the underlying claim on the merits. In *Naugatuck* v. *AFSCME*, *Council No. 4*, *Local 1303*, 190 Conn. 323, 460 A.2d 1285 (1983), the court explained that "[§] 52-418 only authorizes a court to vacate an arbitrator's award and then only under narrow circumstances. Unless an arbitration decision is an award, therefore, there is no right of appeal. This court has held that a finding on arbitrability is not an award until it becomes part of an award on the merits. . . . Therefore, a party must demonstrate that an award on the merits has been rendered before any right to appeal attaches." (Citation omitted; internal quotation marks omitted.) Id., 326. In *Coldwell*, our Supreme Court stated that its conclusion in *Naugatuck* "is consistent with the governing law on arbitration, which provides that an arbitration award settles the rights and obligations of the parties." *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, supra, 293 Conn. 603.

In the present case, the plaintiff concedes that "it is true that an independent arbitrator never heard the instant case or had the opportunity to render an award

in it . . . .'' The plaintiff nevertheless contends that the dismissal of the arbitration is the functional equivalent of an award. We are unpersuaded by this novel claim. The dismissal of the arbitration in the present case is not a final resolution of the underlying claim on the merits; see *Naugatuck* v. *AFSCME, Council No. 4, Local 1303*, supra, 190 Conn. 326; nor does it conclusively resolve the rights and obligations of the parties as to the matter submitted. See *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, supra, 293 Conn. 594. Because we conclude that an essential condition of §§ 52-418 and 52-420 has not been met, we conclude that the court lacked subject matter jurisdiction over the plaintiff's application to vacate.

We next turn to § 52-422, which provides in relevant part: ''At any time before an award is rendered pursuant to an arbitration under this chapter, the superior court . . . upon application *of any party to the arbitration*, may make forthwith such order or decree, issue such process and direct such proceedings as may be necessary to protect the rights of the parties *pending the rendering of the award* and to secure the satisfaction thereof when rendered and confirmed.'' (Emphasis added.)

Section 52-422 permits a judge to make orders pendente lite. To do so, however, our Supreme Court has made clear that ''a pending arbitration is an essential condition that must exist before § 52-422 may be invoked.'' *Goodson* v. *State*, supra, 232 Conn. 180. In *Goodson*, the plaintiff filed a petition pursuant to § 52-422 requesting an order pendente lite. Id., 178. At the time the plaintiff filed his petition, the arbitration process had not yet been invoked, but was the next step in the grievance procedure. Id. The trial court held a hearing on the plaintiff's petition pursuant to § 52-422 and issued an order. Id. On appeal to our Supreme

Court, the defendant claimed that the trial court lacked subject matter jurisdiction over the plaintiff's petition because § 52-422 applies only to *parties to an arbitration* and, at the time the plaintiff filed the petition, there was no pending arbitration. Id., 178–79. The court agreed, explaining that, "[b]y its express terms, § 52-422 allows the trial court to issue an order only 'upon application of any party to the arbitration. . . .' Thus, a pending arbitration is an essential condition that must exist before § 52-422 may be invoked. It is undisputed that on the date the trial court conducted its hearing and entered its order, there was no pending arbitration. The essential condition prescribed by the statute was not met, therefore, and the trial court lacked jurisdiction to have considered the plaintiffs' petition pursuant to § 52-422." Id., 180.

The plaintiff concedes that *Goodson* mandates that a pending arbitration exist before § 52-422 may be invoked but endeavors to distinguish *Goodson* from the facts in the present case. The plaintiff argues that, "[a]t the time that the *Goodson* plaintiffs brought their petition seeking an order pendente lite, they had not yet begun the arbitration process and were still proceeding through their union grievance process. . . . Unlike *Goodson*, [the plaintiff here] had begun the arbitration process . . . . Consequently, the court does have the necessary jurisdictional prerequisite because arbitration had begun . . . ." (Citations omitted.) The plaintiff's effort to distinguish *Goodson* from the procedural facts at hand fails. Like in *Goodson*, here, there is no pending arbitration. Regardless of whether the arbitration had not yet begun or had already concluded, no pending arbitration existed at the time the petition pursuant to § 52-422 was filed. *Goodson* makes clear that an essential condition of § 52-422 is a pending arbitration—a condition that is not met in the present case. We therefore conclude that the court lacked jurisdiction

to have considered the plaintiff's petition for an order pendente lite pursuant to § 52-422.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

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[8] We note that, to the extent the plaintiff was aggrieved by the office's dismissal of the arbitration proceedings, her proper recourse, if any, is under the Uniform Administrative Procedure Act. See General Statutes § 4-166 et seq.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 210

STEVEN WASHBURN *v.* NATIONWIDE MUTUAL INSURANCE COMPANY ET AL.
(AC 44549)

Alvord, Moll and Sheldon, Js.

Argued February 8—officially released February 22, 2022

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

Per Curiam. The judgment is affirmed.

C. L. *v.* J. E.
(AC 43825)

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

Argued February 9—officially released February 22, 2022

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Hon. Constance L. Epstein*, judge trial referee.

Per Curiam. The judgment is affirmed.

BANK OF AMERICA *v.* CHASE ASSOCIATES, INC., ET AL.
(AC 43818)

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

Submitted on briefs February 8—officially released February 22, 2022

Appeal by the defendant Jodie T. Chase from the Superior Court in the judicial district of Hartford, *Sheridan, J.; Cobb, J.*

Per Curiam. The judgment is affirmed.

J. E. *v.* C. L.
(AC 44856)

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

Argued February 9—officially released February 22, 2022

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

Per Curiam. The judgment is affirmed.

MIRIAM MERCADO *v.* HUMBERTO CASTRO-CRUZ
(AC 43752)

Prescott, Cradle and Suarez, Js.

Argued February 10—officially released February 22, 2022

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Cobb, J.*

Per Curiam. The judgment is affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice of Availability of List of Municipalities Exempt from the Affordable Housing Appeals Procedure

In accordance with § 8-30-g of the Connecticut General Statutes, the Department of Housing (DOH) has prepared the list of municipalities that are exempt from the affordable housing appeals procedure and those municipalities that are not exempt. This list is effective March 1, 2022. A copy of this list is available on the agency website at www.ct.gov/doh For additional information please write to Laura Watson, Economic and Community Development Agent, Laura.Watson@ct.gov.

State of Connecticut
Department of Public Health

Notice of Hearing

The Department of Public Health will hold a hearing on April 5, 2022, and if necessary, April 7, 2022, for the purpose of issuing a declaratory ruling.

The subject of the declaratory ruling is as follows:

1. Is Aquarion Water Company appropriately chlorinating public drinking water in Suffield, Connecticut pursuant to Regulations of Connecticut State Agencies § 19-13-B102?
2. What are the appropriate levels of chlorine in drinking water for public water systems pursuant to Regulations of Connecticut State Agencies § 19-13-B102?
3. How does the Department of Public health monitor residual chlorine levels in public water systems pursuant to Regulations of Connecticut State Agencies § 19-13-B102?
4. What public process needs to take place before the decision by a utility company to add chlorine to drinking water is instituted pursuant to Regulations of Connecticut State Agencies § 19-13-B102?

The hearing will be held via Microsoft TEAMS, commencing at 9:00 a.m. The details for connecting to the hearing will be provided 3-5 days prior to the hearing by contacting the Department of Public Health, Public Health Hearing Office at phho.dph@ct.gov will posted to the Public Health Hearing Office's Administrative Hearing Calendar at https://portal.ct.gov/DPH/Public-Health-Hearing-Office/Public-Health-Hearing-Office-Home/Legal-Office-Public-Health-Hearing-Office-Administrative-Hearings-Calendar

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

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

February 15, 2022

Stacy Schulman, Esq.
Hearing Officer
Department of Public Health
Legal Office / Public Health Hearing Office
410 Capitol Avenue, MS# 13PHO
PO Box 340308
Hartford, CT 06134-0308

CT PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO REVISE ITS CONSOLIDATED POLICIES REGARDING THE ADMINISTRATION OF THE CT PAID LEAVE ACT AND TO ADOPT A CONFIDENTIALITY OF PROGRAM INFORMATION POLICY

In accordance with sections 1-121 and 31-49o of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority (''hereinafter the CT Paid Leave Authority'') intends to revise its consolidated policies regarding the administration of the CT Paid Leave Act.

The revisions clarify several issues relating to the remittance of covered employees' contributions, including the following:

- Defining when a contribution will be considered to be late;
- Explaining what constitutes proof of timely submission;
- Establishing that the Authority has the ability to estimate or verify contributions owed based on any source available to it;
- Explaining how late payments will be allocated; and
- Revising the penalty provisions

The revisions also make include several technical changes, including:

- Adding severance pay to the Material Changes in Leave Status definition;
- Revising the definition of Regular Work Schedule to allow for the most recent schedule, if the employee has a regular schedule;
- Describing how the Authority will address requests for benefits associated with leaves that require Employer agreement when there is no separate employer; and
- Clarifying that payments will be made no later than (as opposed to on) the second Tuesday

The Board of Directors of the CT Paid Leave Authority also intends to adopt a policy regarding the confidentiality of program information, which explicitly prohibits access or use of claimant and other information for any non-programmatic use by Authority employees, agents and vendors.

To request a copy of the proposed revisions to its consolidated policies regarding the administration of the CT Paid Leave Act, please email

erin.choquette@ct.gov, including ''Revisions to Consolidated Policies'' in the subject line.

To request a copy of the proposed confidentiality policy, please email erin.choquette@ct.gov, including ''Confidentiality Policy'' in the subject line.

All written comments regarding either of these documents must be submitted by March 25, 2022.

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in December 2021 and January 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Angelori, Alessandro Joseph of Eastchester, NY
Bartels, Sarah Alexandra of East Hampton, CT
Bench, Nathan Hale of Hatfield, MA
Bourquin IV, John Louis of Manorville, NY
Cabral, Donald B. H. of Philadelphia, PA
Costain, Christopher A. of Wallingford, CT
Giles, Erick John of Portland, ME
Goss, Tyler Joseph of Brooklyn, NY
Grozdanov, Anna Ivanova of Scottsdale, AZ
Herst, Eric Jacob of Litchfield, CT
Hines, Victoria Robin Tutunjian of Greenwich, CT
Johnson, Talia Cheyenne of New Bedford, MA
Kaziba, Agnes of Galstonbury, CT
Monroy, Carlos Christopher of Winthrop, MA
Nguyen, Yen N. of Quincy, MA
O'Hare, Erin Eileen of Tappan, NY
Orlie, Laura August of Astoria, NY
Place, Jackson David of Keene, NH
Ramic, Mitchell Adam of Orange, CT
Reich, Max Steven of Stamford, CT
Savino, Emily Ann of Avon, CT
Sorger, Daniel Joseph of Framingham, MA
Stafford, Caoimhe Patricia of Bayville, NY
Streitz, Natasha E. of Stamford, CT
Sullivan, Ian Tyler of North Grosvenordale, CT
Wade, Daniel Haran of Boston, MA
Wolfe, William Scott of Greenwich, CT

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in December 2021 and January 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Alves, Thomas John of Barrington, RI
Ciril, Noelle Crystal of Fairfield, CT
Clark, Deanna D. of New York, NY
Dienst, Victoria J. Winter of New York, NY
Fourton, Jr., Leslie Eugene of New York, NY
Gordon, Matthew Jeremy of Forest Hills, NY
Han, Alexander Jonghee of New haven, CT
Kale, Rahul of Westport, CT
Keough, Timothy J. of Boston, MA
Lopez, Jane of Westbrook, CT
Moore, Mitchell Elliott of Fort Lauderdale, FL
Nadelman, Cary of Weston, CT
Nathanson, Elliott of Easton, CT
Phaguda, Leena of Punta Gorda, FL
Santomaro, Michael Joseph of Smithfield, RI
Walker, M. Elizabeth of Indianapolis, IN