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# CONNECTICUT REPORTS

# Vol. 346

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT

OF THE

## STATE OF CONNECTICUT

# STATE OF CONNECTICUT *v.* ULYSES R. ALVAREZ (SC 20697)

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

*Syllabus*

The defendant, who had been convicted of sexual assault in the fourth degree and risk of injury to a child, appealed to the Appellate Court. The Appellate Court reversed the judgment of conviction, concluding that the state had failed to establish that the trial court's improper withholding of certain sealed medical records of one of the victims, A, was harmless beyond a reasonable doubt and that the trial court had abused its discretion in allowing the state to introduce evidence of uncharged sexual misconduct that was not sufficiently similar to the conduct at issue in the present case. On the granting of certification, the state appealed to this court.

*Held* that, after an examination of the record and briefs on appeal and consideration of the parties' arguments, the Appellate Court's judgment was affirmed, and this court adopted the Appellate Court's thorough

and well reasoned opinion as the proper statement of the issues and the applicable law concerning those issues:

This court undertook a thorough and independent review of the sealed records at issue and identified multiple references to A's history of untruthfulness and of having made false allegations, those records contained information relating to behavioral, cognitive and emotional issues that could have affected A's ability to observe, understand and accurately narrate the events in question, and, because that information was not available elsewhere in the trial court record, defense counsel's cross-examination of A was limited.

Moreover, the record supported the Appellate Court's determination that the uncharged sexual misconduct evidence at issue was not sufficiently similar to the conduct at issue in the present case.

Argued March 22—officially released May 2, 2023

*Procedural History*

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Litchfield, where the court, *Wu*, *J.*, granted the state's motion to introduce certain uncharged misconduct evidence; thereafter, the case was tried to the jury before *Wu*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Bright*, *C. J.*, and *Suarez* and *Sullivan*, *Js.*, which reversed the judgment of the trial court and remanded the case for a new trial, and the state, on the granting of certification, appealed to this court. *Affirmed.*

*Denise B. Smoker*, senior assistant state's attorney, with whom, on the brief, were *David R. Shannon*, state's attorney, and *Dawn Gallo*, former state's attorney, for the appellant (state).

*Kevin M. Smith*, with whom, on the brief, was *Norman A. Pattis*, for the appellee (defendant).

*Opinion*

PER CURIAM. In this certified appeal, the state appeals from the Appellate Court's judgment reversing the trial

court's judgment of conviction against the defendant, Ulyses R. Alvarez, rendered after a jury trial, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (E) and (8), and risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2).[1] See *State* v. *Alvarez*, 209 Conn. App. 250, 252, 271, 267 A.3d 303 (2021). On appeal, the state claims that the Appellate Court incorrectly held that (1) the state had failed to establish that it was harmless beyond a reasonable doubt that the trial court improperly withheld relevant sealed medical records of A,[2] who testified on behalf of the state both to corroborate the testimony of the victim, K, and to provide uncharged sexual misconduct evidence, and (2) the trial court abused its discretion by allowing the state to introduce evidence of uncharged sexual misconduct, specifically, the testimony of P, on the ground that the conduct was not sufficiently similar to the conduct at issue in the present case.

After examining the record and briefs on appeal and considering the arguments of the parties, we conclude

[1] We granted the state's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court improperly apply the constitutional harmless error standard to the trial court's failure to disclose certain sealed records under *State* v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), instead of the standard typically used for purely evidentiary claims?" And (2) "[d]id the Appellate Court incorrectly determine that the trial court had abused its discretion in finding that evidence of the defendant's uncharged misconduct against P was not sufficiently similar to his charged conduct against the complainant, K, in this case?" *State* v. *Alvarez*, 342 Conn. 905, 270 A.3d 692 (2022).

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Furthermore, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

that the judgment of the Appellate Court should be affirmed on the grounds stated by the Appellate Court. More specifically, as to the state's first claim, this court, like the Appellate Court, has undertaken a thorough and independent review of the sealed records. Based on that review, we identified multiple records containing references both to A's history of untruthfulness in general and A's history of making false misconduct allegations in particular. The records also contain information relating to behavioral, cognitive, and emotional issues that could affect A's ability to observe, understand, and accurately narrate the events in question. See *State* v. *Juan A. G.-P.*, 346 Conn. 132, 155, 287 A.3d 1060 (2023) (trial court improperly withheld from defendant relevant impeachment material contained in complainants' psychiatric records and generally describing relevant portions of those records). This information was not available elsewhere in the trial court record, and thus defense counsel's cross-examination of A was limited to the fact that A had a criminal history, A had a history of drug use, and A originally denied that the misconduct at issue had occurred. As to the state's second claim, our review of the trial court record also confirms the Appellate Court's determination that the uncharged sexual misconduct about which P testified was not sufficiently similar to the conduct at issue in the present case. The Appellate Court's thorough and well reasoned opinion fully addresses the certified questions, and, accordingly, we adopt the Appellate Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *State* v. *Henderson*, 330 Conn. 793, 799, 201 A.3d 389 (2019).

The judgment of the Appellate Court is affirmed.

# ORDERS

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IN RE ISABELLA Q.

The petition of the respondent father for certification to appeal from the Appellate Court, 217 Conn. App. 837 (AC 45551), is denied.

*David B. Rozwaski*, assigned counsel, in support of the petition.

*Tess Shaw* and *Evan O'Roark*, assistant attorneys general, in opposition.

Decided April 18, 2023

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STATE OF CONNECTICUT *v.* ERIC L.

The defendant's petition for certification to appeal from the Appellate Court, 218 Conn. App. 302 (AC 45113), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that that the trial court lacked authority to award the defendant presentence confinement credit in view of that court's decision in *State* v. *Hurdle*, 217 Conn. App. 453, 288 A.3d 675, cert. granted, 346 Conn. 923, A. 3d (2023)?"

*Lisa J. Steele*, assigned counsel, in support of the petition.

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

Decided April 18, 2023

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PHILLIP H. INKEL *v.* SUPERIOR COURT, JUDICIAL DISTRICT OF MIDDLESEX

The petition of the plaintiff in error for certification to appeal from the Appellate Court, 218 Conn. App. 902 (AC 45441), is denied.

*Lisa J. Steele*, assigned counsel, in support of the petition.

*Sarah Hanna*, former supervisory assistant state's attorney, in opposition.

Decided April 18, 2023

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# CONNECTICUT APPELLATE REPORTS

# Vol. 219

**CASES ARGUED AND DETERMINED**

IN THE

## APPELLATE COURT

OF THE

## STATE OF CONNECTICUT

# LEONARD STANZIALE *v.* BETTY A. HUNT ET AL.
## (AC 44542)

Prescott, Seeley and Sheldon, Js.

*Syllabus*

The plaintiff motorcyclist sought to recover damages from the defendants B and H for injuries he sustained when he swerved to avoid colliding with a vehicle operated by B and lost control of the motorcycle. A state police trooper who investigated the accident scene testified at trial that the motorcycle had left a skid mark on the road that was about forty feet long. B's husband, H, the owner of the vehicle, testified that he had gone to the scene three hours after the accident and used a tape measure to determine that the skid mark was approximately seventy-one feet in length. In a one count complaint, the plaintiff alleged that B had been negligent in entering the intersection when he was only forty to fifty feet away from her vehicle. The defendants alleged the special defense of comparative negligence, contending that the plaintiff had failed to keep a proper lookout for other vehicles and to apply his brakes in time to avoid a collision. The plaintiff did not request that the jury be given interrogatories to answer should it find in favor of the defendants, and the jury returned a verdict for the defendants. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly permitted H to testify about the length of the skid mark and improperly refused to redact from the plaintiff's medical records all references to the speed at which the motorcycle had been traveling at the time of the accident. *Held*:

1. Contrary to the defendants' assertion, the general verdict rule did not bar this court from reviewing the plaintiff's claims because the contested evidence of the speed at which the motorcycle was traveling and the length of its skid mark were relevant to both the defendants' denial of the plaintiff's claim of negligence and the defendants' special defense of comparative negligence: evidence of the motorcycle's speed was relevant to whether B acted reasonably by entering and proceeding through the intersection as the plaintiff was approaching, as well as to whether the plaintiff negligently caused the accident by traveling at an unreasonable rate of speed and failing to keep a proper lookout for other vehicles, and evidence of the length of the skid mark both undermined the plaintiff's claim that B was negligent in entering the intersection when he was only forty to fifty feet away from her vehicle and supported the defendants' claim that the plaintiff was comparatively negligent in the operation of his motorcycle.
2. The plaintiff could not prevail on his claim that the trial court improperly denied his motion to redact from his medical records all statements as to the speed at which he was operating his motorcycle at the time of the accident: contrary to the plaintiff's assertion, the defendants did not bear the burden of establishing that the statements were admissible under any potentially applicable exception to the rule against hearsay, as it is well established that the party who files a motion to exclude evidence has the burden of demonstrating the inadmissibility of such evidence, which the plaintiff acknowledged in his brief to this court; moreover, the plaintiff's claim that he did not make any of the challenged statements was factually unfounded, as he conceded in his brief to this court that the medical records expressly attributed one of the statements to him, and, because the records contained substantial other evidence, including notations by his medical providers, that he was the source of statements that directly concerned conduct on his part that may have contributed to the cause of the accident, he also failed to prove that such statements were inadmissible against him under the applicable provision (§ 8-3 (1)) of the Connecticut Code of Evidence, the hearsay exception for statements by a party opponent; furthermore, the plaintiff failed to establish that none of the challenged statements were inadmissible against him under § 8-3 (5) of the Connecticut Code of Evidence, the medical treatment exception to the hearsay rule, as he provided no basis to support his contention that his speed at the time of the accident was irrelevant to the treatment of his injuries.
3. The trial court did not abuse its discretion in permitting H to testify about his measurement of the length of the skid mark, as H's testimony was material to the determination of the negligence of both B and the plaintiff, there was an adequate evidentiary foundation for H's testimony, and the possibility that the skid mark H measured had been made by another vehicle during the three hour period after the accident did not render H's testimony as lacking an adequate foundation or irrelevant but went

to the weight of the evidence, which was a matter within the exclusive province of the jury.

Argued September 19, 2022—officially released May 2, 2023

*Procedural History*

Action to recover damages as a result of the named defendant's alleged negligence, brought to the Superior Court in the judicial district of Ansonia-Derby, where the court, *Pierson*, *J.*, denied the plaintiff's motion to preclude certain evidence; thereafter, the case was tried to the jury before *Pierson*, *J.*; verdict for the defendants; subsequently, the court denied the plaintiff's motions to set aside the verdict and for a mistrial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

*Michael S. Hillis*, for the appellant (plaintiff).

*Jesalyn Cole*, with whom, on the brief, was *Colin R. Gibson*, for the appellees (defendants).

*Opinion*

SHELDON, J. In this negligence action arising out of a motorcycle accident on Great Hill Road in Oxford on July 24, 2015, the plaintiff, Leonard Stanziale, appeals from the judgment of the trial court in favor of the defendants, Betty A. Hunt and Harold W. Hunt, which was rendered upon the general verdict of a jury following the denial of the plaintiff's motion to set aside the verdict. On appeal, as in his motion to set aside, the plaintiff claims that the court improperly (1) denied his pretrial motion in limine to redact from his medical records all statements as to the speed at which he was operating his motorcycle at the time of the accident, and (2) overruled his foundation and relevancy objection to the testimony of Harold Hunt, the owner of the motor vehicle that was allegedly being driven by his wife, Betty Hunt, at the time and place of the accident, as to the length of a skid mark he allegedly found, measured,

and photographed in that location when he went there approximately three hours after the accident.[1]

In response to the plaintiff's claims, the defendants argue first that the general verdict rule precludes our review of those claims, and, second, if we conclude that the general verdict rule does not bar our review of those claims, neither such claim requires the reversal of the judgment. For the reasons that follow, although we disagree with the defendants' contention that the general verdict rule bars our review of the plaintiff's claims, we agree with the defendants that neither such claim requires us to reverse the judgment of the trial court in this action.

The following procedural history and facts, as the jury reasonably could have found them, are relevant to this appeal. On January 7, 2016, the plaintiff commenced this action against the defendants, seeking to recover damages for injuries and losses he claims to have suffered due to the negligence of Betty Hunt in operating Harold Hunt's motor vehicle at the time and place of the accident. In his amended complaint, the plaintiff alleged that, at approximately 3:45 p.m. on July 24, 2015, as he was approaching the intersection of Great Hill Road and Fox Drive on his motorcycle, Betty Hunt negligently drove her motor vehicle into the intersection

[1] The plaintiff also claims that the court abused its discretion by denying his motion to set aside the verdict, which claim is entirely premised on the same two claimed evidentiary improprieties he raises in his first two claims on appeal, namely, the court's denial of his motion in limine seeking to preclude all statements as to the plaintiff's speed within his medical records and the court's overruling of his objection to the testimony of Harold Hunt as to the length of the skid mark. Consequently, for the reasons articulated in parts II and III of this opinion, we conclude that the plaintiff cannot prevail on his claim that the court improperly denied his motion to set aside the verdict. See, e.g., *Rendahl* v. *Peluso*, 173 Conn. App. 66, 118–19, 162 A.3d 1 (2017) (summarily rejecting claim that trial court improperly denied motion to set aside verdict premised on evidentiary claims that this court rejected); *Buchanan* v. *Moreno*, 117 Conn. App. 732, 736–37, 980 A.2d 358 (2009) (same).

and directly into the path of the plaintiff's motorcycle. The plaintiff alleged that, in order to avoid a direct collision between the two vehicles, he attempted to "operate his motor vehicle around the Hunt motor vehicle, but his motor vehicle was caused to hit and slide upon the pavement, thereby throwing him from his motor vehicle and across the roadway pavement." As a result of his fall and its aftermath, the plaintiff suffered several serious physical injuries and financial and nonfinancial losses. The plaintiff further alleged that Betty Hunt's conduct that caused his fall and resulting injuries and losses was negligent, in that "(a) she failed to keep a reasonable and proper lookout for other vehicles traveling on Great Hill Road and at the intersection of Great Hill Road and Fox Drive; (b) she failed to keep and maintain her vehicle under reasonable and proper control; (c) she failed to apply her brakes in time to avoid a collision, although by proper and reasonable exercise of her faculties, she could and should have done so; (d) she failed to turn her vehicle to the left or right to avoid a collision, although by proper and reasonable exercise of her faculties, she could and should have done so; [and] (e) in violation of General Statutes § 14-301 (c), she failed to bring her vehicle to a stop in obedience to a stop sign controlling traffic entering the intersection and failed to yield the right of way . . . to the motor vehicle driven by the [plaintiff]." On the basis of these allegations, the plaintiff further claimed that Harold Hunt was liable for his injuries and losses because Harold Hunt was the owner of the vehicle that Betty Hunt was driving with his permission at the time of the accident.

In their answer, the defendants denied the essential allegations of the plaintiff's complaint and asserted the special defense of comparative negligence, alleging that the plaintiff, by his own negligence in operating his

motorcycle at the time and place of the accident, proximately caused the accident and his own resulting injuries and losses.[2] The defendants alleged, more particularly, that the plaintiff was negligent in operating his motorcycle "in one or more of the following respects: (a) in that he was inattentive and failed to keep a proper lookout; (b) in that he failed to keep and operate his vehicle under proper control; (c) in that he failed to make reasonable use of his faculties and senses so as to avoid the accident; (d) in that he drove his vehicle at an excessive rate of speed for the driving conditions then and there prevailing; and (e) in that he failed to slacken his speed so as to avoid said accident although reasonable care required him to do so." The plaintiff denied the essential allegations of the defendants' special defense.

On February 4, 2020, just before the start of trial, the plaintiff filed a "motion in limine to redact medical records." In his motion, the plaintiff sought the court's permission to redact "from his evidentiary medical records," which had been premarked for identification, all "statements . . . that pertain to the alleged speed that [he] was operating his motorcycle at the time of the accident." Although the plaintiff filed no memorandum of law in support of his motion in limine, the motion included the following allegations of fact about the challenged statements and recitations of authority in support of his claim that they should be redacted: "1. They are hearsay within hearsay and not admissible under any hearsay exception. (Conn. Code Evid. § 8-7.) 2. They are not relevant or germane to [the plaintiff's]

[2] At trial, the parties agreed that Harold Hunt was the owner of the automobile operated by Betty Hunt and, consequently, that he would be liable to the same extent as she would be if the claims against her were proved. The record does not reveal the basis for this agreement; however, we presume that the parties were relying on the family car doctrine, as codified in General Statutes § 52-182. See generally *Chen* v. *Bernadel*, 101 Conn. App. 658, 665, 922 A.2d 1142 (2007).

medical treatment. (See, e.g., *Gil* v. *Gil*, 94 Conn. App. 306, 320, 892 A.2d 318 (2006); *State* v. *Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990) ('[b]ecause statements concerning the cause of injury . . . are generally not germane to treatment, they are not allowed into evidence under the medical treatment exception [to the rule against hearsay]'). 3. The medical records do not identify who made the statements concerning the alleged speed at the time of the accident or when such statements were made and as such cannot be verified. 4. [The alleged statements] are inconsistent in the various records, with some stating, '50 mph,' and others stating, '50 kph,' and, as such, the statements' probative values are outweighed by their prejudicial effect arising from the unreliability of such statements."

At oral argument on the motion in limine, the plaintiff's counsel briefly stated that his problems with the multiple "claims of speed" in the plaintiff's medical records were that no such statements were attributed to the plaintiff, the statements regarding speed were inconsistent with one another, and they were not really part of the medical record because there was "no proof" that the plaintiff would have required any different treatment for his injuries based upon his speed at the time of the accident.

The defendants responded to the plaintiff's motion and supporting argument in two ways. First, they argued that the plaintiff himself was the source of most, if not all, of the challenged statements as to his speed at the time of the accident, for the records identified him as the person who had given the history of the accident and his resulting injuries. The substance of such statements, the defendants further argued—concerning the speed at which the plaintiff was operating his motorcycle at the time he fell off it and struck and skidded across the roadway—was directly relevant to the diagnosis and

treatment of the plaintiff's resulting injuries because it concerned the mechanism of injury, which is routinely noted and relied upon by medical personnel in their records of an injured person's treatment. As for any inconsistencies among the statements in the records about the plaintiff's speed at the time of the accident, the defendants' counsel argued simply that resolving such inconsistencies in the evidence is a task that juries are routinely asked and expected to perform.

After hearing the parties' oral arguments on the motion, the court denied the motion from the bench, stating only that "medical records are replete with hearsay statements . . . [and thus it] is commonplace that there should be hearsay contained within medical records. Nevertheless, we have a statute that allow[s] . . . those records to be admitted into evidence, and that is the statute on which [the] plaintiff is relying in submitting these records into evidence, and I am not going to engage in a—I'm not going to parse out certain parts of the records, leaving certain things in and certain things out. Certainly, the plaintiff is more than free to challenge the accuracy of the contents of the record by way of testimony or other appropriate evidence and means, as well as argument, but the motion [in limine] is hereby denied."

Later in the day on February 4, 2020, immediately after the court denied the plaintiff's motion in limine, a three day trial began before a jury. The plaintiff ultimately called six witnesses to testify at trial: Betty Hunt; Michelle Krasenics, an eyewitness who had seen the accident take place from inside her automobile as she was driving westbound along Great Hill Road toward its intersection with Fox Drive; then state police Trooper Michael R. Dyki, who had responded to the scene of the accident in his official police capacity shortly after

the accident occurred;[3] two of the plaintiff's longtime acquaintances, Cheyenne Kistner and David Defeo; and the plaintiff himself. The plaintiff also introduced several exhibits into evidence, including thirteen sets of documents, premarked before trial as plaintiff's exhibits 1 through 13 for identification, which, together, constituted a complete set of the plaintiff's medical records and bills for services in connection with his medical treatment following the accident; nineteen photographs, premarked before trial as plaintiff's exhibits 14 through 32 for identification, which depicted the intersection where the accident had occurred and some of the injuries he had suffered in the accident; and seven additional photographs, premarked before trial as defendants' exhibits A through G for identification, which also depicted the intersection where the accident had occurred. The plaintiff's medical records, which the plaintiff offered into evidence and the court admitted as full exhibits on the second day of trial, without restriction or limitation as to their permissible use, contained all of the statements as to the speed of the plaintiff's motorcycle at the time of the accident, to which he had objected in his motion in limine. The defendants, in turn, called a single witness, Harold Hunt, to testify in their defense at trial concerning the skid mark he had found, measured and photographed at the scene on the evening of the accident. The defendants also offered into evidence a single photograph, premarked before trial as defendants' exhibit H for identification, which presented an aerial view of the intersection where the accident had occurred.

On the basis of the parties' evidence, the jury reasonably could have found the following facts. On July 24, 2015, at approximately 3:45 p.m., Betty Hunt was

[3] By the time of trial, Dyki had retired from the Department of Public Safety, now known as the Department of Emergency Services and Public Protection, and become a police officer for the town of Oxford.

operating an automobile owned by Harold Hunt in the northbound lane of Fox Drive in Oxford, where she had brought it to a complete stop just before its T intersection with Great Hill Road. The weather at the time was sunny, dry, and clear. At the same time, the plaintiff was operating his motorcycle in an easterly direction on Great Hill Road, to the west of its intersection with Fox Drive. Great Hill Road is a winding and hilly road that runs perpendicular to Fox Drive at the point where the two roads intersect at the bottom of a right-curving hill. There is a stop sign controlling northbound traffic on Fox Drive as it reaches the painted stop line just before its intersection with Great Hill Road, but there is no stop sign or any other marking, sign, or signal controlling traffic traveling through that intersection in either direction on Great Hill Road. The posted speed limit on Great Hill Road, as it approached its intersection with Fox Drive, was thirty miles per hour.

After Betty Hunt stopped her vehicle at the intersection of Fox Drive and Great Hill Road, she looked initially to her right, and then to her left, to see if any other vehicles were approaching the intersection on Great Hill Road, then she waited at the stop sign for three or four oncoming vehicles to pass through the intersection. Thereafter, she looked again to her right and saw one automobile off in the distance traveling toward the intersection from the east, then looked again to her left and saw that no vehicles at all were traveling toward the intersection from the west. She then started to turn left into the westbound lane of Great Hill Road without seeing the plaintiff's motorcycle.

As Betty Hunt began to drive through the intersection to turn left, the plaintiff, who had been traveling downhill toward the intersection in the eastbound lane of Great Hill Road, began to approach the intersection from her left. When he saw Betty Hunt's automobile

crossing the roadway ahead of him, at a distance he described as approximately forty to fifty feet, the plaintiff braked hard and swerved to his right to avoid colliding with her automobile. In so doing, the plaintiff locked his motorcycle's brakes, lost control of the motorcycle, and fell off it to the pavement, hitting it hard, bouncing, and then sliding across the roadway. Betty Hunt first became aware of the plaintiff's presence in or near the intersection when she heard the tires of his motorcycle squealing behind her, then she saw him lose control of the motorcycle when she looked in her driver's side mirror. As a result of the accident, the plaintiff, who was not wearing a helmet, sustained lacerations, puncture type wounds, abrasions, road rash type injuries, a partially collapsed lung, and fractures to his ribs and back.

Shortly after the accident, emergency medical personnel from the Valley Emergency Medical Service (VEMS) responded to the accident scene, where they found the plaintiff sitting upright on the ground, leaning against a guardrail. Speaking with VEMS personnel in that location, the plaintiff reported, as noted in his medical records, that he had been driving his motorcycle at "approximately thirty miles per hour when he got cut off at a side street and had to dump the bike. [The plaintiff] was thrown off the motorcycle but not airborne. [The plaintiff was] not wearing a helmet. Only safety gear was a leather vest."

Dyki responded to the accident scene shortly after the emergency medical personnel arrived. While there, he examined the scene, observed a single skid mark in the eastbound lane of Great Hill Road, to the west of its intersection with Fox Drive, and spoke with the plaintiff, Betty Hunt, and Krasenics about what they had seen when the accident occurred. Dyki testified that the sole skid mark he observed, which ended near

the point on Great Hill Road where the plaintiff's motorcycle ultimately came to rest, was approximately forty feet long. After the plaintiff was seated for transport on a backboard because his back pain was too great for him to lie down, he was taken by ambulance to Bridgeport Hospital.

The defendants' only witness, Harold Hunt, contradicted the testimony of the plaintiff and Dyki as to the plaintiff's distance from the intersection of Great Hill Road and Fox Drive when Betty Hunt's vehicle entered the intersection in front of the plaintiff before the plaintiff braked, swerved, and began to slide down the roadway to avoid colliding with her automobile. Harold Hunt testified that, on the evening of the accident, approximately three hours after it occurred, he and Betty Hunt's father went to that location and measured the sole skid mark they found there. Harold Hunt testified that the skid mark, which was depicted in three photographs the plaintiff introduced as exhibits A, B, and C, was seventy-one feet, three inches long.

At the close of all the evidence, the court held a final charge conference[4] with counsel as to how it would instruct the jury, and later, after counsel's closing arguments, it instructed the jury as indicated at the conference. The court's instructions described, inter alia, the elements of the plaintiff's claim of negligence against the defendants, the elements of the defendants' special defense of comparative negligence, the rules for assessing and awarding damages should the jury find the defendants liable, and the process by which the jury should conduct its deliberations and return its verdict. The jury was given a general verdict form with no interrogatories to answer if it should find the issues for the

[4] The trial court had circulated a proposed jury charge to counsel on the first day of trial and had discussed the proposed charge with counsel on multiple occasions thereafter.

defendants, which it was told it should do in either of two circumstances: first, if it found that the plaintiff had failed to prove his claim of negligence against the defendants; or, second, if it found that the defendants had proved their special defense of comparative negligence against the plaintiff and that the plaintiff's proven negligence was greater than that of Betty Hunt.[5] On February 6, 2020, after two hours of deliberations, the jury used the defendants' verdict form to return a general verdict in favor of the defendants.

On March 10, 2020, the plaintiff filed a motion to set aside the verdict and a memorandum of law in support thereof.[6] The plaintiff claimed that the verdict should be set aside on several grounds, including that the court improperly had denied his pretrial motion in limine, and improperly had overruled his foundation and relevancy objection to the testimony of Harold Hunt as to the length of the skid mark. On October 1, 2020, the defendants filed an objection to the motion to set aside, in which they argued in relevant part that the court was barred from setting aside the verdict based upon alleged error in either challenged evidentiary ruling because review of those claims was precluded by the general

[5] The jury also was presented with a plaintiff's verdict form containing interrogatories—as to the percentages of the parties' liability, the specification of economic damages, the findings of fair, just, and reasonable damages, and the total damages accounting for the percentage of liability of each party—to use in the event it found the issues in favor of the plaintiff. The court specifically instructed the jury that, if the liability allocated to the plaintiff "is more than [fifty] percent, you will enter a verdict for the defendant[s]. So, you would set [the plaintiff's verdict] form aside and fill out the verdict for the defendants if the percentage is greater than [fifty] . . . ." The court also instructed the jury that it should only use "the verdict for the defendant[s'] form . . . if you find the issues in favor of the defendants . . . ." Thus, the jury returned a general verdict in this case, and neither party on appeal claims otherwise.

[6] The plaintiff's motion to set aside the verdict also alleged that the verdict was "against the evidence . . . ." The plaintiff does not renew this claim on appeal.

verdict rule and neither such ruling was improper. As to the propriety of the challenged rulings, the defendants argued first that the court properly exercised its discretion in denying the plaintiff's motion in limine because the medical records established that the challenged statements within them had been made by the plaintiff himself, making them admissible against him pursuant to the hearsay exception for statements by a party opponent, and second, that the subject matter of those statements, the speed at which the plaintiff was traveling at the time of the accident, was relevant to his medical treatment, making them also admissible under the medical treatment exception to the hearsay rule.

The defendants also argued that the court had properly overruled the plaintiff's foundation and relevancy objection to the testimony of Harold Hunt as to the length of the skid mark because a sufficient foundation had been laid for such testimony through the testimony of Betty Hunt and Dyki that the skid mark had been left by the plaintiff's skidding motorcycle. The defendants argued that such skid mark evidence was relevant to the plaintiff's credibility as to how far he had been from the intersection when Betty Hunt's vehicle entered the intersection in front of him to turn left before he began to brake and skid along the roadway to avoid colliding with her vehicle.

On January 28, 2021, the court issued a short-form order denying the motion to set aside the verdict and an accompanying order sustaining the defendants' objection to that motion "for the reasons set forth therein." This appeal followed.[7] Additional facts and procedural history will be set forth as necessary.

[7] On March 1, 2021, the plaintiff filed a motion for articulation, requesting that the trial court articulate both the factual and legal bases for its denial of his motion to set aside the verdict. On March 2, 2021, the court denied the plaintiff's motion for articulation. The plaintiff did not file with this court a motion for review of the trial court's denial of his motion for articulation. See Practice Book § 66-7.

I

We first address the defendants' argument that the general verdict rule precludes our review of the plaintiff's claims on appeal. For the following reasons, we disagree with the defendants' claim that that rule applies in the present case.

We begin by setting forth the relevant legal principles governing the operation of the general verdict rule. "Under the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . . Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall. . . . The rule rests on the policy of the conservation of judicial resources, at both the appellate and trial levels." (Internal quotation marks omitted.) *Garcia* v. *Cohen*, 335 Conn. 3, 10–11, 225 A.3d 653 (2020).

"On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellant seeks to have adjudicated. Declining in such a case to afford appellate scrutiny of the appellant's claims is consistent with the general principle of appellate jurisprudence that it is the appellant's responsibility to provide a record upon which reversible error may be predicated." (Internal quotation marks omitted.) Id., 11. "In the trial court, the rule relieves the judicial system from the necessity of affording a second trial if the result of the first trial potentially did not depend upon the trial errors claimed by the appellant. Thus,

unless an appellant can provide a record to indicate that the result the appellant wishes to reverse derives from the trial errors claimed, rather than from the other, independent issues at trial, there is no reason to spend the judicial resources to provide a second trial." (Internal quotation marks omitted.) Id. "[T]he general verdict rule operates . . . to insulate a verdict that may have been reached under a cloud of error, but which also could have been reached by an untainted route." (Internal quotation marks omitted.) *McCrea* v. *Cumberland Farms, Inc.*, 204 Conn. App. 796, 815, 255 A.3d 871, cert. denied, 338 Conn. 901, 258 A.3d 676 (2021).

"[T]he general verdict rule applies to the following five situations: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Internal quotation marks omitted.) *Garcia* v. *Cohen*, supra, 335 Conn. 11–12. It is undisputed that the present case falls into the fourth of the five above-described situations because it involves a general verdict for the defendants, returned on a defendants' verdict form to which the plaintiff agreed without requesting interrogatories, in a trial during which the pleadings raised issues whose resolution could have established two separate and independent grounds for the jury's general verdict in favor of the defendants. The first such ground, based upon the defendants' denial of the plaintiff's claim of negligence, could have been premised on a finding that the plaintiff had failed to prove his claim of negligence against Betty Hunt. The second possible ground, based upon the defendants' special defense of comparative negligence, could have

been premised on findings that the plaintiff negligently caused the accident and his own resulting injuries and losses, and that the plaintiff's proven causative negligence was greater than that of Betty Hunt. Accordingly, the general verdict rule would apply to any of the plaintiff's claims on appeal that did not seek to invalidate both possible grounds for the jury's general verdict. See id.; *Spears* v. *Elder*, 124 Conn. App. 280, 288–89, 5 A.3d 500, cert. denied, 299 Conn. 913, 10 A.3d 528 (2010); *Bergmann* v. *Newton Buying Corp.*, 17 Conn. App. 268, 270–71, 551 A.2d 1277 (1989). To determine which of the plaintiff's appellate claims, if any, is barred by the general verdict rule, a reviewing court must compare those claims to the legal claims presented to the jury, as framed by the parties' pleadings. See *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 865 n.16, 89 A.3d 993, cert. denied, 312 Conn. 920, 94 A.3d 1200 (2014).[8]

On appeal, the plaintiff advances two narrow challenges that the court improperly admitted into evidence (1) hearsay statements within his medical records as to the speed at which he was operating his motorcycle at the time of the accident, and (2) testimony of Harold

[8] The parties' appellate briefs do not frame their general verdict rule arguments in this manner. Rather, both parties analyze whether there was sufficient evidence to support each theory presented to the jury. In contrast to the parties' submissions, the applicability of the general verdict rule does not hinge on whether there was evidence to support all grounds of the verdict but, rather, on whether the appellate claims seek to invalidate all possible grounds of the verdict. See, e.g., *Spears* v. *Elder*, supra, 124 Conn. App. 288–89. The cases cited by the parties on appeal do not undermine but, rather, confirm this point. See *Tetreault* v. *Eslick*, 271 Conn. 466, 473, 857 A.2d 888 (2004) (general verdict rule barred review of claim challenging superseding cause special defense because claim did not contest plaintiffs' failure to establish defendants' negligence); *Morales* v. *Moore*, 85 Conn. App. 208, 211, 855 A.2d 1041 (2004) (general verdict rule barred review of claim challenging sudden emergency doctrine instruction because claim related only to defendants' alleged negligence, not to plaintiff's alleged comparative negligence).

Hunt regarding the length of the skid mark allegedly left by the plaintiff's motorcycle at the scene of the accident, which he found, measured, and photographed on the evening of the accident. When an appellant's claim on appeal challenges the trial court's evidentiary rulings, the applicability of the general verdict rule to any such claim is contingent on whether the evidence thereby challenged is relevant to just some, but not all, of the grounds on which the jury may have based its verdict. For instance, the general verdict rule bars review of claims where the contested evidence is relevant to, or impacts, only one of several possible grounds for the jury's general verdict. See, e.g., *Klein* v. *Quinnipiac University*, 193 Conn. App. 469, 487–88, 219 A.3d 911 (2019) (in premises liability action stemming from plaintiff's falling from bicycle after riding over speed bump on defendant's premises, general verdict rule *barred* review of claim that court improperly admitted testimony of police officer estimating speed at which plaintiff's bicycle was traveling when it struck speed bump because that claim related only to defendant's special defense of contributory negligence, not to plaintiff's own claim that speed bump was dangerous, defective, and unsafe), appeal dismissed, 337 Conn. 574, 254 A.3d 865 (2020); *Modugno* v. *Colony Farms of Colchester, Inc.*, 110 Conn. App. 200, 202, 204–205, 954 A.2d 270 (2008) (in premises liability action stemming from plaintiff's tripping over rocky terrain on defendant's premises, general verdict rule *barred* review of claim that court improperly denied motion for new trial that challenged exclusion from evidence of testimony regarding zoning regulations, permit requirements, and site plan because that evidence related only to premises liability claim and not to defendant's special defenses that plaintiff was comparatively negligent and that dangerous condition was open and notorious); *Diener* v. *Tiago*, 80 Conn. App. 597, 601–602, 836 A.2d 1224 (2003)

(in negligence case stemming from motor vehicle accident, general verdict rule *barred* review of claim that court improperly denied motion to set aside verdict on basis of its exclusion from evidence of photographs depicting defendant's skid marks specifically offered to identify location of cars before, at or after impact because that evidence was not relevant to defendant's special defense that plaintiff had negligently caused accident and its consequences by failing to use proper warning signals prior to accident); *Rivezzi* v. *Marcucio*, 55 Conn. App. 309, 311–13, 738 A.2d 731 (1999) (in case involving negligence claim stemming from plaintiff's falling off dirt bike when it hit large rock defendant previously had pushed into bike path, general verdict rule *barred* review of claim that court improperly admitted into evidence hearsay statement within hospital record that plaintiff was traveling at seventy miles per hour because that evidence was relevant only to whether plaintiff was comparatively negligent).

Conversely, the general verdict rule does not bar review of claims if the contested evidence is relevant to all the possible grounds of the jury's general verdict. See, e.g., *McCrea* v. *Cumberland Farms, Inc.*, supra, 204 Conn. App. 814–18 (in case involving negligence claim stemming from motor vehicle accident, general verdict rule *did not bar* review of claim that court improperly admitted evidence of plaintiffs' motive in filing lawsuit, which went to plaintiffs' general credibility, because improper admission of evidence affecting plaintiffs' credibility would have been relevant to all possible grounds of jury's verdict, necessarily tainting entire case); *Spears* v. *Elder*, supra, 124 Conn. App. 290–92 (in case involving claims of slander and fraud, although general verdict rule *barred* review of claim that court improperly excluded evidence of plaintiff's reputation because that evidence was relevant only to plaintiff's slander claim but did not impact his fraud

claim, general verdict rule *did not bar* review of claim that court improperly excluded evidence of plaintiff's arrest record because that evidence was relevant to impeach credibility of plaintiff and thus applied to both of his causes of action); *Segale* v. *O'Connor*, 91 Conn. App. 674, 677–80 and 678 n.3, 881 A.2d 1048 (2005) (in case involving negligence claim stemming from motor vehicle striking pedestrian, general verdict rule *barred* review of claim that court improperly excluded hearsay of eyewitness that unknown declarant had stated, " 'I didn't hit him, did I?,' " because that claim related only to negligence of defendant and not to plaintiff's alleged comparative negligence, but general verdict rule *did not bar* review of claim that court improperly admitted full text of transcribed hearsay statement of decedent as to his recollection of accident and that he was issued police warning for jaywalking because that claim implicated both plaintiff's negligence claim and defendant's special defense of comparative negligence).

On the basis of the foregoing authorities, we conclude that the general verdict rule does not bar our review of the plaintiff's claims on appeal because the evidence challenged in those claims, as to the speed at which he was operating his motorcycle when he braked to avoid colliding with the defendants' automobile and the length of the skid mark he left on the pavement by so braking, was relevant to both of the legal grounds on which the jury could have based its general verdict for the defendants. The speed at which the plaintiff was traveling when he first applied his brakes to avoid colliding with the defendants' automobile was relevant to the reasonableness of Betty Hunt's actions in entering and driving through the intersection to turn left as he was approaching it from her left because the faster he then was traveling, the less likely it was that he would have come into her field of vision and she would have seen him in time to slow or stop her automobile, and thus

to yield him the right of way at a stop sign, before entering the intersection and completing her left turn. By the same token, such evidence bore directly on the defendants' claims in their special defense of comparative negligence that the plaintiff negligently caused the accident by traveling at an unreasonable rate of speed and by failing to keep a proper lookout for other vehicles on the highway before locking his brakes and skidding to a stop to avoid colliding with the defendants' automobile, and thereby failing to keep his motorcycle under proper and reasonable control. Logically, the faster the plaintiff was traveling when he saw the defendants' automobile and applied his brakes, the less time he would have had to avoid colliding with that automobile without losing control of the motorcycle and having to lay it down before reaching the intersection, and the more likely it was that the jury would have found his conduct to be negligent due to operating at an unreasonable speed, failing to keep a reasonable and proper lookout for other vehicles on the highway, and/or failing to keep his vehicle under proper and reasonable control.

Likewise, the challenged skid mark evidence was relevant both to the plaintiff's claim of negligence against the defendants and to the defendants' special defense of comparative negligence. In substance, the challenged evidence from Harold Hunt was that the skid mark he observed, photographed, and measured at the scene of the accident, in the eastbound lane of Great Hill Road to the west of its intersection with Fox Drive, was just over seventy-one feet long. Such testimony directly contradicted testimony from Dyki that that same skid mark, which he had observed when he arrived at the scene of the accident shortly after it occurred, was approximately forty feet long. By necessary implication, moreover, Harold Hunt's testimony as to the length of the skid mark left by the plaintiff's motorcycle at the

scene of the accident contradicted the plaintiff's own testimony that he had first seen Betty Hunt's automobile enter the intersection in front of him and locked his brakes to avoid hitting her when she was only forty or fifty feet ahead of him. Such evidence, therefore, was relevant to the credibility of the plaintiff as to his description of the sequence of the events that led to the accident, including his claim that Betty Hunt had entered the intersection in front of him when he was only forty or fifty feet away from her, where she could and should have seen him approaching. It thereby tended to undermine the plaintiff's claim that Betty Hunt had failed to keep a proper and reasonable lookout for other vehicles on the highway and failed to yield the right of way to him at an intersection controlled by a stop sign. By the same token, such evidence was relevant to the defendants' special defense of comparative negligence because it tended to support the defendants' assertion that the plaintiff had negligently caused the accident by failing to keep a proper and reasonable lookout for other vehicles on the highway as he approached the intersection and by failing to apply his brakes or to turn his motorcycle to the left or to the right in time to avoid a collision when a reasonable person in his circumstances, operating a motorcycle at a proper and reasonable speed, could and would have done so. Stated simply, the evidence of the speed of the plaintiff's motorcycle and the distance it skidded on the road were relevant to the jury's determination as to which of the operators—the plaintiff or Betty Hunt—was negligently responsible for the plaintiff's injuries and, if both were so responsible, whose negligence was greater.

At trial, the factual issues as to the location and the speed of the plaintiff's motorcycle when Betty Hunt proceeded into the intersection was the crux of the

case. Both parties, in their opening statements and closing arguments, repeatedly emphasized the importance of the plaintiff's speed and its impact on both the plaintiff's and Betty Hunt's actions at the time of the accident. The parties' opening and closing arguments referenced at least twenty-five times the speed of the plaintiff's motorcycle and the length of the skid mark it left at the accident scene. The plaintiff's counsel argued in closing that, "[o]ne of the things that I want you to pay attention to, and we kind of went through it laboriously yesterday, was this idea about miles per hour, and the reason why I spent so much time on it is, is you're going to be asked to determine if there's anything that you could say from the accident scene or from anything, that [the plaintiff] was speeding or going too fast for the conditions." The court, in accordance with the parties' submissions, provided an instruction to the jury on the standard for determining whether the operator of a vehicle was traveling unreasonably fast.

Both parties had different versions of the speed and location of the plaintiff's motorcycle, and, consequently, these issues resulted in a credibility contest at trial. The defendants' counsel made this clear in closing argument by informing the jury that it had to make a credibility determination as to whether to believe either the plaintiff's testimony or the statements contained in his medical records. The defendants' counsel further stated in closing argument, and in her opposition to the plaintiff's motion to set aside the verdict, that Harold Hunt's testimony that the skid mark measured seventy-one feet, three inches in length could be used to impeach the plaintiff's testimony that he was only forty to fifty feet away from the intersection when he saw Betty Hunt's automobile. The plaintiff's counsel posed the same inquiry to the jury and specifically asked it to discredit certain of the references to speed contained in the plaintiff's medical records. The jury necessarily

had to credit one side or the other as to the speed and the location of the plaintiff's motorcycle and, consequently, the amount of time that both parties had to make their decisions, given their locations on the road. Thus, here, as in *McCrea*, *Spears* and *Segale*, the contested evidence was relevant both to the credibility of the plaintiff and to the alleged negligence of the two parties involved.[9] Therefore, we conclude that the general verdict rule does not bar our review of either of

[9] The pertinent cases to the contrary are distinguishable. In *Diener*, this court held that the general verdict rule barred review of a claim that the trial court had improperly excluded evidence of photographs depicting skid marks caused by the defendant's vehicle that had been offered to identify the locations of cars before, at or after impact because that evidence was not relevant to the defendant's special defense that the plaintiff had failed to use proper warning signals. *Diener* v. *Tiago*, supra, 80 Conn. App. 601–602. Here, however, the plaintiff's claim challenges the admissibility of Harold Hunt's testimony as to the length of the skid mark, which was neither offered for a specific purpose nor was subject to a limiting instruction as to how it could be used by the jury at the time of the trial. Thus, the jury could have used Harold Hunt's testimony for all proper purposes, including, but not limited to, impeaching the plaintiff, supporting the inference that the plaintiff was traveling at a high rate of speed, or to establish the plaintiff's location when Betty Hunt's vehicle entered the intersection. See generally *In re Corey C.*, 198 Conn. App. 41, 78, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020); *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, 175 Conn. App. 692, 723–24, 168 A.3d 538, cert. denied, 327 Conn. 960, 172 A.3d 801 (2017). Further, the defendants' special defense did not include any reference to the warning signals used by Betty Hunt.

Neither *Klein* nor *Rivezzi* compels a different conclusion. In *Klein*, the general verdict rule barred review of a claim that the court improperly admitted the testimony of a police officer to estimate the speed at which the plaintiff's bicycle traveled over a speed bump because that claim related only to the defendant's contributory negligence special defense. *Klein* v. *Quinnipiac University*, supra, 193 Conn. App. 487–88. In *Rivezzi*, the general verdict rule barred review of a claim that the court improperly admitted into evidence a hearsay statement within the plaintiff's hospital record that he was riding at seventy miles per hour on a dirt bike when it hit a large rock because that evidence was relevant only to whether the plaintiff was comparatively negligent. *Rivezzi* v. *Marcucio*, supra, 55 Conn. App. 311–13. The contested speed evidence in *Klein* and *Rivezzi* implicated only the plaintiffs' comparative negligence because that evidence was not relevant to the defendants' liability for a speed bump on the roadway or a large rock in the path taken by the plaintiff. In contrast, the speed evidence in the

the plaintiff's claims on appeal. Accordingly, we will now address the merits of the plaintiff's claims.

## II

The plaintiff's first claim on appeal, as previously noted, is that the court improperly denied his pretrial motion in limine to redact from his medical records all statements as to the speed at which he was operating his motorcycle at the time of the accident. Generally, he argues that all such statements should have been redacted because they constituted hearsay, or hearsay within hearsay, which the defendants had not shown and the court had not determined to be admissible under any recognized exception to the hearsay rule. Focusing, more specifically, on the hearsay exceptions for statements by a party opponent[10] and for medical treatment,[11] which the defendants previously had invoked to justify the court's in limine ruling when they

present case was relevant to the negligence of both the plaintiff and Betty Hunt because, as explained previously, the accident was fluid in that it involved Betty Hunt's traveling into the intersection as the plaintiff was approaching.

[10] Section 8-3 (1) of the Connecticut Code of Evidence provides: "A statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, (B) a statement that the party has adopted or approved, (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by the party's agent, servant or employee, concerning a matter within the scope of the agency or employment, and made during the existence of the relationship, (E) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy, (F) in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or (G) a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question."

[11] Section 8-3 (5) of the Connecticut Code of Evidence provides: "A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment."

opposed the plaintiff's challenge to that ruling in his motion to set aside the verdict, the plaintiff argues that the challenged statements were not admissible under either exception because the defendants had not established either that he had made any of the challenged statements or that the subject matter of such statements was relevant or germane to the diagnosis or treatment of his accident related injuries.

The defendants dispute the plaintiff's arguments on three grounds, which we find persuasive. First, and most fundamentally, they claim that the plaintiff's arguments improperly attempt to shift the burden of proving the admissibility of the challenged statements to them rather than assuming the burden of proving their inadmissibility himself. This, they claim, is improper for two reasons, with which we agree. To begin with, it is well established that a party who files a motion in limine to exclude evidence on the ground that it is inadmissible under the rules of evidence "has the burden of demonstrating that the evidence is inadmissible on any relevant ground." *Menna* v. *Jaiman*, 80 Conn. App. 131, 138 n.4, 832 A.2d 1219 (2003).[12] Here, the plaintiff bears the burden on appeal of demonstrating that the challenged statements were inadmissible against him under the Connecticut Code of Evidence.

Additionally, if, as here, a party in a personal injury action challenges the admissibility of statements in an

[12] This rule stands in contrast to the generally applicable rule that the burden to establish the admissibility of evidence in the face of a properly asserted objection is on the proponent of the evidence. See *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 753, 680 A.2d 301 (1996). The burden ordinarily will not shift to the opponent of the evidence to demonstrate that the evidence is inadmissible. See also 1 Wigmore on Evidence (Tillers Rev. 1983) § 18, p. 841 ("The burden of proving the grounds of an objection is ordinarily not upon the opponent . . . . [T]he burden of establishing the preliminary facts essential to satisfy any rule of evidence is upon the party offering it. The opponent merely invokes the law; if it is applicable to the evidence, the proponent must make the evidence satisfy the law.").

otherwise admissible medical record on the ground that they are not relevant or germane to the diagnosis or treatment of any relevant injury, the burden is on the party seeking to redact such statements to specify his objections to the statements and demonstrate their inadmissibility against him under the medical treatment exception to the hearsay rule. See *Aspiazu* v. *Orgera*, 205 Conn. 623, 628, 535 A.2d 338 (1987). Indeed, the plaintiff so acknowledges in his reply brief, in which, relying on *Aspiazu* and this court's subsequent decision in *Nevers* v. *Van Zuilen*, 47 Conn. App. 46, 57, 700 A.2d 726 (1997), he states: "It is the objecting party's burden to put the trial court on notice of the specific nonmedical sections of the report that should be redacted . . . ." Under these authorities, the plaintiff's argument that the challenged statements should have been redacted because the defendants did not demonstrate their admissibility under any potentially applicable hearsay exception misstates our law and must accordingly be rejected.

The defendants' second basis for opposing the plaintiff's claim of error based upon the court's denial of his motion in limine is that one of his principal grounds for requesting the redaction of all statements from his medical records as to the speed at which he was operating his motorcycle at the time of the accident—that he had not been shown by the defendants to have made any of the challenged statements—is factually unfounded. Indeed, despite the allegations of his motion, the plaintiff has conceded in his principal appellate brief that the records themselves expressly attribute at least one of the challenged statements to him. Although the plaintiff does not specifically identify that statement in his brief, he is obviously referring to his original statement to the emergency medical technicians from VEMS who first found him at the scene of the accident, sitting up against a guardrail on the road

where he had fallen and was injured. In that statement, as reported by VEMS personnel in their official report, which they signed and filed at 4:43 p.m. on July 24, 2015, the plaintiff stated that he had been traveling on his motorcycle at approximately thirty miles per hour when he was cut off at a side street and had to lay down his bike to avoid colliding with another motor vehicle.

Although the foregoing statement alone was sufficient to defeat the plaintiff's original, all-or-nothing motion, in which he requested the redaction from his medical records of *all* statements as to his speed at the time of the accident on the ground, inter alia, that he had not made *any* such statement, that statement was not the only statement about speed in the plaintiff's medical records that is fairly attributable to him. In fact, his medical records contain substantial evidence that he was the source of most of the challenged statements as to his speed at the time of the accident. Several challenged statements in the hospital records about his speed, for example, expressly noted that the information had been "provided by the patient and the EMS personnel." Such notations appeared in entries containing descriptions of the speed at which the plaintiff was traveling that were made by Dr. Zev Balsen, a medical resident at the hospital; the attending medical provider, Dr. Tanya D. Shah; and the admitting medical provider, Dr. Alisa Savetamal. Because all of these statements were made hours after the emergency medical technicians had delivered the plaintiff to the hospital, the doctors' reliance on the emergency medical technicians' input as to the plaintiff's speed must logically have been based on the emergency medical technicians' written report, which included the plaintiff's original statement that he was traveling at approximately thirty miles per hour at the time of the accident.[13]

[13] No explanation appears in the records for the consistent differences among the doctors in describing the speed at which the plaintiff was traveling

In addition to the above-described notations as to the source of reported information about the history of plaintiff's injuries, Shah specifically mentioned in the hospital records on several occasions that she personally had spent critical care time "obtaining history from patient or surrogate." No other source of patient history is noted elsewhere in the hospital records.

Because several of the challenged statements as to the plaintiff's speed at the time of the accident are clearly attributable to him, and such statements directly concern conduct on his part that may have contributed to the causation of the accident and his resulting injuries and losses, the plaintiff has failed to prove that such statements were not admissible against him under the hearsay exception for statements by a party opponent.

Finally, the defendants argue that the plaintiff failed to establish that the challenged statements were inadmissible under the medical treatment exception to the hearsay rule by demonstrating that they were not relevant or germane to the diagnosis and treatment of his accident related injuries. In support of his claim to the contrary, the plaintiff has cited cases in which our appellate courts have ruled that statements in medical records as to facts going only to the legal responsibility of other persons for causing an accident should be excluded from such records because they are not relevant or germane to the plaintiff's medical treatment for his injuries. See, e.g., *Kelly* v. *Sheehan*, 158 Conn. 281, 282, 284–86, 259 A.2d 605 (1969) (information in medical record as to who drove car involved in injury producing accident should be redacted from medical record

at the time of the accident, with Balsen always stating that the plaintiff had been "going 50 mph"; Shah always stating that "[the plaintiff's] vehicle was traveling at a high speed"; and Savetamal always stating that the plaintiff had been traveling at "approx. 50 KPH at the time of the accident." Only Balsen's description varies materially from the plaintiff's own description of his speed.

because it was not relevant or germane to injured person's medical treatment); see also *Gil* v. *Gil*, supra, 94 Conn. App. 320–21 (making exception to general rule excluding evidence of causation from medical records for statements identifying child's family member as cause of child's stress and anxiety, on theory that such information is relevant to treatment that may be required for child). The defendants have rightly noted, however, that cases in which medical records contain information identifying the person who caused and is legally responsible for an injury must be distinguished from those in which additional details in such records describe the physical manner in which the injury was caused, reasoning that the latter, unlike the former, may shed useful light on the nature and extent of the injury and inform a medical care provider's judgment as to how the injury should be treated. Such information is particularly relevant if it concerns the mechanism of injury, describing how, physically, the injuries were inflicted, by what instrument or other means they were inflicted, and/or at what speed or with what force they were so inflicted. Such details, they rightly argue, may give medical care providers guidance as to what else they should look for to assess the injuries properly and determine how best to treat them.

In this case, apart from generally dismissing the relevance to the diagnosis or treatment of the plaintiff's injuries of the speed at which his motorcycle was moving when he fell off it, struck the pavement, and was dragged or slid across it on his head, side and back, the plaintiff has provided no basis in evidence or argument to support his claim that his speed at the time of this accident was irrelevant to the treatment of his injuries. It is true, of course, as the plaintiff has suggested, that some of the plaintiff's injuries were visible on his body, and the existence of other, associated internal injuries might have been inferable from the

appearance of those visible injuries and the pain he reported suffering as a result of their infliction. Logic suggests, however, that the speed at which the plaintiff struck the roadway while not wearing a helmet or other protective equipment might have led his medical care providers to examine and treat him differently than if he had fallen to the pavement less violently, at a slower speed. They might, for example, have questioned if and to what extent he had suffered more serious internal injuries as a result of the fall, not only to his arms, legs, and torso, but also to his head and brain. That logic is consistent with the ruling of our Supreme Court in *Berndston* v. *Annino*, 177 Conn. 41, 411 A.2d 36 (1979), in which the court determined that statements as to an injured person's speed at the time of an injury producing accident are "relevant to the severity of impact and, inferentially, to the injury sustained [in that accident]." Id., 43. Although the court in *Berndston* noted that courts in other jurisdictions were divided as to whether evidence of speed should be admitted when liability is not in dispute, it adopted what it described as "[t]he prevailing view" on that issue; id., 44; concluding that "evidence of speed, physical impact, and the like is admissible as relevant to the probable extent of personal injuries. . . . This accords with our view. We conceive this to be a rational and logical approach to the problem." (Citations omitted.) Id., 44–45. It is clear that information concerning speed and physical impact is information relevant to a medical care provider for the diagnosis of the extent of injuries and treatment.

Consistent with this authority, the official commentary to § 8-3 (5) of the Connecticut Code of Evidence expressly notes that "[§] 8-3 (5) excepts from the hearsay rule statements describing 'the inception or general character of the cause or external source of an injury . . . when reasonably pertinent to medical diagnosis or treatment.' " Against this background, we conclude

that the plaintiff failed to carry his burden of establishing, as he claimed in his motion in limine and has argued before this court, that none of the statements in his medical records about the speed at which he was traveling on his motorcycle at the time of the accident were relevant or germane to his treatment for the injuries he suffered therein.[14]

III

The plaintiff next claims that the court improperly overruled his objection to the testimony of Harold Hunt regarding the length of the skid mark he found, photographed and measured on the roadway at the scene of the accident approximately three hours after the accident. Specifically, the plaintiff argues that Harold Hunt's testimony as to his measurement of the length of the skid mark was irrelevant and inadmissible because there was an inadequate evidentiary foundation to establish "that the skid mark was an accurate depiction of the scene of the accident at the time that the accident occurred." We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. During the direct examination of Betty Hunt, the plaintiff introduced exhibits A, B, and C into evidence, all of which

[14] We finally note that the procedural posture of this case raised two possible reasons for not reaching and deciding this issue on the merits. First, the plaintiff failed to obtain and present to this court a decision from the trial court specifically addressing and deciding his in limine claim that none of the challenged statements was admissible against him under the medical treatment exception to the hearsay rule. Second, the plaintiff introduced the challenged statements into evidence himself without renewing his motion in limine or clarifying that, by so doing, he was only attempting to comply with the court's in limine ruling and thus was not waiving his right to seek appellate review of the denial of his motion in limine. Because the defendants did not ask the court to decline review of the plaintiff's in limine claim on either of these grounds and both parties fully briefed that claim on the merits without suffering any apparent prejudice, we have chosen to review the plaintiff's claim on its merits.

are photographs of the intersection of Fox Drive and Great Hill Road. Depicted in exhibits A, B, and C is a single skid mark in the eastbound lane of Great Hill Road as it approaches its intersection with Fox Drive from the west. Exhibit A, which was taken from the perspective of a person standing in the middle of Great Hill Road, to the west of Fox Drive and facing east, depicts a single skid mark beginning substantially to the west of the intersection of Fox Drive and ending essentially where the intersection begins. Exhibit B, which was taken from the same perspective as exhibit A, shows an open reel measuring tape resting on the surface of the roadway and spanning the entire distance from where the skid mark begins to the spot where an individual—later identified in the defendants' testimony as Betty Hunt's father—is standing near the outlet of Fox Drive. Exhibit C, which was taken from the same perspective as exhibits A and B, depicts the same skid mark in the same location.

The plaintiff's counsel asked Betty Hunt a series of questions regarding exhibits A, B, and C and the skid mark shown in them. Betty Hunt testified that she was familiar with the photographs and that they depicted the location where the accident had occurred. She was asked whether she knew who took the photographs, and she responded that "I know someone that took two of those [photographs] because that's my father standing in one of them." She further testified that Harold Hunt and her father "went and took" two of the photographs, defendants' exhibits A and B, on the night of the accident. The plaintiff's counsel then asked Betty Hunt several questions regarding the skid mark shown in exhibits A and B. She was asked, "there's a picture in exhibit A of a skid mark . . . [d]id you see that?" Betty Hunt responded, "[y]es, sir," and, "[m]y father—there's [a] tape measure in ours." She was then asked, "[b]ut you do believe that's the skid mark from the

accident? Betty Hunt responded, "[i]t looks to be." Betty Hunt then was asked whether, when Harold Hunt and her father "got to the scene, that's what they thought, that the skid mark was from the accident?" Betty Hunt responded, "[i]t was there during the accident, yes." Betty Hunt testified that Harold Hunt and her father had brought that tape measure to the scene several hours after the accident because her insurance company had declined to send someone out to investigate the scene that same night. Betty Hunt identified the individual shown at the end of the tape measure as her father and stated that Harold Hunt had used the tape measure to take the measurements of the skid mark. The defendants did not object to any of the foregoing testimony.

Later in the trial, the plaintiff's counsel elicited testimony from Dyki as to his observation of the skid mark. The plaintiff's counsel questioned Dyki about plaintiff's exhibit 14, which he identified as another photograph of the intersection of Great Hill Road and Fox Drive. Exhibit 14, like the photographs in exhibits A and B, showed a single skid mark in the eastbound lane of Great Hill Road beginning to the west of Fox Drive and ending at the point along the roadway where Great Hill Road intersects with Fox Drive. Dyki testified that he "believe[d]" the skid mark in exhibit 14 was "a skid mark from the motorcycle . . . ." The plaintiff's counsel then asked Dyki if, "when [he] looked at the area of Great Hill [Road] and [Fox Drive], did [he] look for any skid marks?" Dyki responded, "[y]es," and testified that he "observed approximately forty feet of skid marks from vehicle one, which was the motorcycle, in the eastbound lane of Great Hill Road, which led to its final rest[ing] position." Dyki testified that his observations were made immediately after he arrived at the scene of the accident. On cross-examination, Dyki testified that he did not recall measuring the skid mark,

although he said he was "sure" that he had done so. He did not recall, however, what device he had used to make the measurement or in what fashion he had done so. He further stated that his approximation within his report of the length of the skid mark being forty feet was due to the fact that he did not complete a "scale map on that. If it was a to-scale map, then we certainly would have done precise measurements and reference points and so forth."

After the plaintiff rested his case, the sole witness called by the defendants was Harold Hunt, who testified only with respect to the skid mark. Harold Hunt testified that, after learning that Betty Hunt had been involved in an accident, he went to the accident scene on the evening of the accident, at approximately 6:35 p.m. or 6:40 p.m. Harold Hunt testified that he observed a skid mark at the accident scene and took photographs of the skid mark, which he recognized as exhibits A and B. He further testified that the additional object shown resting on the roadway in exhibit B was his tape measure, that Betty Hunt's father was shown in the exhibit at the other end of the skid mark, and that he personally had measured the skid mark shown in the exhibit. The defendants' counsel then asked Harold Hunt, "what did you observe on your tape measure?" The plaintiff's counsel objected on the grounds of "[r]elevancy, materiality, there's no foundation as to what the skid marks are from, there's no identification. So, if you allowed it in, it would be allowing in testimony about skid marks that we don't know what the etiology of the skid marks were." The court overruled the plaintiff's objection. When asked again what he observed the measurement to be on the tape measure, Harold Hunt answered, "Seventy-one feet, three inches, and the reason I say three inches is because the beginning of the skid mark is obviously a little lighter than when it becomes solid. So, between six and three inches it was—didn't really

look like it was there. So, three inches past seventy-one feet I began to mark." On cross-examination, Harold Hunt testified that he "did not see the skid mark when the accident happened" because he had arrived at the accident scene at 6:35 p.m., three hours after the accident.

We next set forth the standard of review and legal principles relevant to our resolution of this claim. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . Evidence is not rendered inadmissible because it is not conclusive. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010); see Conn. Code Evid. § 4-1 (" '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence"); see also *State* v. *Wynne*, 182 Conn. App. 706, 721, 190 A.3d 955 (" 'materiality turns upon what is at issue in the case, which generally will be determined by the pleadings and the

applicable substantive law' "), cert. denied, 330 Conn. 911, 193 A.3d 50 (2018).

We conclude that the court did not abuse its discretion by overruling the plaintiff's objection to the testimony of Harold Hunt as to his measurement of the length of the skid mark because that testimony was supported by an adequate foundation and was relevant. First, there was an adequate evidentiary foundation to provide context for Harold Hunt's testimony as to the length of the skid mark. Prior to the testimony of Harold Hunt, the plaintiff previously had introduced exhibits A, B, C, and 14 into evidence. All of these exhibits are photographs that clearly depict the intersection where the accident occurred and show a single skid mark in the eastbound lane of Great Hill Road as it approaches its intersection with Fox Drive. Exhibit B shows an open reel measuring tape resting on the surface of the road extending eastbound from the beginning to the end of the skid mark, at a point where an individual identified as Betty Hunt's father is standing in the intersection of Great Hill Road and Fox Drive.

Corroborating these exhibits was the testimony of the Hunts and Dyki, all of which was elicited by the plaintiff's counsel. Betty Hunt testified that exhibits A and B were taken by her father and Harold Hunt on the night of the accident when they went to the accident scene and measured the lone skid mark in that location. Betty Hunt testified that the lone skid mark depicted in the photograph of the roadway leading to the intersection where the accident occurred "looks to be" the one that was left by the plaintiff's motorcycle when it skidded and went down in that location, and she confirmed that Harold Hunt and her father had used a tape measure to measure the length of the skid mark from the accident. Likewise, Dyki testified that his investigation of the accident scene immediately after the accident revealed the skid mark depicted in exhibit

14. Dyki confirmed that this single skid mark was caused by the plaintiff's motorcycle and that the skid mark led to the final resting position of the plaintiff's motorcycle. Finally, prior to his testimony as to the length of the skid mark, Harold Hunt testified that he and Betty Hunt's father went to the accident scene three hours after the accident. He testified that he observed a single skid mark and took photographs of the skid mark that were introduced as exhibits A and B. He testified that his tape measure was depicted in exhibit B and that he personally used that device to measure the skid mark. All of this evidence cumulatively provided a proper foundation for Harold Hunt's subsequent testimony as to what he observed on his tape measure when he used it to measure the length of the skid mark.

Second, the length of the skid mark caused by the plaintiff's motorcycle was plainly relevant to this action. As explained in part I of this opinion, Harold Hunt's testimony was material to determining the negligence of both Betty Hunt and the plaintiff because it supported an inference as to the speed of the plaintiff and established where the plaintiff was in relation to the intersection when he first saw Betty Hunt's automobile and locked the brakes of his motorcycle. Harold Hunt's testimony that the skid mark measured seventy-one feet, three inches in length also was also material to the credibility of Dyki, who testified that, in his estimation, the length of the skid mark was forty feet, and to the credibility of the plaintiff, who testified that he was only forty to fifty feet away from the intersection when Betty Hunt's vehicle began to enter the intersection and he applied his brakes.

In contrast to the foregoing, the plaintiff argues that Harold Hunt's testimony was not supported by an adequate foundation, and thus was irrelevant, because there was no evidence that the accident scene was restricted to traffic during the three hours between the

accident and the time when Harold Hunt measured the skid mark, and thus it was possible that another vehicle had left the skid mark that Harold Hunt measured. The possibility that the skid mark measured by Harold Hunt was made during the three hour period after the accident does not render Harold Hunt's testimony without adequate foundation or irrelevant; instead, that hypothesis goes to the weight of the inference supported by exhibits A, B, C, and 14 as well as to the testimony of the Hunts and Dyki, which is a matter lying within the exclusive province of the jury. See, e.g., *State* v. *Lori T.*, 345 Conn. 44, 74, 282 A.3d 1233 (2022) (" '[i]t is the jury's role as the sole trier of the facts to weigh the conflicting evidence and to determine the credibility of witnesses' "); *Booker* v. *Stern*, 19 Conn. App. 322, 333, 563 A.2d 305 (1989) (fact that photographs of plaintiff's property were taken one year after completion of renovations by defendant's workers goes to "weight that should be afforded that evidence").

Finally, we are not persuaded by the plaintiff's substantial reliance on *Tarquinio* v. *Diglio*, 175 Conn. 97, 394 A.2d 198 (1978). In *Tarquinio*, the trial court overruled the plaintiff's foundation objection to photographs of skid marks on the highway taken five hours after a motor vehicle accident. Id., 98. Our Supreme Court stated that "a photograph depicting such skid marks would be relevant to prove the appearance of the scene only if it could be demonstrated that those same marks were visible on the road immediately after the accident." Id., 99. In light of this principle, our Supreme Court concluded that the trial court improperly admitted the challenged photographs into evidence because there was no foundational testimony that the individual who took the photographs five hours after the accident "ever said or observed that the appearance of the road at the time the photographs were taken was the same as it had been following the accident." Id.

Our Supreme Court nevertheless concluded that the admission of these photographs constituted harmless error because one of the photographs taken by the police immediately after the accident depicting the skid marks already had been admitted into evidence. Id., 100. Here, unlike in *Tarquinio*, the plaintiff does not challenge the admission of the several photographs depicting the skid mark. To the contrary, the plaintiff himself introduced exhibits A, B, and C into evidence and elicited an abundance of evidence from the witnesses to support the conclusion that the skid mark Harold Hunt measured was the skid mark that had been left by the plaintiff's motorcycle, including the testimony of Dyki and Betty Hunt, who were at the accident scene in close temporal proximity to the accident and testified that the single skid mark in the intersection had been left by the plaintiff's motorcycle. In sum, we conclude that the court did not abuse its discretion in overruling the plaintiff's objection to the testimony of Harold Hunt as to the length of the skid mark.

The judgment is affirmed.

In this opinion the other judges concurred.

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## THOMAS NAPOLITANO *v.* ACE AMERICAN INSURANCE COMPANY ET AL.
## (AC 44694)

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

*Syllabus*

Pursuant to statute (§ 31-348), the cancellation of any workers' compensation insurance policy "shall not become effective until fifteen days after notice of such cancellation has been filed with the chairperson" of the Workers' Compensation Commission.

Pursuant further to *Dengler* v. *Special Attention Health Services, Inc.* (62 Conn. App. 440), the notice of cancellation of a workers' compensation insurance policy pursuant to § 31-348 must be "certain and unequivocal."

The plaintiff employer, whose employee had sustained injuries in the course of his employment, sought a declaratory judgment and damages against the defendant insurance company A Co. for, inter alia, breach of contract, after A Co. refused to defend or indemnify the plaintiff under his workers' compensation insurance policy issued by A Co. A Co. claimed that the policy had been terminated prior to the date of loss, May 29, 2018. The plaintiff's second insurance policy with A Co. was effective from October, 2017, to February, 2018, and his third policy was to be effective from February, 2018, to February, 2019. A Co. mailed two letters to the plaintiff dated April 5, 2018, the second of which notified him that he was in noncompliance with an audit charge for his second policy and that his failure to comply had resulted in the cancellation of his third policy as of April 25, 2018. The plaintiff emailed certain documents relating to compliance to his insurance producer, the defendant L Co., on April 7, 2018, and, on April 10, 2018, he received an email from L Co.'s agent, the defendant E, notifying him that he was compliant at that time. On April 16, 2018, the defendant T Co., A Co.'s agent, emailed the defendant to inform him, inter alia, that he needed to provide additional documents within five days of that notice to be in compliance; prior to April 25, 2018, the plaintiff did not take any action in response to the April 16, 2018 email. The plaintiff claimed that the second April 5, 2018 notice of cancellation was not "certain and unequivocal" as required by § 31-348 and *Dengler* because the other notices sent by A Co. gave him an opportunity to negate the cancellation. A Co. filed a motion to strike the count of the plaintiff's amended complaint alleging a claim of bad faith, which the trial court granted. Thereafter, the court granted the plaintiff's motion for summary judgment as to the counts of his complaint seeking a declaratory judgment regarding the parties' rights under the third policy and a judgment as to liability as to his breach of contract claim. The court further determined that its ruling rendered moot the remainder of the plaintiff's claims against A Co. and awarded damages to the plaintiff. On A Co.'s appeal and the plaintiff's cross appeal to this court, *held*:

1. The trial court erred in granting the plaintiff's motion for summary judgment and, thus, the court also erred in awarding the plaintiff damages: A Co.'s second notice to the plaintiff of April 5, 2018, effectively cancelled the plaintiff's third policy as of April 25, 2018, because it expressly stated that the effective date of the cancellation of the policy was April 25, 2018, and, thus, it was certain and unequivocal under § 31-348 and complied with the requirements thereof, and the plaintiff's subjective understanding of when his policy was terminated was irrelevant to this court's determination as to whether the third policy was effectively cancelled; moreover, the plaintiff could not prevail on his claim that the summary judgment rendered in his favor should be affirmed on the alternative ground that E, acting as an agent of A Co., had negated the cancellation notice by notifying him that he was in compliance, as genuine issues

of material fact existed as to whether E was acting as an agent of A Co. and whether the April 16, 2018 email sent by T Co. constituted a withdrawal of the April 5, 2018 cancellation notice; accordingly, the damages the court awarded were vacated, and the counts of the complaint directed to A Co. that the court deemed moot were revived on remand.

2. The trial court improperly granted A Co.'s motion to strike the count of the plaintiff's complaint asserting a claim of bad faith: the plaintiff set forth sufficient specific factual allegations to establish that A Co. denied coverage under the third policy for a dishonest purpose, as he alleged that A Co. undertook a specific course of conduct leading up to and at the time of the denial of coverage, including failing to respond to a workers' compensation action brought by the plaintiff's employee, providing confusing information regarding his third policy and refusing coverage after E told him that he was compliant, in order to avoid paying a claim under a policy with which he was told he was compliant before the date of loss; moreover, it could be inferred from the facts the plaintiff alleged that A Co.'s deliberate course of conduct in denying coverage was unlikely to be attributable to an honest mistake or negligence, but, rather, a deliberate refusal to provide otherwise available coverage for the purpose of increasing profits.

Argued September 13, 2022—officially released May 2, 2023

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was transferred to the Complex Litigation Docket; thereafter, the plaintiff filed an amended complaint; subsequently, the court, *Moukawsher*, *J.*, granted the named defendant's motion to strike; thereafter, the court, *Moukawsher*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the named defendant appealed and the plaintiff cross appealed to this court. *Reversed*; *further proceedings*.

*Brian M. Paice*, for the appellant-cross appellee (named defendant).

*Kristen S. Greene*, with whom was *Michael Feldman*, for the appellee-cross appellant (plaintiff).

*Opinion*

MOLL, J. The defendant Ace American Insurance Company[1] appeals from the judgment of the trial court granting the motion for summary judgment filed by the plaintiff, Thomas Napolitano, doing business as Napolitano Roofing, as to counts one and two of the plaintiff's fifth amended complaint, in which he sought a declaratory judgment and asserted a breach of contract claim, respectively. On appeal, the defendant claims that the court erred in (1) granting the plaintiff's motion for summary judgment because the court improperly determined that (a) the defendant's notice of cancellation to the plaintiff, cancelling his workers' compensation insurance policy, was ineffective and (b) the defendant breached its duty under the policy to defend or indemnify the plaintiff with respect to a workers' compensation claim submitted by his employee, (2) awarding attorney's fees to the plaintiff, as damages, in connection with his defense of the workers' compensation claim and a lawsuit brought by the employee, and (3) awarding prejudgment statutory interest to the plaintiff relating to workers' compensation payments that he made to his employee. In addition, the plaintiff cross appeals from the court's granting of the defendant's motion to strike count three of his fifth amended complaint, in which he asserted a claim of bad faith. The plaintiff argues on appeal that he pleaded legally sufficient allegations that the defendant breached the

[1] In addition to Ace American Insurance Company, the plaintiff's original complaint named as defendants Travelers Indemnity Company (Travelers), Chubb National Insurance Company (Chubb), Lanza Insurance Agency, LLC (Lanza), and Jazmin Echevarria. Subsequently, because Ace American Insurance Company indicated that it would assume liability and financial responsibility for the alleged conduct of Travelers and Chubb, who were acting as its agents, Chubb and Travelers were dropped as party defendants by way of an amended complaint. As for Lanza and Echevarria, they are not participating in this appeal, as the claims against them remain pending in the trial court. For these reasons, we refer to Ace American Insurance Company as the defendant.

implied covenant of good faith and fair dealing when it refused to defend or indemnify him under his insurance policy. With respect to the defendant's appeal, we reverse the summary judgment of the trial court rendered in favor of the plaintiff, and, as a result, we also vacate the attorney's fees and prejudgment statutory interest awarded to the plaintiff—relief that was predicated on the court's conclusion that the plaintiff was entitled to judgment as a matter of law on count two. As to the plaintiff's cross appeal, we reverse the decision of the trial court striking the third count of the plaintiff's fifth amended complaint.[2]

The following undisputed facts and procedural history are relevant to our resolution of this appeal and this cross appeal. The plaintiff had three workers' compensation insurance policies with the defendant, the first of which is not germane to this appeal. The second policy was effective from October 21, 2017, to February 9, 2018 (second policy). The third policy had effective dates of coverage from February 9, 2018, to February 9, 2019 (third policy). On March 28, 2018, the defendant mailed the plaintiff a notice of an audit noncompliance charge, stating in relevant part that the plaintiff would be charged an additional $912 for noncompliance with the required premium audit for the second policy, and

[2] The record reflects that the defendant did not file a motion for judgment on the stricken third count of the plaintiff's fifth amended complaint. See Practice Book § 10-44. "It is well established that [t]he granting of a motion to strike . . . ordinarily is not a final judgment . . . . Nevertheless, [i]n similar circumstances where a count of a complaint was stricken, but the plaintiff failed to plead over, no judgment was entered thereon and the remaining counts were disposed of by way of summary judgment, this court has considered the appeal to have been from a final judgment." (Citation omitted; internal quotation marks omitted.) *Dressler* v. *Riccio*, 205 Conn. App. 533, 537 n.2, 259 A.3d 14 (2021). Because the court disposed of the remaining counts of the plaintiff's fifth amended complaint directed to the defendant by way of summary judgment, we have jurisdiction to entertain the plaintiff's claim challenging the granting of the defendant's motion to strike count three of the fifth amended complaint.

requesting, inter alia, payroll records to complete the audit. On April 3, 2018, the defendant mailed the plaintiff a notice that was identical to the March 28, 2018 notice, other than the date of creation. On April 5, 2018, the defendant mailed the plaintiff a notice titled "Notice of Noncooperation with Audit Current Coverage" (first April 5 notice). The first April 5 notice stated that the plaintiff had not complied with requests to obtain "payroll, classification and tax information" for the plaintiff's second policy. The notice also stated that "[f]ailure to comply will result in cancellation of your current . . . policy. If the audit is not conducted prior to the effective date of cancellation, the cancellation will remain in effect. If you have already complied with our request, please disregard this notice." The effective date of cancellation, although not appearing on the first April 5 notice, appeared on a second notice sent by the defendant to the plaintiff on the same day, April 5, 2018, titled "Workers Compensation and Employers Liability Policy Cancellation" (second April 5 notice). The second April 5 notice stated in relevant part that the third policy "is cancelled in accordance with its terms as of the effective date of cancellation indicated," i.e., April 25, 2018.

On April 7, 2018, the plaintiff emailed his 2017 tax returns to his insurance producer, the defendant Lanza Insurance Agency, LLC (Lanza). On April 10, 2018, the plaintiff emailed the defendant Jazmin Echevarria, Lanza's agent, indicating that he had received a cancellation notice and inquiring whether the defendant had received his tax returns for the audit. That same day, Echevarria responded to the plaintiff's email, informing him that she "just called and they stated that you are compliant at this time."[3] On April 16, 2018, Travelers,

[3] The parties dispute whether Echevarria reported the correct policy number to the defendant when she inquired whether the plaintiff was compliant with his policy. That issue is neither before us on appeal nor relevant to our analysis of the issues that are before us, and we therefore do not address it.

the defendant's agent, emailed the plaintiff (April 16 email), stating in relevant part that he still had "premium audit documents missing" for the second policy period. The April 16 email notified the plaintiff that he still needed to provide a "PolicyHolder Audit Report" and to provide it "within [five] days of this notice." The parties do not appear to dispute that, prior to April 25, 2018, the plaintiff did not take any action in response to the April 16 email.

On May 29, 2018 (date of loss), Joshua Arce, an employee of the plaintiff, fell from a roof, sustaining injuries arising out of and in the course of his employment. On July 16, 2018, Arce filed a claim for compensation benefits with the Workers' Compensation Commission (commission). The defendant denied Arce's claim and refused to defend or indemnify the plaintiff under the third policy, claiming that the policy had been terminated prior to the date of loss.[4]

On April 6, 2020, after holding a formal hearing on August 26 and November 18, 2019, the Workers' Compensation Commissioner for the First District (commissioner)[5] found that, on the date of loss, Arce fell from

[4] The plaintiff's third policy stated in relevant part that "[w]e have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits. We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. . . . We will pay promptly when due the benefits required of you by the workers compensation law. . . . We will pay all sums that you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this [policy]." The policy covered bodily injuries to employees, with other requirements not relevant here, that "arise out of and in the course of . . . employment."

[5] "We note that General Statutes § 31-275d (a) (1), effective as of October 1, 2021, provides in relevant part that '[w]herever the words "workers' compensation commissioner", "compensation commissioner" or "commissioner" are used to denote a workers' compensation commissioner in [several enumerated] sections of the general statutes, [including sections contained in the Workers' Compensation Act, General Statutes § 31-275 et seq.] the words "administrative law judge" shall be substituted in lieu thereof . . . .' " *Arrico* v. *Board of Education*, 212 Conn. App. 1, 4 n.4, 274 A.3d

a roof sustaining compensable injuries arising out of and in the course of his employment. The commissioner also found that the plaintiff did not have workers' compensation insurance on the date of loss because the third policy was "properly cancelled electronically with the [commission]" through the National Council on Compensation Insurance (NCCI) on April 6, 2018.[6]

During the August 26, 2019 session of the formal hearing, the commissioner stated that his determination as to whether the second April 5 notice effectively cancelled the third policy on April 25, 2018, was limited to whether the defendant had complied with the requirements of General Statutes § 31-348, in that the cancellation was reported to the commission fifteen days prior to the effective date of cancellation.[7] In that regard,

148 (2022). Because the workers' compensation proceedings detailed herein occurred prior to October 1, 2021, we will refer to the workers' compensation commissioner who presided over the proceedings involving Arce as the commissioner.

[6] Because the commissioner determined that the plaintiff did not have workers' compensation insurance on the date of loss, the Second Injury Fund (fund) became a party to the workers' compensation proceeding pursuant to General Statutes § 31-355 (b), which provides in relevant part: "When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. The administrative law judge, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund. . . ."

[7] General Statutes § 31-348 provides in relevant part: "Every insurance company writing compensation insurance or its duly appointed agent shall report in writing or by other means to the chairperson of the Workers' Compensation Commission, in accordance with rules prescribed by the chairperson, the name of the person or corporation insured, including the state, the day on which the policy becomes effective and the date of its expiration, which report shall be made within fifteen days from the date of the policy. The cancellation of any policy so written and reported shall not become effective until fifteen days after notice of such cancellation has been filed with the chairperson. . . ."

the commissioner stated that he would examine only whether the NCCI reported the policy as terminated on the date of loss and not whether the second April 5 notice complied with the defendant's contractual obligations under the third policy.

On November 4, 2020, the plaintiff and the Second Injury Fund (fund) entered into a settlement agreement with Arce, wherein, inter alia, the plaintiff and the fund agreed to pay to Arce $225,000 in compensation for the prior, present, and subsequent medical care for his injuries arising out of the May 29, 2018 fall. Pursuant to that agreement, Arce agreed to withdraw the action that he had filed against the plaintiff; the fund also agreed to withdraw its intervening complaint in that action. See *Arce* v. *Napolitano*, Superior Court, judicial district of Hartford, Docket No. CV-19-6115160-S.

On November 30, 2018, while the workers' compensation proceedings were ongoing, the plaintiff commenced the present action. On October 21, 2019, the plaintiff filed his fifth amended complaint (i.e., the operative complaint), in which five counts were directed to the defendant. Count one sought a declaratory judgment vis-à-vis the parties' rights under the third policy. Counts two, three, four, and eight alleged breach of contract, bad faith, negligent misrepresentation, and promissory estoppel, respectively.[8]

On November 20, 2019, the defendant filed a motion to strike, accompanied by a memorandum of law in support thereof, directed to count three of the plaintiff's fifth amended complaint asserting a claim of bad faith. On December 3, 2019, the plaintiff filed an objection to

[8] The plaintiff included Lanza and Echevarria in the count of negligent misrepresentation and alleged separate counts of negligence and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., against Lanza and Echevarria only. As noted previously in this opinion, the plaintiff's claims against Lanza and Echevarria are not relevant to this appeal. See footnote 1 of this opinion.

the defendant's motion to strike. On January 14, 2020, the trial court, *Moukawsher*, *J.*, issued a memorandum of decision granting the defendant's motion to strike.

On February 5, 2020, the plaintiff filed a motion for summary judgment, accompanied by a supporting memorandum of law and exhibits, as to counts one and two of his fifth amended complaint, seeking a declaratory judgment and a judgment as to liability only as to the breach of contract claim, respectively. On March 20, 2020, the defendant filed an objection, accompanied by a supporting memorandum of law and exhibits. On April 13, 2020, the plaintiff filed a reply with an accompanying exhibit.[9] On January 22, 2021, following a hearing held on January 20, 2021, the court issued a memorandum of decision granting the plaintiff's motion for summary judgment as to counts one and two of his fifth amended complaint. The court further determined that its ruling rendered moot the remainder of the plaintiff's claims against the defendant, namely, counts four (negligent misrepresentation) and eight (promissory estoppel).[10] On April 22, 2021, following an evidentiary hearing in damages, the court issued a memorandum of decision awarding damages to the plaintiff in the amount of (1) $225,000 in reimbursement owed to the fund for Arce's settlement amount, (2) $7600 for "indemnity paid to [Arce]," (3) $78,264 in workers' compensation related attorney's fees and expenses, and (4) $2400 in "[s]tatutory interest on workers' compensation and indemnity." This appeal followed. Additional facts will be set forth as necessary.

[9] The plaintiff also filed a supplemental memorandum of law and exhibits in support of his motion for summary judgment.

[10] The defendant also filed a motion for summary judgment as to the plaintiff's request for a declaratory judgment and claims of breach of contract, negligent misrepresentation, and promissory estoppel, which the court denied. The defendant has not claimed on appeal that the court erred in denying its motion for summary judgment, and, therefore, we do not address that ruling further.

I

With respect to its appeal, the defendant claims that the trial court erred in granting the plaintiff's motion for summary judgment as to counts one and two of the plaintiff's fifth amended complaint, which sought a declaratory judgment and asserted a breach of contract claim, respectively, and in specifically determining that the cancellation of the third policy was not effective because the second April 5 notice was not "unambiguous and unequivocal." The defendant also claims that, in calculating the damages vis-à-vis the breach of contract claim, the court improperly awarded the plaintiff attorney's fees and prejudgment statutory interest. For the reasons that follow, we conclude that the court erred in rendering summary judgment in the plaintiff's favor, and, consequently, it follows that the court also erred in awarding the plaintiff attorney's fees and prejudgment statutory interest.

As a preliminary matter, we set forth our standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence

of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [or to deny a] motion for summary judgment is plenary." (Footnote omitted; internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 539–40, 285 A.3d 1128 (2022).

The following procedural history is relevant to our resolution of the defendant's claim. In moving for summary judgment on counts one and two of his fifth amended complaint, the plaintiff argued, inter alia, that there was no effective cancellation of his third policy and that the defendant was obligated under the third policy to defend or indemnify him with regard to the workers' compensation claim brought by Arce. The plaintiff claimed that, under *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440, 774 A.2d 992 (2001), the cancellation of a workers' compensation insurance policy is only effective if it is "definite, certain, and unambiguous." See *Dengler* v. *Special Attention Health Services, Inc.*, supra, 460 (cancellation notice for workers' compensation policy required to be "certain and unequivocal"). Under this standard, the plaintiff claimed that the second April 5 notice was ineffective because, when read with the other notices detailed previously in this opinion that the defendant sent to the plaintiff around that time, which gave the plaintiff an opportunity to negate the cancellation, that notice was not "definite, certain, and unambiguous."

In its objection to the plaintiff's motion for summary judgment, the defendant argued, inter alia, that the second April 5 notice was an effective cancellation of the plaintiff's third policy because it complied with the language of the policy and the requirements of § 31-348. The defendant further claimed that the April 25, 2018 cancellation of the third policy, effectuated by the second April 5 notice, was not negated by the other, aforementioned notices that the defendant sent to the plaintiff around that time; in that regard, the defendant claimed that the second April 5 notice was "definite and certain."

In granting the plaintiff's motion for summary judgment as to the request for a declaratory judgment and the breach of contract claim, the court determined that "a reasonable jury could not find [the two April 5 notices, the email exchange with Echevarria, and the April 16 email] unambiguous and unequivocal," and that, "because the cancellation wasn't unambiguous and unequivocal, it was invalid." The court concluded that "the policy was not cancelled on April 25, [2018], and therefore was in force on May 29, 2018, when . . . Arce fell from a roof" and further held that, "[t]o the extent [the defendant] refuses to pay the claim at issue on the basis of cancellation . . . it has breached its contract with [the plaintiff] because there was no cancellation." The court emphasized that cancellation of a workers' compensation insurance policy must be "unambiguous and unequivocal" under *Dengler* and stated that if the second April 5 notice "were the only evidence, [the defendant] would be right. It unequivocally tells [the plaintiff] that his policy is being cancelled. But ignoring the other communications associated with [the second April 5 notice] would be absurd." The court placed special emphasis on the other communications sent by the defendant to the plaintiff, including the first April 5 notice and the April 16 email. Regarding the April 16 email, the court stated that "there was

no April 25th deadline anymore. [The defendant] set an April 21st deadline—and no penalty for meeting it.[11] This could only mean that either there was no deadline and cancellation anymore or at least that a reasonable person might see it that way. Therefore, at a minimum, [the plaintiff] was provided ambiguous information about what he must do when and the consequences for not doing it."[12] (Footnote added.)

On appeal, the defendant claims that the court erred in granting the plaintiff's motion for summary judgment on counts one and two of the plaintiff's fifth amended complaint on the basis of its determination that the cancellation of the third policy was not effective, because, according to the defendant, the cancellation of the third policy was "unambiguous and unequivocal." Specifically, the defendant argues that the court improperly (1) compared the second April 5 notice to the other notices that the plaintiff received, including the April 16 email requesting additional documents and

[11] We infer that the court was interpreting, in referring to an April 21, 2018 deadline, the language in the April 16 email sent by Travelers to the plaintiff, which directs the plaintiff to provide documents "within [five] days" of the date of the April 16 email.

[12] The court further stated that "[t]his ruling moots the other claims between [the plaintiff] and [the defendant] [i.e., negligent misrepresentation and promissory estoppel], so the court will not rule on the other counts on summary judgment or send them to trial." On September 8, 2022, this court ordered, sua sponte, that the parties "be prepared to address at oral argument whether the trial court's January 22, 2021 memorandum of decision disposed of the plaintiff's claims of negligent misrepresentation and promissory estoppel against the defendant . . . such that this appeal and cross appeal were taken from a final judgment. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, [183 A.3d 1164] (2018); Practice Book §§ 61-3 and 61-4 (a)." At oral argument, the defendant argued that the appeal and the cross appeal were taken from a final judgment and that, if this court concludes that the trial court erred in granting the plaintiff's motion for summary judgment on counts one and two of his fifth amended complaint, then it follows that the negligent misrepresentation and promissory estoppel claims would be revived on remand. The plaintiff did not address the final judgment issue during argument. We conclude that there is no jurisdictional bar to hearing this appeal and cross appeal.

(2) considered the plaintiff's subjective understanding of the second April 5 notice, as well as the other notices that he received, including the first April 5 notice and the April 16 email. We conclude that the second April 5 notice effectively cancelled the third policy on April 25, 2018, because it was (1) certain and unequivocal[13] under § 31-348 and complied with the requirements thereof, and (2) cancelled in accordance with the third policy.

In support of its claim that the second April 5 notice was certain and unequivocal, the defendant relies on this court's decision in *Dengler*. In *Dengler*, a workers' compensation insurer denied a workers' compensation claim, contending that it had cancelled its insurance policy with the plaintiff's employer prior to the date on which the plaintiff suffered a work related injury. *Dengler* v. *Special Attention Health Services, Inc.*, supra, 62 Conn. App. 442–44. Prior to cancellation, the insurer sent copies of two notices to the chairperson of the commission and sent both notices to the employer. Id., 457–58. The first notice, dated July 18, 1996, warned the employer that its insurance policy would be cancelled in thirty days following the date of that notice unless the employer paid its past due premiums. Id., 457–58 n.3. The second notice, dated August 16, 1996, informed the employer that its policy

[13] We pause to note that both the trial court and the parties frame what is required of a workers' compensation insurance cancellation notice under *Dengler* in similar but varying ways. One standard cited by the defendant in its appellate brief follows the language in *Travelers Ins. Co.* v. *Hendrickson*, 1 Conn. App. 409, 412, 472 A.2d 356 (1984), which requires automobile insurance cancellation notices to be "definite and certain." Another standard cited by the defendant stems from *Dengler* v. *Special Attention Health Services, Inc.*, supra, 62 Conn. App. 461, which requires cancellation notices to be " 'unambiguous and unequivocal . . . .' " Because the court in *Dengler* interpreted § 31-348—which specifically concerns workers' compensation insurance policies—as requiring a cancellation notice to be "certain and unequivocal," we use that language for purposes of our analysis herein. See id., 460.

was cancelled, effective the next day, August 17, 1996, due to the nonpayment of premiums. Id., 458 n.4. This court affirmed the holding of the Compensation Review Board, which upheld the ruling of a Workers' Compensation Commissioner, that the insurer's August 16, 1996 cancellation of the policy did not take effect until fifteen days after submitting the notice with the chairperson of the commission, in accordance with the requirements of § 31-348. Id., 457–62. The court in *Dengler* highlighted, for purposes of reporting a workers' compensation policy cancellation to the chairperson of the commission, the distinction between each notice, namely, that the first "constituted a warning that the policy would be [cancelled] if [past due] premiums were not paid"; id., 458; in which case a " 'cancellation might occur' "; (emphasis omitted) id., 461; the second "constituted a notice of cancellation." Id., 458. The court in *Dengler* emphasized that "[t]he occurrence of an event, i.e., the payment of past due] premiums, could have negated the attempted cancellation at issue in the present case. On the basis of the terms of the July 18, 1996 letter, [the employer] possessed the authority to negate the cancellation altogether." Id., 461.

At issue in *Dengler* was not that each notice could have communicated conflicting messages to the employer; rather, the gravamen was that each notice was filed with the chairperson of the *commission*, less than one month apart, attempting to effectuate the cancellation of the employer's insurance policy pursuant to § 31-348. Indeed, this court emphasized in *Dengler* that "[o]ur Supreme Court has explained the importance of providing sufficient notice of cancellation by noting that [workers'] compensation is a peculiar type of insurance, and that to every policy each employee of the insured is in a very real sense a party . . . . [T]he purpose of the notice was to make an authentic record so that any employee or prospective employee

might ascertain whether the employer is insured, and, if so, in what company, and that the insurer is estopped to deny the truth of the formal record, whether or not the particular employee whose rights are in question examined the files where such records are kept; and . . . that, as the record stated that the policy was in effect, the insurer could not deny that this was so. . . . That rule protects employees' interests by affording them access to accurate records filed in the chair[person's] office about an employer's compensation coverage. . . . What the statute and case law require is a certain and unequivocal cancellation specifying an ascertainable date and time when cancellation will occur, not a specific date and time when cancellation might become effective if certain events do or do not transpire." (Citations omitted; internal quotation marks omitted.) Id., 460.

In the present case, the plaintiff claims, inter alia, that the second April 5 notice is not "definite, certain, or unambiguous" when viewed alongside the first April 5 notice, the email exchange with Echevarria, and the April 16 email, which, the plaintiff posits, the trial court was permitted to examine under *Dengler*. The plaintiff, however, overlooks the key issue presented in *Dengler*. The first notice in *Dengler*—a warning that the employer's policy would be cancelled if it did not pay its outstanding balance—was not certain and unequivocal such that it would provide employees and prospective employees, in consulting the records in the chairperson's office, with accurate information as to whether the employer had workers' compensation insurance or whether it would be cancelled on a specified date. "A third party examining the records in the commissioner's office could not ascertain whether [the negation of cancellation] occurred." *Dengler* v. *Special Attention Health Services Inc.*, supra, 62 Conn. App. 461. The

court in *Dengler* reasoned that § 31-348 requires a workers' compensation cancellation notice to be certain and unequivocal to protect employees and prospective employees in a search for whether an employer has workers' compensation insurance. Id., 460. What an employer policyholder subjectively interprets from reading various notices sent by an insurer is not a consideration in the determination of whether a cancellation notice is certain and unequivocal in the pursuit of compliance with § 31-348. "[The employer's] understanding of when its policy was [cancelled] is not persuasive evidence of when the cancellation legally occurred. . . . In that regard, an employer's understanding as to when coverage terminated is largely irrelevant; the cancellation occurs in accordance with the statute." Id., 461; see also *Bellerive* v. *Grotto*, *Inc.*, 206 Conn. App. 702, 707, 260 A.3d 1228 ("[C]ancellation of a workers' compensation insurance policy occurs in accordance with § 31-348. . . . Indeed, § 31-348 has been interpreted as protecting employees or anyone examining coverage records in the commissioner's office. In that regard, an employer's understanding as to when coverage terminated is largely irrelevant." (Citation omitted; internal quotation marks omitted.)), cert. denied, 339 Conn. 908, 260 A.3d 483 (2021).

By its express terms, the second April 5 notice unequivocally informed the plaintiff that his third policy "is cancelled in accordance with its terms as of the effective date of cancellation indicated herein, and at the hour on which the policy became effective." That notice states that the "effective date of cancellation" is April 25, 2018. On the basis of the summary judgment record before us, the commission received the second April 5 notice on April 6, 2018, and there is no evidence that the commission also received the notice of noncooperation (i.e., the first April 5 notice), such that it

would provide conflicting information to both the chairperson of the commission and an inquiring employee and/or prospective employee as to whether the third policy would be cancelled on a specified date. Moreover, as previously noted, the plaintiff's subjective understanding as to when his policy terminated is generally irrelevant to our determination as to whether the third policy was effectively cancelled. Indeed, that the first April 5 notice gave the plaintiff an opportunity to cure does not negate the unambiguous and unequivocal cancellation detailed in the second April 5 notice. See *21st Century North America Ins. Co.* v. *Perez*, 177 Conn. App. 802, 820–24, 173 A.3d 64 (2017) (explaining that earlier notice, warning of cancellation in event of nonpayment of insurance premium, does not negate subsequent cancellation notice), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018). Therefore, the first April 5 notice is not relevant to our analysis.

The plaintiff claims, however, as an alternative ground for affirmance, that the rendering of summary judgment in his favor should be affirmed because Echevarria, acting as an agent of the defendant, negated the cancellation notice by notifying the plaintiff that he was in compliance. On the basis of the summary judgment record before us, we conclude that there is a genuine issue of material fact as to whether Echevarria was acting as an agent of the defendant when she told the plaintiff that he was compliant with his policy, and, therefore, the summary judgment rendered in the plaintiff's favor cannot be affirmed on that alternative ground. Additionally, because the parties dispute whether Echevarria was acting as an agent of the defendant, there exists a genuine issue of material fact as to whether the April 16 email sent by Travelers to the plaintiff—warning him that he still needed to provide a "PolicyHolder Audit Report" for the second policy

"within [five] days"—constituted a withdrawal of the cancellation.

Furthermore, the third policy required the defendant to "mail or deliver . . . not less than ten days advance written notice stating when the [cancellation] is to take effect" to the plaintiff's mailing address. The defendant mailed this written notice on April 5, 2018, twenty days in advance of when the cancellation would take effect. As previously noted, the second April 5 notice also stated the effective date of cancellation. The defendant complied with that requirement, and the plaintiff has not suggested that more was required for the defendant to cancel the third policy. See *ED Construction, Inc.* v. *CNA Ins. Co.*, 130 Conn. App. 391, 403, 24 A.3d 1 (2011) ("[T]he unambiguous language of the policy allows for the cancellation of the policy by [the insurer] so long as notice is provided to the plaintiff ten days prior to the date of cancellation. The plaintiff has not provided us with any provisions of the policy or any cases that suggest there are any limitations, other than the notice requirement, on when or under what circumstances the policy can be cancelled by [the insurer].").

In sum, we conclude that, on the basis of the summary judgment record, the plaintiff did not have workers' compensation insurance on the date of loss because the second April 5 notice cancelled the third policy pursuant to (1) the requirements of § 31-348, including that the notice was certain and unequivocal and was filed with the chairperson of the commission fifteen days prior to the date of cancellation, and (2) the terms of the third policy. Accordingly, the court improperly rendered summary judgment in favor of the plaintiff on counts one and two of his fifth amended complaint.

In light of our conclusion that summary judgment was rendered improperly in the plaintiff's favor on counts one and two, the damages awarded in the

amount of $313,264 on count two (i.e., the breach of contract count) must be vacated. See *Sovereign Bank* v. *Licata*, 116 Conn. App. 483, 495, 977 A.2d 228 (2009) (reversing judgment of trial court with respect to one count of complaint and vacating award made pursuant to that count), appeal dismissed, 303 Conn. 721, 36 A.3d 662 (2012).

Furthermore, because we are reversing the summary judgment rendered in favor of the plaintiff as to counts one and two, it follows that the counts directed to the defendant that the court deemed moot as a result of its summary judgment decision—i.e., count four (negligent misrepresentation) and count eight (promissory estoppel)—are revived on remand. See footnote 12 of this opinion.

II

In the plaintiff's cross appeal, the plaintiff claims that the trial court erred in granting the defendant's motion to strike count three of his fifth amended complaint, in which he asserted a claim of bad faith (motion to strike). We agree.

As a preliminary matter, we set forth our standard of review. "The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . [W]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a

complaint challenged by a [defendant's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Citations omitted; internal quotation marks omitted.) *Lavette* v. *Stanley Black & Decker, Inc.*, 213 Conn. App. 463, 470–71, 278 A.3d 1072 (2022). At the same time, "[m]ere conclusions of law, without factual support, are not enough to survive a motion to strike." *Keller* v. *Beckenstein*, 117 Conn. App. 550, 565, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009).

The following procedural history is relevant to our resolution of this cross appeal. In support of the claim of bad faith raised in count three of his fifth amended complaint, the plaintiff alleged in relevant part that the defendant breached the covenant of good faith and fair dealing in that it "failed to properly respond to [Arce's] workers' compensation claim"; "provided false, confusing and/or misleading information to [the plaintiff] in connection with the [third] policy"; "received and accepted financial information [it] requested from [the plaintiff] prior to the Arce accident, but nevertheless maintain[s] the [third] policy was cancelled"; "directed [the plaintiff] in the cancellation notice to contact Lanza with any questions concerning the cancellation, which he did and was told he was 'compliant,' but now maintain[s], after the Arce accident and workers' compensation claim, he was not compliant"; "represented that [the plaintiff] was 'compliant' with the [third] policy prior to the Arce accident and workers' compensation claim, but now, after the Arce accident and workers' compensation claim, maintain[s] the [third] policy was cancelled"; and that, in "denying coverage for the workers' compensation claim after the Arce loss, and continuing to deny coverage through present, [the defendant has] done so intentionally with improper motive for the

purpose of wrongfully denying the claim in order to avoid paying the workers' compensation claim—which claim was covered under [the third] policy—and to increase profits to [the defendant] to the detriment of the plaintiff."

In its motion to strike, the defendant argued that the plaintiff failed to allege sufficient facts demonstrating that the defendant acted in bad faith. Specifically, the defendant argued that the plaintiff's allegations that the defendant acted with an intentional and improper motive to increase profits were merely conclusory. In his objection, the plaintiff claimed that he alleged legally sufficient facts to plead that the defendant acted in bad faith because he alleged that the defendant intentionally and with improper motive denied coverage under the third policy in order to increase profits. On January 9, 2020, the court held a hearing on the defendant's motion to strike.

In granting the defendant's motion to strike, the court determined that the "claim still fails to state a claim for breach of the covenant of good faith and fair dealing. The count still doesn't allege that [the defendant] knew it was wrong.[14] [The defendant] may have 'intended' to cancel the coverage, but it may have done so because of its negligently held but honest belief that it was the right thing to do." (Footnote added.) The court questioned whether "not wanting to pay a claim" is always bad faith or an improper motive and concluded that it would be bad faith if the defendant "knew the claim was valid and chose to cheat [the plaintiff] out of paying money it knew was due. . . . [B]eing wrong isn't enough. Being negligently wrong isn't enough. . . . [H]ere that remains all . . . that this complaint

[14] The plaintiff raised a claim of bad faith in count three of all five of his previously filed complaints in this action. Count three was previously stricken by the court for failure to allege that the defendant acted with "wrongful motive."

alleges." The court ruled that the "plaintiff may not replead a claim for breach of the covenant of good faith and fair dealing."

"We begin by setting forth the required elements for bad faith claims. [I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . . To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. . . . Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794–95, 67 A.3d 961 (2013).

"There is some variance among trial court decisions concerning the standard of pleading required to state a legally sufficient bad faith cause of action. One line of cases requires specific allegations that establish malice or a dishonest purpose . . . ." *Prucker* v. *American Economy Ins. Co.*, Superior Court, judicial district of Tolland, Docket No. CV-18-6013630-S (May 31, 2019) (68 Conn. L. Rptr. 626, 628); see *Marder* v. *Nationwide*

*Ins. Co.*, Superior Court, judicial district of New Haven, Docket No. CV-13-6038355-S (November 12, 2015) (61 Conn. L. Rptr. 269, 274) (granting defendant's motion to strike because plaintiff "fails to allege the requisite specificity to support her claim of bad faith" and to "specifically allege that the defendant acted with a dishonest purpose . . . rising to the level of bad faith"); *Brickhouse* v. *Progressive Casualty Ins. Co.*, Superior Court, judicial district of New Haven, Docket No. CV-14-6048681-S (December 2, 2014) (granting defendant's motion to strike where complaint did not contain "specific facts to show how the defendant's actions were done in bad faith and in what manner the conduct was done with ill purpose"); *Cifatte* v. *Utica First Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-13-6038325-S (September 5, 2014) (granting defendant's motion to strike where complaint lacked "any allegation of a specific activity" to support bad faith claim); *Fowler* v. *Allstate Property & Casualty Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5016911-S (January 7, 2009) (granting defendant's motion to strike where plaintiff made "no specific factual allegations establishing a dishonest purpose" and did not "allege that the conduct at issue was engaged in knowingly or willfully").

"[A]nother [line of cases] applies a less stringent standard accepting factual allegations from which an inference of bad faith may be drawn." *Prucker* v. *American Economy Ins. Co.*, supra, 68 Conn. L. Rptr. 628. The second approach requires only that the plaintiff "allege sufficient facts or allegations from which it may reasonably be inferred that the defendant breached the implied covenant of good faith and fair dealing. . . . Under the less stringent standard, bad faith may be inferred by repetitive, knowing or deliberate conduct as such allegations are unlikely to be attributable to an honest mistake or mere negligence . . . . Nevertheless,

[even] where courts have used an inference analysis . . . they have looked to allegations that the conduct at issue was engaged in purposefully." (Citations omitted; internal quotation marks omitted.) *Marder* v. *Nationwide Ins. Co.*, supra, 61 Conn. L. Rptr. 272; see *Labonne* v. *Hingham Mutual Fire Ins. Co.*, Superior Court, judicial district of New London, Docket No. CV-12-6014737-S (March 7, 2014) (57 Conn. L. Rptr. 794, 796) (denying defendant's motion to strike where reasonable inference could be drawn from allegations that defendant acted with " 'interested or sinister' motive in order to avoid paying benefits owed . . . under the . . . insurance contract"); *Urban Apparel Plus, LLC* v. *Sentinel Ins. Co., Ltd.*, Superior Court, judicial district of New Haven, Docket No. CV-13-6035293-S (October 31, 2013) (57 Conn. L. Rptr. 124, 126) (denying defendant's motion to strike because plaintiff alleged "defendant intentionally engaged in specific behavior from which one can reasonably infer a sinister motive on the part of the defendant"); *Fradera* v. *State Farm Mutual Automobile Ins. Co.*, Superior Court, judicial district of New Haven, Docket No. CV-11-6003104-S (July 26, 2013) (denying defendant's motion to strike where plaintiff alleged facts demonstrating that defendant breached contract in bad faith); *Perkins* v. *Hermitage Ins. Co.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-11-6006314-S (February 29, 2012) (denying defendant's motion to strike because plaintiff alleged defendant acted with dishonest purpose, even though plaintiff did not specifically allege that defendant "had an intent to mislead or deceive or defraud").

As previously noted, to state a claim of bad faith, a plaintiff must allege specific facts, or allege sufficient facts to raise a reasonable inference, that a defendant acted with a sinister motive or a dishonest purpose during the course of a contractual relationship. See *Capstone Building Corp.* v. *American Motorists Ins.*

*Co.*, supra, 308 Conn. 794–95. The plaintiff claims that he has done so here, in that he has alleged sufficient facts in count three to satisfy either approach adopted by our trial courts. We agree. Construing the plaintiff's factual allegations in count three of his fifth amended complaint in the most favorable light, we read them as being sufficient to plead a claim of bad faith under either approach.[15]

Under the first approach, the plaintiff has set forth sufficient specific factual allegations to establish that the defendant denied coverage under the third policy for a dishonest purpose. The plaintiff specifically alleged that the defendant acted with the "improper motive for the purpose of wrongfully denying the [workers' compensation] claim" to increase its profits. Further, as noted above, the plaintiff alleged facts indicating that the defendant undertook a specific course of conduct leading up to and at the time of the denial of coverage, including failing to respond to the workers' compensation action, providing confusing information regarding his third policy, and refusing coverage after Echevarria told the plaintiff that he was compliant, all in order to avoid paying a claim under a policy with which the plaintiff was told he was compliant before the date of loss. The plaintiff also has set forth allegations sufficient under the second approach adopted by our trial courts. That is, it may be inferred from the facts alleged in count three that the defendant's deliberate course of conduct in denying coverage was unlikely to be attributable to an honest mistake or negligence, but, rather, a deliberate refusal to provide otherwise available coverage for the purpose of increasing profits.

In sum, we conclude that the court improperly granted the defendant's motion to strike the third count of the plaintiff's fifth amended complaint.

[15] We pause to note that the court did not indicate in its memorandum of decision whether it adopted either of the two approaches utilized by our trial courts in granting the defendant's motion to strike.

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

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* STERLING D. DECOSTA (AC 45512)

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

*Syllabus*

Convicted on a plea of guilty, pursuant to the *Alford* doctrine, of the crime of interfering with an officer, the defendant appealed to this court, claiming that the trial court improperly failed to advise him during its plea canvass that, by pleading guilty, he was waiving his right to a jury trial. In sentencing the defendant, the trial court imposed a fine of $200, which the defendant immediately and voluntarily paid before leaving the courthouse on the date the judgment was rendered. *Held* that the defendant's appeal was dismissed: pursuant to statute (§ 54-96a), the defendant's voluntary payment of the fine imposed by the trial court as his sentence vacated his appeal and restored the judgment.

Argued April 3—officially released May 2, 2023

*Procedural History*

Information charging the defendant with the crimes of interfering with an officer and reckless driving, brought to the Superior Court in the judicial district of Middlesex, geographical area number nine, where the defendant was presented to the court, *Sanchez-Figueroa, J.*, on a plea of guilty to the charge of interfering with an officer; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the charge of reckless driving, and the defendant appealed to this court. *Appeal dismissed.*

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

*Meryl R. Gersz*, deputy assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's

attorney, and *Steven M. Lesko*, senior assistant state's attorney, for the appellee (state).

*Opinion*

PER CURIAM. The defendant, Sterling D. DeCosta, appeals from the judgment of conviction rendered after a plea of guilty pursuant to the *Alford* doctrine[1] of interfering with an officer in violation of General Statutes § 53a-167a. In sentencing the defendant, the court imposed only a fine of $200, which the defendant immediately and voluntarily paid before leaving the courthouse on the date the judgment was rendered. On appeal, the defendant claims that the judgment must be reversed because the court improperly did not advise him during its plea canvass that, by pleading guilty, he was waiving his right to a jury trial.

Even in criminal cases, "an appeal is purely a statutory privilege accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met." (Internal quotation marks omitted.) *State* v. *Coleman*, 202 Conn. 86, 88–89, 519 A.2d 1201 (1987); see also *Abney* v. *United States*, 431 U.S. 651, 656, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) ("it is well settled that there is no constitutional right to an appeal"). General Statutes § 54-96a provides in relevant part: "Any person appealing from the judgment of the Superior Court, adjudging him to pay a fine only, may pay the same at any time before the hearing in the Supreme Court or Appellate Court, without further cost, which payment shall vacate the appeal and restore the judgment." See also *State* v. *Eastman*, 92 Conn. App. 261, 264–65, 884 A.2d 442 (2005) (interpreting § 54-96a). Because the defendant voluntarily has paid the fine, the legislature has directed that this appeal shall be vacated and the judgment "restore[d]."

The appeal is dismissed.

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

# JOHANNA FRANCIS *v.* CIT BANK, N.A., ET AL.
## (AC 45253)

Prescott, Suarez and Seeley, Js.

*Syllabus*

The plaintiff property owner sought to recover damages for, inter alia, unlawful entry and detainer against the defendant companies. More than one year after the deadline for compliance with the defendants' discovery requests, the defendants filed a motion for nonsuit due to the plaintiff's failure to comply with her discovery obligations, which was granted by the trial court. The plaintiff did not appeal from the judgment of nonsuit. The plaintiff thereafter filed a motion to open the judgment of nonsuit, which was denied. The plaintiff appealed to this court, which limited the appeal to the trial court's denial of the motion to open the judgment. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion to open the judgment: the plaintiff failed to satisfy her burden in connection with the motion to open of demonstrating that she had been prevented by accident, mistake or reasonable cause from satisfying her discovery obligations; moreover, all of the arguments made by the plaintiff in her appeal challenged the trial court's judgment of nonsuit rather than its denial of the motion to open, and the plaintiff failed to address the basis for the judgment of nonsuit, namely, her failure to comply with her discovery obligations.

Argued January 11—officially released May 2, 2023

*Procedural History*

Action to recover damages for, inter alia, unlawful entry and detainer, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the motion for nonsuit filed by the named defendant et al. and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed.*

*Douglas R. Steinmetz*, for the appellant (plaintiff).

*Geoffrey K. Milne*, for the appellees (named defendant et al.).

*Opinion*

SUAREZ, J. In this civil action, the plaintiff, Johanna Francis, brought causes of action sounding in unlawful entry and detainer and trespass against the defendants CIT Bank, N.A., and Cascade Funding RM1 Alternative Holdings, LLC.[1] The plaintiff appeals from the judgment of the trial court denying her motion to open the judgment rendered by the trial court after it granted a motion for nonsuit filed by the defendants. The plaintiff claims that the court improperly denied her motion to open the judgment.[2] We affirm the judgment of the court.

The following facts and procedural history are relevant to our analysis.[3] The underlying action is related to ongoing foreclosure proceedings between the parties. See *CIT Bank, N.A.* v. *Francis*, 214 Conn. App. 332, 280 A.3d 485 (2022) (reversing judgment of strict foreclosure). In her revised complaint, the plaintiff alleged that, on multiple occasions, agents of the defendants, claiming a mortgage interest in the property sought to be foreclosed, and without her consent, forcibly entered the subject property, a residential property in New Canaan in which she owned the entire beneficial interest. The plaintiff alleged that, in derogation of her

[1] The plaintiff also named Freedom Financial Senior Funding Corporation as a defendant in the underlying action, but that entity did not appear and has not participated in this appeal. All references in this opinion to the defendants are to CIT Bank, N.A., and Cascade Funding RM1 Alternative Holdings, LLC.

[2] We note that, by order dated March 2, 2022, this court granted the defendants' February 1, 2022 motion to dismiss any portion of the appeal not related to the court's denial of the motion to open, noting that the present appeal "is limited to the January 18, 2022 denial of the motion to open the judgment of nonsuit."

[3] Initially, the plaintiff was represented by counsel in this action. On March 15, 2021, the court granted counsel's motion to withdraw his appearance. On September 27, 2021, the plaintiff filed an appearance as a self-represented party. On October 22, 2021, counsel filed an appearance on the plaintiff's behalf. The plaintiff is represented by counsel in this appeal.

right to exclusive possession of the property, the defendants' agents forcibly entered and damaged the property in several ways and that they detained various items of her personal property. The plaintiff also alleged that, as a result of the defendants' entries into her property, she felt unsafe and was forced to reside elsewhere. In her revised complaint, the plaintiff, seeking various forms of relief, brought claims sounding in unlawful entry and detainer in violation of General Statutes § 47a-43 and common-law trespass.

On February 23, 2021, the defendants filed a motion entitled "Motion for Nonsuit and/or in the Alternative to Dismiss." Therein, the defendants, pursuant to Practice Book § 13-14,[4] argued that a judgment of nonsuit was appropriate because the plaintiff had failed to comply with her discovery obligations, particularly, responding to the defendants' written interrogatories and requests for production dated September 19, 2019, with which she should have complied by November 19, 2019.[5] Alternatively, the defendants, pursuant to Practice Book

[4] Practice Book § 13-14 provides in relevant part: "(a) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy or the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery order made pursuant to Section 13-13, or has failed to comply with the provisions of Section 13-15, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order proportional to the noncompliance as the ends of justice require.

"(b) Such orders may include the following . . .

"(5) An order of dismissal, nonsuit or default. . . ."

[5] The defendants correctly represented in their motion that, on January 28, 2020, they filed a prior motion for nonsuit focusing on the plaintiff's noncompliance, and, on February 18, 2020, the plaintiff filed a notice of compliance. In support of their contention that the plaintiff had not actually complied with their interrogatories and requests for production, the defendants attached as an exhibit to their February 23, 2021 motion the plaintiff's responses thereto. It suffices to observe that, on their face, several of the plaintiff's responses were incomplete and represented that she was either

§ 14-3,[6] argued that a dismissal of the action was appropriate because the plaintiff had failed to prosecute her action with due diligence. Moreover, the defendants argued that, even though the plaintiff's counsel had represented to the court and to opposing counsel that the plaintiff would do so, the plaintiff had failed to add a necessary party to the action. On May 27, 2021, the court, *Hon. Kenneth B. Povodator*, judge trial referee, after holding a remote hearing on the motion, granted the defendants' motion insofar as the defendants sought a judgment of nonsuit.[7] In granting the motion for nonsuit, the court was persuaded by the fact that the plaintiff had engaged in a pattern of noncompliance with discovery for more than one year. Although the court did not grant the defendants' request to dismiss the action for the plaintiff's failure to prosecute the action with reasonable diligence, the court nevertheless stated that the plaintiff had failed to file an appearance after

in the process of obtaining records or information or that she would produce information in the future.

[6] Practice Book § 14-3 provides in relevant part: "(a) If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. At least two weeks' notice shall be required except in cases appearing on an assignment list for final adjudication. . . ."

[7] The plaintiff did not participate in the remote hearing on the motion for nonsuit. During the hearing, the court noted that, since March 15, 2021, when it granted the plaintiff's counsel permission to withdraw his representation in this action, the plaintiff had not filed an appearance. Nonetheless, the court noted at the hearing that, when it scheduled the hearing on the defendants' motion, it ordered the defendants' counsel "to send a copy of [the notice of the hearing] to the plaintiff so that the plaintiff would be aware that we were going to be scheduling a hearing such as this . . . to make sure that the plaintiff in her unrepresented capacity was aware that there was a potential for a dispositive motion to be granted." The court noted that, on May 25, 2021, the defendants' counsel filed a notice with the court that it had complied with the court's order to provide notice of the hearing to the plaintiff. Attached to that filing was written confirmation from the delivery service, FedEx, that the notice had been delivered to the plaintiff at a New York address.

her counsel had been permitted to withdraw his representation in this action, and the plaintiff had failed to prosecute the action diligently. The plaintiff did not appeal from the judgment of nonsuit.

On September 27, 2021, the plaintiff filed an appearance in this action as a self-represented party, and she filed a motion to open the judgment of nonsuit. The plaintiff claimed that several factors worked against her prosecuting the action with reasonable diligence. These reasons included her poor health, self-represented status, and involvement in unrelated legal matters. Additionally, the plaintiff represented that she did not receive notice of the May 27, 2021 remote hearing because the defendants attempted to provide her with notice at her business address in Brooklyn, New York, instead of at her mailing address in New Canaan. On October 1, 2021, the defendants filed a written objection to the motion to open. On October 22, 2021, counsel appeared for the plaintiff, and, on November 18, 2021, filed a written reply to the defendants' objection to the motion to open.

On January 18, 2022, the court, in a written decision, denied the motion to open. The court stated that "[t]he issues raised by the plaintiff [in her motion to open] have little or nothing to do with the granting of the motion for nonsuit and little or nothing to do with whether the judgment should be opened." The court further stated that, "to the extent that the plaintiff has contended that there was no formal order relating to discovery that had been violated, such that a nonsuit or dismissal was inappropriate, the court will go back to basics. In the absence of any objection, a [discovery] 'request' becomes an order of the court automatically, under . . . Practice Book § 11-2. . . . [I]t is somewhat disingenuous for the plaintiff to claim that some [twenty] months after the defendant[s] had served discovery requests . . . and more than [one] year after a

purported compliance [had been filed by the plaintiff] indicating that responsive materials were being sought and would be provided but without any actual/apparent supplementation, the plaintiff was not on fair notice that a nonsuit or dismissal might be entered. . . .

"[T]here is an overarching issue that the plaintiff has not addressed adequately. It is now almost [two] years since the defendants filed their first motion relating to noncompliance with discovery and approximately [eleven] months since the defendants filed their second motion relating to noncompliance. With all of her discussion of the need for proportionality and a deadline for compliance, the plaintiff does not claim to have provided anything in the nature of full compliance despite the 'promises' that materials were being sought [by her] as set forth in a notice of compliance that was filed some [twenty-three] months ago."

The court also addressed the plaintiff's contention that she did not receive notice of the May 27, 2021 remote hearing on the motion for nonsuit. The court stated that "[h]er claim that the notice relating to scheduling [the] argument was inappropriately sent to a Brooklyn address is dubious on a number of levels. She claims the Brooklyn address is a business address, but that is the address provided by (and apparently used by) her former counsel. The Brooklyn address appears to be an apartment address, tending to suggest it is residential in nature. The limited discovery compliance provided by the plaintiff (responses to interrogatories) strongly suggests that the New Canaan address was not suitable for living, consistent with the Brooklyn address being an actual residential address, in part further confirmed by the characterization of the New Canaan address as something in the nature of a legal address."

The court responded to additional arguments raised by the plaintiff's counsel in its reply to the defendants'

objection to the motion to open. In particular, the court stated that, insofar as the plaintiff argued that the defendants failed to comply with Practice Book § 17-22, requiring that notice be given of the entry of judgment, that provision did not apply in the present case because the court's granting of a nonsuit was not premised on her failure to appear but, rather, on her failure to comply with discovery. The court also responded to the plaintiff's argument that, contrary to Practice Book § 14-3, she had not been afforded the requisite notice of the court's hearing. The court stated that such argument was "disingenuous" because, at the time of its notice of hearing, the plaintiff was a nonappearing party, and any lack of notice "was at least substantially due to her failure to have an appearance in the file." The court also noted that an argument based on a failure to comply with the notice provision of Practice Book § 14-3; see footnote 6 of this opinion; was misplaced in light of the fact that the primary focus of the defendants' motion was the plaintiff's noncompliance with the rules of discovery, not the plaintiff's failure to prosecute the action with reasonable diligence. Moreover, responding to the plaintiff's arguments concerning lack of notice of the court's remote hearing of May 27, 2021, the court reasoned that, "[e]ven assuming that the plaintiff did not receive any notice of the hearing . . . until after the hearing, despite claims of diligence thereafter, the record appears to be devoid of any activity or claims of activity after the first week of June, 2021, and before September 27, 2021."

On appeal, the plaintiff argues that the court improperly denied the motion to open for several reasons. First, the plaintiff argues that, because she was an unrepresented and nonappearing party at the time that the court rendered its judgment of nonsuit, the court should have afforded her "deference" under the circumstances. Second, the plaintiff argues that it was

improper for the court to dismiss the action for failure to prosecute with reasonable diligence because the court did not provide her with the notice required under Practice Book § 14-3. Third, the plaintiff argues that it was improper for the court to have rendered a judgment of nonsuit based on her noncompliance with the rules of discovery because (1) a clear discovery order did not exist, (2) the record did not establish the violation of an order that never existed, and (3) the judgment of nonsuit was disproportionately harsh. All of these arguments challenge the court's judgment of nonsuit rather than its denial of the motion to open and, accordingly, are unpersuasive for the reasons that we will discuss subsequently in this opinion.

The power of a court to set aside a judgment of nonsuit is conferred by General Statutes § 52-212, which provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . ."

"In ruling on a motion to open a judgment of nonsuit, the trial court must exercise sound judicial discretion, which will not be disturbed on appeal unless there was an abuse of discretion. . . . In reviewing the trial court's exercise of its discretion, we make every presumption in favor of its action." (Citation omitted.) *Biro* v. *Hill*, 231 Conn. 462, 467–68, 650 A.2d 541 (1994). In

the present case, the plaintiff did not appeal from the judgment of nonsuit, and, thus, she is presently limited to challenging the court's exercise of discretion in denying the motion to open. See *Tiber Holding Corp.* v. *Greenberg*, 36 Conn. App. 670, 671, 652 A.2d 1063 (1995) ("When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time to appeal." (Citation omitted; internal quotation marks omitted.)).

To the extent that the plaintiff, in her motion to open, raised arguments that essentially challenged the court's exercise of its discretion on May 27, 2021, in rendering a judgment of nonsuit, such arguments were not a proper subject of the motion to open. Consequently, in this appeal, the plaintiff cannot rely on arguments of this nature to demonstrate that the court abused its discretion in denying her motion to open. See footnote 2 of this opinion. Moreover, to the extent that the plaintiff argues in this appeal that the court improperly determined that she failed to prosecute the action with reasonable diligence, we note that the court did not dismiss the action for the plaintiff's failure to prosecute the action with reasonable diligence. Rather, it rendered a judgment of nonsuit as a consequence of the plaintiff's lengthy pattern of failing to comply with her discovery obligations.

To prevail in connection with her motion to open, it was incumbent on the plaintiff to address the basis for the judgment of nonsuit, namely, her noncompliance with the defendants' interrogatories and requests for production of September 19, 2019. The record reflects

that the plaintiff was represented by counsel when these discovery obligations arose, when the defendants first attempted to obtain a judgment of nonsuit related to her noncompliance on January 28, 2020, when the plaintiff filed a notice of compliance on February 18, 2020, and when the defendants filed their second motion for nonsuit related to her noncompliance on February 23, 2021. As the court correctly stated in its memorandum of decision denying the motion to open, however, the plaintiff's arguments in support of the motion to open did not pertain to the issue of her noncompliance with discovery. The plaintiff did not attempt to satisfy her burden in connection with the motion to open of demonstrating that she had been prevented by accident, mistake, or reasonable cause from satisfying her discovery obligations. Thus, the plaintiff failed to proffer a legally appropriate reason why the motion to open the judgment should be granted.[8] Accordingly, the plaintiff is

[8] The defendants argue that the additional arguments raised by the plaintiff's counsel in his reply memorandum of November 18, 2021, should not be considered by this court because, unlike the grounds set forth in the plaintiff's motion to open, which was filed just one day shy of the four month time limit set forth in § 52-212, these additional grounds were not put before the court in a timely manner, within that four month time period. The defendants also argue that because the arguments raised in the reply memorandum of November 18, 2021, were untimely, the trial court lacked subject matter jurisdiction over the motion to open, and, consequently, this court lacks jurisdiction over this appeal.

These jurisdictional arguments are not persuasive. "Our courts have the inherent authority to open, correct, or modify judgments, but this authority is restricted by statute and the rules of practice. . . . For a trial court to open or set aside a judgment, a motion to open or a motion to set aside must be filed within four months of the date judgment is rendered with certain limited exceptions, e.g., the parties waive the statutory time limitation. . . . This statutory time limitation operates as a constraint, *not on the trial court's jurisdictional authority*, but on its substantive authority to adjudicate the merits of the case before it." (Citations omitted; emphasis added; internal quotation marks omitted.) *Jonas* v. *Playhouse Square Condominium Assn., Inc.*, 173 Conn. App. 36, 39–40, 161 A.3d 1288 (2017). Moreover, even if we were to assume that the trial court lacked subject matter jurisdiction over the motion, that lack of jurisdiction would not affect this court's subject matter jurisdiction over the plaintiff's appeal from the final

unable to demonstrate that the court abused its discretion in denying the motion to open.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

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judgment rendered by the trial court denying the motion to open. See *Herasimovich* v. *Wallingford*, 149 Conn. App. 325, 327 n.2, 87 A.3d 1177 (2014) ("[t]his court has jurisdiction over any final judgment of the Superior Court even if that court lacked jurisdiction").

[9] The plaintiff's arguments concerning notice in connection with the hearing on the motion for nonsuit simply are not relevant to our review of the court's ruling on the motion to open. Nonetheless, we note that the court aptly observed that issues concerning her receiving notice of the hearing on the motion for nonsuit were attributable to the plaintiff's own conduct, not to factors outside of her control. To this end, we note that the plaintiff appended to her motion to open email correspondence between her and staff in the Superior Court clerk's office that reflects that, on multiple occasions prior to the May 27, 2021 hearing, the plaintiff was instructed to complete and file with the clerk's office an appearance form. As stated previously in this opinion, the plaintiff did not file an appearance as a self-represented party until September 27, 2021.

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# NOTICE

## Public Hearing on Practice Book Revisions Being Considered by the Rules Committee of the Superior Court

On Monday, May 8, 2023, at 10:00 a.m., the Rules Committee of the Superior Court will conduct a public hearing for the purpose of receiving comments concerning Practice Book revisions that are being considered by the Committee and for the purpose of receiving comments on any proposed new rule or any change in an existing rule that any member of the public deems desirable. Those revisions were published in the Law Journal of April 25, 2023, and are published on the Judicial Branch website at www.jud.ct.gov/pb.htm. The public hearing will be followed by a Rules Committee meeting.

Comments may be forwarded to the Rules Committee by email at RulesCommittee@jud.ct.gov or by mail at the following address, and should be received on or before Wednesday, May 3, 2023:

Rules Committee of the Superior Court

Attn: Counsel to the Committee

P.O. Box 150474

Hartford, CT 06115-0474

The Rules Committee public hearing and meeting will be conducted electronically using *Microsoft Teams* communication and collaboration platform, and in person at 231 Capitol Avenue, Hartford, CT, in the Attorney's Conference room. The hearing will also be broadcast on the Judicial Branch's YouTube channel.

Individuals who would like to access the public hearing and/or meeting electronically so that they may speak at the hearing, may do so by clicking here. Individuals who would like to access the public hearing and/or meeting electronically but who do not wish to speak at the hearing, may do so by clicking

https://www.youtube.com/@connecticutjudicialmeeting6042/featured.

Individuals who would like to speak at the public hearing should access the hearing online or arrive at the hearing one-half hour before the hearing begins in order to be recognized and placed in line while waiting to speak. Each speaker will be allowed five minutes to offer remarks. Anyone who believes that they cannot cover their remarks within the five minute time period allowed during the public hearing, and anyone who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions, may submit their written comments to the Rules Committee.

It is important that certain procedures are followed by every individual who wishes to access the public hearing and/or meeting through *Microsoft Teams*, and for those who attend the hearing and/or meeting in person who wish to speak at the public hearing. All individuals who access the public hearing and meeting must at all times act in a professional and respectful manner. Any individual whose conduct is deemed by the Rules Committee to be disruptive or inappropriate will be removed from the public hearing or meeting.

Hon. Andrew J. McDonald

*Chair*, Rules Committee of the Superior Court

# NOTICE

## Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On May 16, 2023, at 2 p.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom, 231 Capitol Avenue, Hartford, for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure which are being considered by the Justices and Judges, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the April 25, 2023 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit or who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions may submit their comments to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or by forwarding their comments to the co-chairs at the following address:

Co-Chairs of the Advisory Committee on Appellate Rules

Attn: Attorney Jill Begemann

Connecticut Appellate Court

75 Elm Street

Hartford, CT 06106

All comments should be received by May 10, 2023.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of handicap accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail ADA.Contact@connapp.jud.ct.gov or call (860) 757-2200, ext. 3141 before May 10, 2023.

Hon. Gregory T. D'Auria

Hon. Eliot D. Prescott

Co-Chairs, Advisory Committee on Appellate Rules

# NOTICE

## Adoption of Revisions to the Connecticut Code of Evidence

Notice is hereby given that on April 25, 2023, the justices of the Supreme Court adopted revisions to Section 7-3 of the Connecticut Code of Evidence and the commentary thereto, to become effective upon promulgation in this Connecticut Law Journal of May 2, 2023.

Hon. Richard A. Robinson

Chief Justice, Supreme Court

## INTRODUCTION

Contained herein are amendments to the Connecticut Code of Evidence. The amendments are indicated by bold brackets for deletions and underlines for added language.

Supreme Court

## AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

### Sec. 7-3. Opinion on Ultimate Issue

**(a) General rule; Exceptions.** Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that**[**,**]**: (1) other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue; and (2) a lay witness may give an opinion that embraces an ultimate issue identifying any person in video recordings or photographs, if such testimony meets the standards for the admissibility of lay witness opinion testimony in Section 7-1.

**(b) Mental state or condition of defendant in a criminal case.** ''No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.'' General Statutes § 54-86i.

COMMENTARY

**(a) General rule; Exceptions.**

''[A]n ultimate issue [is] one that cannot **[**''**]**reasonably be separated from the essence of the matter to be decided [by the trier of fact].''

(Internal quotation marks omitted.) **[***State* v. *Finan*, 275 Conn. 60, 66, 881 A.2d 187 (2005).**]** *State* v. *Favoccia*, 306 Conn. 770, 786, 51 A.3d 1002 (2012). The common-law rule concerning the admissibility of a witness' opinion on the ultimate issue is phrased in terms of a general prohibition subject to numerous exceptions. E.g., *State* v. *Spigarolo*, 210 Conn. 359, 373, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); *State* v. *Vilalastra*, 207 Conn. 35, 41, 540 A.2d 42 (1988). **[**Subsection (a) adopts t**]**The general bar to the admission of nonexpert and expert opinion testimony that embraces an ultimate issue, with certain exceptions, remains intact, following the decision in *State* v. *Gore*, 342 Conn. 129, 269 A.3d 1 (2022). See id., 135 n.7.

Subsection (a) (1) recognizes an exception to the general rule for expert witnesses in circumstances in which the jury needs expert assistance in deciding the ultimate issue. A common example is a case involving claims of professional negligence. See, e.g., *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). When there is particular concern about invading the province of the fact finder, courts may allow the expert to testify regarding common behavioral characteristics of certain types of individuals; *State* v. *Vilalastra*, supra, 207 Conn. 45 (behavior of drug dealers); but will prohibit the expert from opining as to whether a particular individual exhibited that behavior. See, e.g., *State* v. *Taylor G.*, 315 Conn. 734, 762–63, 110 A.3d 338 (2015) (behavior of child victim of sexual abuse). Expert opinion on the ultimate issue admissible under subsection (a) (1) also must

satisfy the admissibility requirements applicable to all expert testimony set forth in Sections 7-2 and 7-4.

Subsection (a) (2) recognizes an exception, established in *State* v. *Gore*, supra, 342 Conn. 129, to the ''ultimate issue rule'' in circumstances in which the admission of lay opinion testimony identifying persons in surveillance videos or photographs would be helpful to the jury due to the witness' familiarity with the depicted individuals. The holding is not limited to surveillance video but, rather, applies to any type of video recording or photograph. Id., 132 n.2. Lay opinion testimony in this context is admissible under subsection (a) (2) if the opinion meets the requirements of Section 7-1 because it is ''rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.''

In considering the admissibility of testimony under subsection (a) (2), courts should evaluate ''the totality of the circumstances'' under the four factor test adopted in *State* v. *Gore*, supra, 342 Conn. 151, and its progeny.

**(b) Mental state or condition of defendant in a criminal case**.

Subsection (b), including its use of the term ''opinion or inference,'' is taken verbatim from General Statutes § 54-86i. The Code attributes no significance to the difference between the term ''opinion or inference,'' as used in subsection (b), and the term ''opinion'' or ''opinions,'' without the accompanying ''or inference'' language, used in other provisions of Article VII of the Code.

# NOTICES

## CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in February and March 2023. 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*

Ahmed, Tauseef Saeed of Syosset, NY
Carbone, Gina Marie of Watertown, CT
Collins II, Michael John of Tuckahoe, NY
Deese, Elijah Gabriel of Farmington, CT
Durham, Michael Rene of Stamford, CT
Kambanis, Alexander Aristides of Fairfield, CT
Keilty, Addison Sandra of Litchfield, CT
Malcolm, Ashlica of Bronx, NY
McDonald, Stephen J. of Charlottesville, VA
O'Connor, Patrick Joseph of Harrison, NY
Parker, Lyn Allison of North Reading, MA
Reilly, Jennifer Ann of Gilbert, AZ
Sowell, Tashia Lorena of East Hartford, CT
Stubbs, Arianna Nicole of Johnston, RI
Sundel, Nathaniel Eli of New York, NY
Taylor, Amy Jean of Brooklyn, NY
Vergara, Melissa Gail Saulog of Washington, DC

## CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in February and March 2023. 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*

Cahill, Jessica Shea of Darien, CT
Colon, Rose M. of Springfield, MA
Conte, Felice of New Haven, CT
Driscoll, Jennifer Marie of Fairfield, CT
Halper, Jill Andrea of Weston, CT
Herrera Hernández, Lisa Jeaneth of North Haven, CT
Jacob, Andrew William of Stamford, CT
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Rozo, Veronica Alejandra of Easton, CT
Saharko, Peter David of Mendham, NJ