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CONNECTICUT REPORTS

Vol. 348

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* GONZALO DIAZ (SC 20720)

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

Syllabus

Convicted of the crimes of felony murder, burglary in the first degree, conspiracy to commit burglary in the first degree, attempt to commit robbery in the first degree, and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. At trial, one of the defendant's accomplices, D, testified pursuant to a cooperation agreement with the state. D testified that, on the night of the murder, she had driven her boyfriend, J, and J's friend, who allegedly was the defendant and went by the name "E," to the victim's house to buy drugs. Once they arrived, J informed D that they were going to rob the victim. D and E approached the house while J waited across the street. When the victim opened the door, E drew a gun and barged into the victim's house. D was scared and ran back to the car, where she met J. According to D, she heard a gunshot as she fled. The defendant testified in his own defense. Although he admitted that he went to the victim's house with J and D to buy drugs, he testified that he stayed near the car while J and D approached the house and that, after ten to fifteen minutes, he heard a gunshot. According to the defendant, J handed D a gun when J reentered the car. While cross-examining the defendant, the prosecutor indicated that a video recording of the defendant's interviews with the police, in which the defendant made certain statements that were inconsistent with his trial testimony, would be played at a later point in the trial. The video recordings, however, ultimately were not offered into evidence. During rebuttal argument, the prosecutor remarked on D's credibility, stating that either D or the defendant was "completely wrong" because their testimony was not consistent. The prosecutor also made remarks regarding the fact that the defendant, during his testimony, did not express outrage toward others who had implicated him or who had testified against him, and then proceeded to ask the jurors how they would feel if they were

being accused of the crimes for which the defendant was being tried. The trial court issued a general credibility instruction that was applicable to all of the witnesses, an instruction applicable to accomplices that named D by name, and an instruction concerning the defendant's testimony in particular. The court specifically instructed the jurors to assess the defendant's credibility in the same manner as that of other witnesses and that they could consider "his interest in the verdict" in assessing his credibility. On appeal, the defendant claimed, for the first time, that the trial court had committed plain error by instructing the jury that it could consider the defendant's interest in the outcome of the trial and that the prosecutor had made certain improper remarks during his cross-examination of the defendant and during rebuttal argument. *Held*:

1. The defendant could not prevail on his claim that the trial court had committed plain error by instructing the jury that it could consider his interest in the outcome of the trial in assessing the credibility of his trial testimony:

In *State* v. *Medrano* (308 Conn. 604), this court exercised its supervisory authority over the administration of justice and directed trial courts to refrain from instructing the jury that, when a defendant testifies, it may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial, and, although this court agreed, and the state conceded, that the trial court's instruction in the present case violated the directive in *Medrano* in an obvious and readily discernible manner, the defendant failed to demonstrate that the erroneous instruction resulted in manifest injustice.

The fact that a trial court's jury instruction, by commission or omission, fails to comply with a supervisory rule does not, in and of itself, establish the existence of manifest injustice necessary for plain error, and, instead, the defendant must establish that the evidence adduced at trial, the disputed factual issues before the jury, and the instructions as a whole gave rise to the danger of juror misunderstanding or confusion that prompted the court to adopt the rule that the trial court failed to implement.

In the present case, although the trial court included a sentence that improperly made a specific reference to the defendant's interest in the outcome of the trial, the erroneous instruction was brief and immediately preceded and followed by qualifying language, which the defendant did not challenge on appeal and which required the jury to evaluate the defendant's testimony as it would the testimony of any other witness, and, viewing the jury charge in its entirety, this court concluded that the erroneous instruction did not mislead the jury.

Moreover, this court could not conclude that the erroneous jury instruction so affected the fairness and integrity of, and public confidence in, the judicial proceedings so as to require reversal of the judgment, as the

jury was free to infer from the evidence presented at trial, including the defendant's admission that he traveled with J and D to the victim's home to purchase drugs from a known drug house and evidence that he was in that area at the time the victim was killed, that the defendant was a ready and willing participant in the criminal activity that resulted in the victim's death, and also to infer that the defendant's behavior following the crimes, particularly changing his cell phone number and lying to the police, was inconsistent with innocence and indicative of consciousness of guilt.

There was no merit to the defendant's contention that the erroneous instruction likely misled the jury by placing the defendant on equal footing with D for purposes of the jury's credibility determination, the trial court's instructions having carefully distinguished between the special credibility rules governing the testimony of an accomplice and the general credibility rules governing the testimony of all other witnesses who might have an interest in the outcome of the case, including the defendant, and the trial court explicitly informed the jury that the defendant's testimony should be assessed in accordance with its general credibility instruction governing the testimony of all other witnesses, whereas D's testimony was governed by the special credibility instruction unique to the testimony of accomplices.

2. There was no merit to the defendant's claim that the prosecutor had engaged in certain improprieties during his cross-examination of the defendant and during rebuttal argument because none of the prosecutor's remarks was improper:

a. The prosecutor did not improperly comment on D's credibility, during rebuttal argument, when he stated that either D or the defendant must be "wrong":

Contrary to the defendant's argument that the prosecutor's comment improperly implied that the jury could not find the defendant not guilty unless it found that D had lied, the prosecutor's isolated remark did not make a direct connection between the defendant's guilt and D's credibility or misrepresent the state's burden of proof.

Moreover, because D only identified her accomplices as J and E, and never identified the defendant as E, the jury was not required to find that D had lied in order to find the defendant not guilty of the charged crimes.

b. The prosecutor did not make an improper golden rule argument when, during rebuttal argument, he commented on the defendant's lack of outrage toward his accusers and asked the jurors how they would feel if they had been accused of the crimes for which the defendant was on trial:

The prosecutor's observation about the defendant's lack of outrage and his question to the jurors did not appeal to the jurors' passions or emotions but, instead, asked the jurors to use their common sense and experience to infer that an innocent person accused of the crimes charged would have exhibited some outrage or anger on the witness stand, and such an argument fell within the permissible bounds of fair comment on witness credibility.

c. The prosecutor did not argue facts not in evidence during his cross-examination of the defendant:

Certain questions the prosecutor asked the defendant about threats he allegedly made to D's son were not improper because those questions were designed to test the defendant's credibility and to rebut, impeach, modify, or explain the defendant's direct testimony, and the defendant did not claim that the prosecutor lacked a good faith basis to ask those questions or that the questions themselves or the information sought was inflammatory, inadmissible, unduly prejudicial, or in violation of a court order.

Moreover, the prosecutor's comments that allegedly inconsistent statements the defendant made during his video-recorded police interrogations would be played at a later point during the trial did not constitute improprieties, insofar as the jury was aware of the existence of the recordings and of the fact that many of the defendant's statements therein were inconsistent with his trial testimony, the defendant did not claim that the inconsistent statements were inadmissible for impeachment purposes or that the prosecutor lacked a good faith intent to play them at the time he made the challenged remarks, and the record did not reflect that the prosecutor's comments were delivered in a sarcastic, provocative, or aggressive manner.

Argued November 14, 2023—officially released April 9, 2024

Procedural History

Substitute information charging the defendant with the crimes of felony murder, manslaughter in the first degree with a firearm, burglary in the first degree, conspiracy to commit burglary in the first degree, attempt to commit robbery in the first degree, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury, where the charges of felony murder, manslaughter in the first degree with a firearm, burglary in the first degree, conspiracy to commit burglary in the first degree, and attempt to

commit robbery in the first degree were tried to the jury before *Schuman*, *J.*; verdict of guilty of felony murder, manslaughter in the first degree with a firearm, burglary in the first degree, conspiracy to commit burglary in the first degree, and attempt to commit robbery in the first degree; thereafter, the charge of criminal possession of a firearm was tried to the court; finding of guilty; subsequently, the court vacated the conviction as to manslaughter in the first degree with a firearm and rendered judgment of guilty of felony murder, burglary in the first degree, conspiracy to commit burglary in the first degree, attempt to commit robbery in the first degree, and criminal possession of a firearm, from which the defendant appealed to this court. *Affirmed.*

Shanna P. Hugle, deputy assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Don E. Therkildsen* and *Amy Sedensky*, supervisory assistant state's attorneys, for the appellee (state).

Opinion

ECKER, J. In this direct appeal,[1] the defendant, Gonzalo Diaz, raises two unpreserved claims challenging his conviction of felony murder, burglary in the first degree, conspiracy to commit burglary in the first degree, attempt to commit robbery in the first degree, and criminal possession of a firearm. First, he claims that the trial court committed plain error when it instructed the jury that it may consider his interest in the outcome of its verdict when assessing the credibility of his trial testimony, contrary to our statement in *State* v. *Medrano*, 308 Conn. 604, 631, 65 A.3d 503 (2013), that such an instruction should not be given. Second, he claims that

[1] See General Statutes § 51-199 (b) (3).

the prosecutor made improper remarks during cross-examination and rebuttal argument, in violation of his due process right to a fair trial. We affirm the trial court's judgment.

The jury reasonably could have found the following facts. The victim, Denise Rogers-Rollins, and her son sold drugs out of their home on Wall Street in Waterbury. During the early morning hours of December 7, 2019, the victim was shot and killed in her home. The police investigation into the victim's death led to the questioning of Shavonnah Draper, whose car was spotted parked nearby at the time of the shooting. Draper initially lied to the police regarding her involvement in the crimes but later admitted that she drove her boyfriend, Howard Jefferson, and his friend, E, from Bridgeport to the victim's residence on Wall Street in Waterbury to buy drugs on the night of the shooting. Pursuant to Jefferson's instructions, Draper did not park in front of the victim's home but, instead, parked nearby on Shelley Street. When Draper, Jefferson, and E exited the vehicle, Jefferson informed Draper that they "were going to rob the place, and [Draper was going to be] the one to get the door open." Draper participated in the planned robbery because she was afraid of Jefferson, who regularly abused her physically.

Draper and E approached the victim's residence while Jefferson waited across the street. Draper knocked on the door, and the victim asked who was there. Draper answered: "[I]t's me." The victim asked Draper if she had called beforehand, and Draper responded that there had been "no answer." When the victim opened the door, E pulled out "a dark colored gun" and "bum-rushe[d] her" inside. Scared, Draper ran back to the car, where she met Jefferson. Draper heard the victim screaming and the sound of a gunshot as she ran to the car. Draper entered the driver's seat of her vehicle, and Jefferson got into the passenger's seat. Draper started the car

and turned around to proceed down Shelley Street away from Wall Street. As she was driving away, Draper saw E walking down Shelley Street. Jefferson instructed Draper to pick up E, and Draper complied. After E entered the car, Jefferson asked E, "[w]hat the fuck happened?" E replied, "I don't know. I don't know. I hit her, and [the gun] went off." Draper drove back to Bridgeport and dropped E off near State Street and Lee Avenue.

The defendant was interviewed by the police twice, once on December 20, 2019, and again on January 7, 2020. During his first interview, the defendant identified himself as E after viewing video surveillance footage depicting Jefferson and E near Wall Street on the night of the victim's death. The defendant subsequently was arrested and charged in a six count substitute information with (1) manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a), (2) felony murder in violation of General Statutes § 53a-54c, (3) burglary in the first degree in violation of General Statutes §§ 53a-8 and 53a-101 (a) (3), (4) conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 and 53a-101 (a) (3), (5) attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), and (6) criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant elected a jury trial on the first five counts and a bench trial on the sixth count.

Testifying at trial pursuant to a cooperation agreement, Draper provided a version of events consistent with the facts set forth in the preceding paragraphs. She acknowledged that she had been unable to identify the defendant as E from a photographic array conducted shortly after the incident, and she never identified the defendant as E at trial.

The defendant testified in his own defense. He admitted that, on the night of the shooting, he traveled from Bridgeport to Waterbury with Jefferson and Draper to buy drugs, but he denied any knowledge of, or involvement in, the attempted robbery, burglary, and killing of the victim. According to the defendant, Draper parked her car on Shelley Street, and he, Jefferson, and Draper exited the vehicle. Jefferson informed the defendant that "he had to take care of something. He [was] going to this trap house, [where] he [knew] this lady that lives there that use[s] drugs . . . and her son sell[s] drugs."[2] The defendant stayed with the car and smoked a cigarette while Jefferson and Draper went to the trap house on Wall Street.

The defendant testified that, after waiting by the car for approximately ten to fifteen minutes, he heard a gunshot. He walked to the corner of Wall and Shelley Streets and looked around but did not see anything. He then walked back to the car, only to discover that it was locked. The defendant returned to the corner of Wall and Shelley Streets, where he saw Draper walking down the street with Jefferson following fifteen to twenty feet behind her. Draper reached the car and got into the driver's seat, and the defendant sat in the back. Jefferson waved Draper along and kept walking down Shelley Street in the opposite direction. Draper turned the car around and drove down Shelley Street, where she picked up Jefferson. Jefferson entered the front passenger seat of the vehicle and handed Draper "a small, black," semiautomatic gun, which Draper placed in the center console.

According to the defendant's testimony, he "could see a cop car coming" and heard sirens as Draper was driving away. Although it was "obvious something [had] happened," the defendant did not ask Draper and Jeffer-

[2] The defendant testified that a trap house is "[a] place that sells drugs."

son what had occurred because he "didn't want to be involved." Draper drove back to Bridgeport, where she dropped the defendant off near State Street and Lee Avenue.

The defendant acknowledged that he had changed his cell phone number approximately one week after the death of the victim. He said that he did so because Draper had been arrested, Jefferson had stopped communicating with him, and he "felt like [he] was being set up." The defendant therefore "cut [his] ties with [Jefferson]."

The defendant also admitted that he had lied to the police multiple times during the two interviews regarding the incident. The defendant initially told the police that, on the night of the victim's death, he had traveled from Bridgeport to Waterbury with "one of [his] boys" and denied going to the Wall Street area. Additionally, the defendant initially informed the police that, although he had met up with Jefferson in Waterbury that night, it was just the two of them, and no one else had joined them. When the police advised the defendant that they had video surveillance footage of him in a car with Jefferson and Draper, the defendant admitted that he had gone back to Bridgeport with Jefferson and Draper but still denied traveling to Waterbury with them. The defendant also originally denied going to the Wall Street area with Jefferson and Draper, informing the police that the couple had left him "for [one-half] hour to forty-five minutes when they went somewhere." Later, the defendant admitted to the police that he had traveled to Waterbury with Jefferson and Draper and went with them to the Wall Street area but denied ever exiting the car, adamantly stating that he was "positive" that he "stayed in the car the whole time . . . ." When informed by the police that there were eyewitnesses who saw three people exiting Draper's car on Shelley

Street,[3] the defendant changed his story and stated that he got out of the car on Shelley Street, but only to smoke a cigarette.

On the basis of the foregoing evidence, the jury found the defendant guilty of felony murder, manslaughter in the first degree with a firearm, burglary in the first degree, conspiracy to commit burglary in the first degree, and attempt to commit robbery in the first degree, while the trial court found him guilty of criminal possession of a firearm. At sentencing, the trial court vacated the defendant's manslaughter conviction but otherwise rendered judgment in accordance with the jury's verdict and the court's finding.[4] The trial court sentenced the defendant to a total effective sentence of forty-five years of imprisonment,[5] and this direct appeal followed.

I

The defendant claims that the trial court committed plain error by instructing the jury that, in assessing the

[3] Although there was an eyewitness who testified that she saw three or four individuals returning to a gray car parked at the corner of Wall and Shelley Streets after the shooting, no eyewitness testified regarding who exited the gray car after it first parked on Shelley Street.

[4] With the agreement of the defendant, the state moved to vacate the defendant's manslaughter conviction because there was only one homicide, and it would violate the defendant's right to be free from double jeopardy to convict the defendant of both felony murder and manslaughter in the first degree with a firearm. The trial court granted the state's motion and vacated the defendant's manslaughter conviction without prejudice to reinstatement if his felony murder conviction is reversed or vacated on appeal.

[5] The trial court sentenced the defendant to forty years of imprisonment for the crime of felony murder and imposed the following concurrent sentences: twenty years of imprisonment for burglary in the first degree, twenty years of imprisonment for conspiracy to commit burglary in the first degree, and twenty years of imprisonment for attempt to commit robbery in the first degree. Additionally, the trial court sentenced the defendant to five years of imprisonment for the crime of criminal possession of a firearm, to run consecutively to the other sentences, for a total effective sentence of forty-five years of imprisonment.

credibility of his trial testimony, it "necessarily [could consider] his interest in the verdict that [it] will [return]." The state concedes that this instruction plainly was erroneous in light of *State* v. *Medrano*, supra, 308 Conn. 604, in which we "exercise[d] . . . our supervisory authority over the administration of justice . . . [to] direct our trial courts in the future to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial." Id., 631. The state contends, however, that the defendant's claim fails under the second prong of the plain error test because the defendant has failed to demonstrate that the erroneous instruction resulted in manifest injustice. We agree.

The following additional information regarding the trial court's jury instructions is relevant to our resolution of this claim. The trial court instructed the jury as follows with respect to the defendant's testimony in particular: "In this case, the defendant testified. An accused person having taken the stand, [he] stands before you like any other witness. He is entitled to the same considerations and must have his testimony tested and measured by you by the same factors and standards as you would judge the testimony of any other witness. *That necessarily involves consideration of his interest in the verdict that you will render.* Of course, you have no right to disregard his testimony, or to disbelieve his testimony, merely because he is accused of a crime. You will consider my earlier instructions on the general subject matter of credibility that obviously pertain to the defendant's testimony, as well as the testimony of any other witness."[6] (Emphasis added.)

In its general instructions on witness credibility, the trial court informed the jury that, in ascertaining the

[6] The defendant challenges only the italicized portion of the trial court's jury charge.

facts, "you must decide which testimony to believe and which testimony not to believe. You may believe all, none, or any part of any witness' testimony. In making that decision, you may take into account a number of factors, including the following: (1) Was the witness able to see, or hear, or know the things about which that witness testified? (2) How well was the witness able to recall and describe those things? (3) What was the witness' manner while testifying? (4) Did the witness have an interest in the outcome of this case, or any bias, or prejudice concerning any party or any manner involved in the case? (5) How reasonable was the witness' testimony considered in light of all the evidence in the case? And (6) was the witness' testimony contradicted by what that witness has said, or done, at another time, or by the testimony of other witnesses, or by other evidence? Of course, you should use your common sense and good judgment in applying these factors."

This instruction continued: "In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail. Remember, also, that it is not uncommon for two honest people to witness the same event yet perceive or recall things differently. If you should think that a witness has deliberately testified falsely in some respect, you should carefully consider whether you should . . . rely [on] any or all of the remainder of his or her testimony. These are some of the factors you may consider in whether to believe testimony."

The trial court also instructed the jury regarding the law governing certain specified categories of witnesses, including police officers, expert witnesses, and accomplices. With respect to the latter category of witnesses, the trial court identified the defendant's alleged accom-

plice, Draper, by name and informed the jury that, "[i]n weighing the testimony of . . . Draper, you should consider the fact that she is facing charges as an accomplice to the crimes charged in this case. It may be that you would not believe a person who has committed a crime as readily as you would believe a person of good character. In weighing the testimony of an accomplice who has not yet been sentenced or whose case has not yet been disposed of, you should keep in mind that she may, in her own mind, be looking for some favorable treatment in the sentence or disposition of her own case; therefore, she may have such an interest in the outcome of this case that her testimony may have been colored by that fact. Therefore, you must look with particular care at the testimony of an accomplice and scrutinize it very carefully before you accept it. You should also bear in mind, however, that there are many offenses that are of such a character that . . . the only persons capable of giving useful testimony are those who are, themselves, implicated in the crime. It is for you to decide what credibility you will give to an accomplice and whether you will believe or disbelieve the testimony of a person who by her own admission has committed or contributed to the crimes charged by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you."

Defense counsel did not object to the trial court's instruction regarding consideration of the defendant's interest in the outcome of the trial. On appeal, the defendant now claims for the first time that this instruction constitutes plain error. To prevail on this unpreserved claim, the defendant must satisfy the two-pronged plain error test. First, the defendant must establish that "there was an obvious and readily discernable error . . . ." (Internal quotation marks omitted.) *State* v. *Blaine*, 334 Conn. 298, 306, 221 A.3d 798

(2019). Second, the defendant must establish that the obvious and readily discernable "error was so harmful or prejudicial that it resulted in manifest injustice." (Internal quotation marks omitted.) Id. In sum, reversal is required only if the alleged error is "*both* so clear *and* so harmful" that it affects the fairness and integrity of and public confidence in the judicial proceedings. (Emphasis in original; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 78, 60 A.3d 271 (2013); see also *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017) ("plain error . . . is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings" (internal quotation marks omitted)).

The defendant's plain error claim rests on the fact that the challenged portion of the charge violated this court's clear directive in *State* v. *Medrano*, supra, 308 Conn. 604. The trial court in *Medrano* gave a jury instruction similar to the one under consideration in this case, informing the jury that, in assessing the testimony of the defendant, Rafael Medrano, the jury could "consider the importance to him of the outcome of the trial." (Internal quotation marks omitted.) Id., 624. On appeal, Medrano claimed for the first time that the trial court's instruction undermined the presumption of his innocence and deprived him of his due process right to a fair trial. Id., 622. We concluded that Medrano's unpreserved constitutional claim was reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), but that no constitutional violation occurred pursuant to *State* v. *Williams*, 220 Conn. 385, 397, 599 A.2d 1053 (1991), in which we held that a comparable instruction emphasizing a defendant's interest in the outcome of the trial and the need to evaluate the defendant's testimony in the same fashion as the testimony of other witnesses was not unduly repetitive and did

not overstep the bounds of evenhandedness. See *State* v. *Medrano*, supra, 622–26. Because the trial court's instruction did not dilute the presumption of innocence or deprive Medrano of a fair and just trial, his claim failed under *Golding*. See id., 630–31.

Although we affirmed Medrano's conviction, we expressed concern "that instructions regarding the defendant's interest in the outcome of a case, when viewed in isolation from the qualifying language concerning evaluating the defendant's credibility in the same manner as the testimony of other witnesses, could give rise to a danger of juror misunderstanding." Id., 629–30. We therefore exercised our supervisory authority over the administration of justice prospectively to "direct our trial courts in the future to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial. Instead, we instruct[ed] the trial courts to use the general credibility instruction to apply to a criminal defendant who testifies." Id., 631.

The state concedes that, pursuant to *Medrano*, the first prong of the plain error test is satisfied in the present case because the trial court erred in giving the challenged instruction regarding the defendant's interest in the outcome of the trial, and the error was plain, in the sense that it was patent, readily discernable, obvious, and not debatable. See, e.g., *State* v. *Jamison*, 320 Conn. 589, 596, 134 A.3d 560 (2016). We agree and pause to repeat the mandatory directive issued in *Medrano*: a trial court's jury charge must not single out a criminal defendant's testimony for special treatment based on the defendant's interest in the result of the jury's verdict or the importance to him of the outcome of the trial.

The remaining issue is whether the error resulted in manifest injustice. The fact that a trial court's jury

instruction, by commission or omission, fails to comply with a rule issued pursuant to our supervisory authority "does not, in and of itself, establish the existence of manifest injustice necessary for plain error." *State* v. *Sanchez*, supra, 308 Conn. 83; see id., 82–87 (trial court's failure to issue eyewitness identification instruction contrary to supervisory rule adopted in *State* v. *Ledbetter*, 275 Conn. 534, 575, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), did not result in manifest injustice); see also *State* v. *Smith*, 275 Conn. 205, 237, 239–40, 881 A.2d 160 (2005) (erroneous jury instruction on intent to cause death contrary to supervisory rule adopted in *State* v. *Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002), did not result in manifest injustice); *State* v. *Nims*, 70 Conn. App. 378, 385, 797 A.2d 1174 (jury instruction on ingenuity of counsel contrary to supervisory rule adopted in *State* v. *Delvalle*, 250 Conn. 466, 475–76, 736 A.2d 125 (1999), did not affect "the fairness and integrity of the proceedings" or result in "manifest injustice"), cert. denied, 261 Conn. 920, 806 A.2d 1056 (2002). To prove manifest injustice, the defendant must establish that the evidence adduced at trial, the disputed factual issues before the jury, and the instructions as a whole actually gave rise, in the particular case under review, to the danger of juror misunderstanding or confusion that prompted the court to adopt the rule that the trial court failed to implement. See, e.g., *State* v. *Sanchez*, supra, 82–84.

Reviewing the trial court's charge in its entirety, we conclude that the defendant has failed to establish that the erroneous instruction resulted in manifest injustice. Although the trial court included a sentence in its charge that improperly made a specific reference to the defendant's interest in the outcome of the trial, it also instructed the jury in clear and direct terms that the jury's assessment of the defendant's testimony must be "tested and measured . . . by the same factors and

standards as you would judge the testimony of any other witness." The trial court cautioned the jury that it had "no right to disregard [the defendant's] testimony, or to disbelieve his testimony, merely because he is accused of a crime" and directed the jury specifically to consider its "earlier instructions on the general subject matter of credibility that obviously pertain to the defendant's testimony, as well as the testimony of any other witness." Those earlier instructions on general credibility permitted the jury to consider whether any witness (which, as the trial court later explained, included the defendant) "[had] an interest in the outcome of this case, or any bias, or prejudice concerning any party or any manner involved in the case . . . ." Because the erroneous instruction was brief and immediately preceded and followed by qualifying language that is not challenged by the defendant on appeal requiring the jury to evaluate the defendant's testimony as it would the testimony of any other witness, we are confident that the jury was not misled.[7]

[7] To support his claim to the contrary, the defendant relies on *United States* v. *Solano*, 966 F.3d 184, 186, 193 (2d Cir. 2020), in which the Second Circuit Court of Appeals held that it was plain error to instruct a jury that a defendant's interest in the outcome of the trial created a motive to testify falsely. In arriving at its conclusion, the Second Circuit relied on its prior case law—including *United States* v. *Gaines*, 457 F.3d 238 (2d Cir. 2006), and *United States* v. *Brutus*, 505 F.3d 80 (2d Cir. 2007)—in which it expressly " 'denounce[d] any instruction . . . that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely' " because, among other reasons, " 'a defendant does not always have a motive to testify falsely. An innocent defendant has a motive to testify truthfully.' " (Emphasis omitted.) *United States* v. *Solano*, supra, 194, quoting *United States* v. *Gaines*, supra, 246. In *Medrano*, we found *Gaines* and *Brutus* to be distinguishable because the trial court did not "explicitly [state] that [Medrano's] interest in the case gave him a motivation to testify falsely." *State* v. *Medrano*, supra, 308 Conn. 629. Likewise, in the present case, the erroneous instruction did not inform the jury that the defendant's interest in the outcome of the trial created a motive to testify falsely. The instruction at issue, read as a whole, directed the jury to assess the defendant's testimony as it would that of any other witness. Accordingly, the defendant's reliance on *Solano* is misplaced.

Our conclusion in this regard is reinforced by the evidence adduced at trial, which established that the defendant traveled from Bridgeport with Jefferson and Draper to purchase drugs in Waterbury and was in the vicinity of the victim's home on Wall Street, a known drug house, when the victim was shot and killed. The defendant did not dispute that he was with Draper and Jefferson near Wall Street at the time of the attempted robbery, burglary, and killing of the victim but testified that he had no knowledge of or involvement in those crimes. Despite the defendant's testimony, the jury was free to infer that he was a ready and willing participant in the criminal activity that resulted in the victim's death. See *State* v. *Patrick M.*, 344 Conn. 565, 576, 280 A.3d 461 (2022) ("[t]he jury is permitted to rely on its common sense, experience and knowledge of human nature in drawing inferences . . . and may draw factual inferences on the basis of already inferred facts" (internal quotation marks omitted)). Additionally, the defendant's behavior following the crimes, particularly changing his cell phone number and lying to the police, was inconsistent with innocence and indicative of consciousness of guilt. See, e.g., *State* v. *Turner*, 181 Conn. App. 535, 564, 187 A.3d 454 (2018) (evidence that, after crime was committed, defendant changed his cell phone number, evaded police, and lied about his identity supported inference of consciousness of guilt), aff'd, 334 Conn. 660, 224 A.3d 129 (2020). On the present factual record, we cannot conclude that the erroneous jury instruction "so affected the fairness and integrity of and public confidence in the judicial proceedings as to require reversal of the judgment." *State* v. *Sanchez*, supra, 308 Conn. 84; see also *State* v. *Kyle A.*, 348 Conn. 437, 450–51, 307 A.3d 249 (2024) (in reviewing jury instruction for plain error, court must evaluate evidence adduced at trial to determine whether manifest injustice occurred).

The defendant contends that the erroneous instruction likely misled the jury because it placed the defendant on equal footing with Draper for purposes of the jury's determination of credibility. To the contrary, the trial court explicitly informed the jury that the defendant's testimony should be assessed in accordance with its general credibility instruction governing the testimony of all other witnesses, whereas Draper's testimony was governed by the special credibility instruction unique to the testimony of accomplices. Indeed, the trial court specifically informed the jury that it had "no right to disregard [the defendant's] testimony, or to disbelieve his testimony, merely because he is accused of a crime." Draper, in contrast, had confessed to her involvement in the crimes and was "facing charges as an accomplice," and the trial court accordingly instructed the jury that it might not believe her testimony "as readily as [it] would believe a person of good character." The trial court tailored its accomplice instruction to the specific risk posed by accomplice testimony, explaining that an accomplice like Draper, "who has not yet been sentenced or whose case has not yet been disposed of . . . [may] be looking for some favorable treatment in the sentence or disposition of her own case," and, therefore, accomplice testimony must be examined "with particular care . . . and scrutinize[d] . . . very carefully" before it is accepted. The trial court's instructions thus carefully distinguished between the special credibility rules governing the testimony of an accomplice and the general credibility rules governing the testimony of all other witnesses who might have an interest in the outcome of the case, including the defendant. We have no reason to think that the trial court's erroneous instruction resulted in manifest injustice necessitating the reversal of the defendant's conviction.

II

The defendant claims on appeal, for the first time, that the prosecutor committed multiple improprieties

during his cross-examination of the defendant and during rebuttal argument,[8] which deprived the defendant of his constitutional right to a fair trial. Specifically, the defendant contends that the prosecutor improperly (1) commented on Draper's credibility, (2) appealed to the jurors' emotions, and (3) argued facts not in evidence. The state responds that the defendant's claims are unreviewable because the alleged improprieties that occurred during cross-examination are unpreserved evidentiary claims and the alleged improprieties that occurred during rebuttal argument were waived.[9] Alternatively, the state argues that the prosecutor's remarks were not improper and, even if improper, did not deprive the defendant of a fair trial. We need not decide whether the defendant's prosecutorial impropriety claims are unpreserved evidentiary claims, or whether they were waived, because we agree with the state that none of the prosecutor's remarks was improper. See, e.g., *State*

[8] We observe that the prosecutor's closing argument was extremely brief and that he reserved the bulk of his time for rebuttal. No claim of error is raised with respect to this tactic, but we repeat the concern that we articulated in *State* v. *Gonzalez*, 338 Conn. 108, 257 A.3d 283 (2021): "Prosecutors should avoid structuring their closing arguments in a manner that reserves the entirety of their summation for rebuttal, which could implicate a defendant's constitutional rights. Of course, under such circumstances, trial judges have discretion and are in the best position to fashion an appropriate remedy, including providing the defendant with an opportunity to make additional closing arguments to the jury." Id., 141 n.20.

[9] The state does not dispute that unpreserved prosecutorial impropriety claims alleging the violation of a defendant's due process right to a fair trial generally are reviewable even when raised for the first time on appeal. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 572–73, 849 A.2d 626 (2004). The state claims, however, that defense counsel affirmatively waived any challenge to the alleged improprieties committed during rebuttal argument because, after completing his argument, the prosecutor asked in open court whether the trial court or defense counsel had "any objections to any of [his] statements in closing," and defense counsel responded that she "did not have any objections . . . [but] would have expressed them." With respect to the alleged improprieties that occurred during cross-examination, the state, quoting *State* v. *Graham*, 344 Conn. 825, 857, 282 A.3d 435 (2022), contends that the defendant's claims are "nothing other than unpreserved and unreviewable evidentiary issues" because " ' "[s]imply posing an objectionable question does not amount to an actionable impropriety." ' " See id., 858

v. *Michael T.*, 338 Conn. 705, 718–19, 259 A.3d 617 (2021) (declining to decide whether defendant's claim was prosecutorial impropriety claim or unpreserved evidentiary claim because challenged remark was not improper); *State* v. *Wilson*, 111 Conn. App. 614, 631 and n.8, 960 A.2d 1056 (2008) (declining to decide whether defendant's prosecutorial impropriety claim was waived because prosecutor's remark was not improper), cert. denied, 290 Conn. 917, 966 A.2d 234 (2009).

It is well established that "[p]rosecutorial impropriety can occur during both the cross-examination of witnesses and in the course of closing or rebuttal argument." *State* v. *Long*, 293 Conn. 31, 37, 975 A.2d 660 (2009). "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process." (Internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 340, 260 A.3d 1152 (2021). First, we examine whether an impropriety occurred. Id. If the prosecutor's remarks were improper, then we move on to the second step and examine whether the impropriety deprived the defendant of his constitutional right to a fair trial. Id. "[T]he burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." (Internal quotation marks omitted.) Id.

A

We first address whether the prosecutor improperly commented on Draper's credibility during rebuttal by

(declining to address "an unpreserved evidentiary claim masquerading as a claim of prosecutorial impropriety").

Although we need not address the merits of the state's waiver claim, we note that, to the extent that a prosecutor has a concern or question about the propriety of any remarks made during closing and rebuttal arguments, the proper procedure is to identify the area of concern and to ask the trial court to inquire of defense counsel whether he or she wishes to be heard on that particular issue. This procedure avoids any appearance, after the fact, that the prosecutor may have been seeking to solicit a blanket waiver of any claims of alleged impropriety.

arguing that "[s]omeone is completely wrong, either . . . Draper or [the defendant], because both events don't line up."[10] The defendant claims that this comment violated the rule set forth in *State* v. *Singh*, 259 Conn. 693, 712, 793 A.2d 226 (2002), because it implied that the jury could not find the defendant not guilty unless it found that Draper had lied. We do not agree.

In *Singh*, we held that it is improper for a prosecutor essentially to argue during closing that, "in order to find the defendant not guilty, the jury must find that witnesses had lied . . . ." Id., 712. We explained that "[t]he reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof" and "preclude[s] the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit." (Internal quotation marks omitted.) Id., 709–10. We later held, in *State* v. *Albino*, 312 Conn. 763, 97 A.3d 478 (2014), that, in closing argument, there is a distinction between characterizing a witness' testimony as a lie and characterizing it simply as wrong. "[W]hen the prosecutor argues that the jury must conclude that one of two versions of directly conflicting testimony must be wrong, the state is leaving it to the jury to make that assessment [of the witness' veracity]. . . . [B]y framing the argument in such a manner, the jury is free to conclude that the conflict exists due to mistake (misperception or misrecollection) or deliberate fabrication." Id., 787.

[10] The defendant also claims that the prosecutor improperly expressed his own personal opinion on Draper's credibility when he stated, "[*i*]*f you believe* [*Draper's*] *testimony*, she's the least culpable person, she's the most credible and least culpable person in this [case]." (Emphasis added.) This claim lacks merit because the prosecutor was not expressing his personal opinion on Draper's credibility. Instead, the prosecutor explicitly conditioned his observations about relative culpability on the jury's decision whether to believe Draper's testimony. See, e.g., *State* v. *Ciullo*, 314 Conn. 28, 41, 100 A.3d 779 (2014) ("[a] prosecutor's mere use of the words 'honest,' 'credible,' or 'truthful' does not, per se, establish prosecutorial impropriety").

Nonetheless, the mere "use of the term 'wrong' instead of 'lying' " will not always be proper if the prosecutor's " 'closing arguments provid[e], *in essence*, that in order to find the defendant not guilty, the jury must find that witnesses had lied . . . .' " (Emphasis in original.) Id., quoting *State* v. *Singh*, supra, 259 Conn. 712.

The prosecutor's isolated remark did not make a direct connection between the defendant's guilt and Draper's credibility; nor did it misrepresent the state's burden of proof. See *State* v. *Albino*, supra, 312 Conn. 788. Notably, Draper was unable to identify the defendant as E, the individual who "bum-rushe[d]" the victim with a gun and committed the charged crimes, and the jury was informed of that fact on more than one occasion. Given that Draper never identified the defendant as her accomplice, the jury was not required to find that Draper had lied to find the defendant not guilty. See *State* v. *Pjura*, 200 Conn. App. 802, 830, 240 A.3d 772 ("[T]he prosecutor's comments . . . did not implicate a core justification for the *Singh* rule because they did not force the jury to find the defendant not guilty only if it first concluded that the other witnesses had lied. . . . The jury . . . could have found the defendant guilty on the basis of his testimony alone."), cert. denied, 335 Conn. 977, 241 A.3d 131 (2020); *State* v. *McCoy*, 171 Conn. App. 311, 320, 157 A.3d 97 (2017) (prosecutor's argument that, "in order for the jurors to find that [a witness] had received a secret plea deal, they would need to find that several of the other witnesses had lied" was not improper under *Singh* because it "did not improperly present the jury with a choice between believing the state's witnesses and [finding] the defendant [not guilty]"), rev'd in part on other grounds, 331 Conn. 561, 206 A.3d 725 (2019). We therefore conclude that the challenged remark was not improper.

B

The defendant contends that the prosecutor's remarks regarding the defendant's testimonial demeanor constituted an improper golden rule argument. The prosecutor argued: "Consider, if only this, when he testified, I'm only talking about his testimony, his demeanor on the stand, his appearance on the stand. Was he outraged? Was he mad at Draper? Was he outraged people were saying these things about him? Nah. Kind of matter of fact. . . . Any outrage? How would you feel if you were there being accused of this? Would you be upset? Be mad? Or just, ah, it happens?" We reject this claim.

A golden rule argument "urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes. . . . Such arguments are improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." (Internal quotation marks omitted.) *State* v. *Long*, supra, 293 Conn. 53–54. The principle underlying the prohibition on golden rule arguments is that jurors must "decide cases on the basis of the facts as they find them, and reasonable inferences drawn from those facts, rather than by any incitement to act out of passion or sympathy for or against any party" by imagining themselves as a party in the case. Id., 57–58.

As with many questions involving the propriety of arguments to the jury, the precise boundaries of fair play are not always easily articulated. "[N]ot all arguments that ask jurors to place themselves in a particular party's situation implicate the prohibition on golden rule argument[s]." (Internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 839, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017). The appellate courts of this state "repeatedly [have] held that a prosecutor does not violate the golden rule

by using the pronoun 'you' or by asking the jurors to place themselves in the position of the witness if the prosecutor is using these rhetorical devices to ask the jury to assess the evidence from the standpoint of a reasonable person or to employ common sense in evaluating the evidence." Id., 839–40; see, e.g., *State* v. *Long*, supra, 293 Conn. 58 (prosecutor did not make improper golden rule argument because his remarks "were not intended to unduly arouse the jurors' emotions or to elicit the jurors' sympathies; rather, they were intended to encourage the jurors to draw inferences from the evidence of [the victim's] actions that were presented at trial on the basis of the jurors' views as to how a reasonable [person] would act under the circumstances"); *State* v. *Bell*, 283 Conn. 748, 773, 931 A.2d 198 (2007) (same).

We conclude that the prosecutor's argument did not appeal to the jurors' passions or emotions but, instead, asked the jurors to use their common sense and experience to infer that an innocent man accused of the crimes charged would have exhibited some outrage or anger on the witness stand. Such an argument falls "within the permissible bounds of fair comment on witness credibility." *State* v. *Courtney G.*, supra, 339 Conn. 345 n.7; see id., 347–48 (prosecutor's comment on defendant's testimonial demeanor and " 'lack of outrage' " on witness stand was not improper because prosecutor "implicitly urged the jurors to infer, on the basis of their common sense and experience, that an innocent man falsely accused of sexually assaulting a child would have exhibited outrage while testifying").[11]

[11] The defendant argues that a prosecutor's reliance on a criminal defendant's testimonial demeanor is problematic because it invites the "jury to depart from neutrality and emotionally assess [a defendant's] credibility and culpability based on what [it considers] to be [a] normal" reaction to an allegation of criminal conduct. (Emphasis omitted.) The dilemma faced by testifying defendants of color is particularly acute, the defendant argues, because such defendants are subject to an attack on their credibility if they appear overly calm on the witness stand but may also feed "into biases that persons of color are usually more aggressive" if they appear to be outraged.

C

Lastly, the defendant claims that the prosecutor improperly referred to facts not in evidence during cross-examination when he asked the defendant questions about threats the defendant allegedly made to Draper's son[12] and commented that allegedly inconsistent statements made during the defendant's video-recorded police interrogations would be played later.[13] We find no merit to these claims on this record.

The defendant's challenge to the prosecutor's questions fails because it is entirely appropriate to ask properly phrased questions on cross-examination that relate to the credibility of a criminal defendant's direct testimony, even if those questions exceed the scope of the questioning on direct examination and refer to facts

The defendant does not ask us, however, to reconsider and overrule our case law holding that a prosecutor properly may comment on a criminal defendant's testimonial demeanor. See, e.g., *State* v. *Courtney G.*, supra, 339 Conn. 348; *State* v. *Luster*, 279 Conn. 414, 440, 902 A.2d 636 (2006); *State* v. *Dupigney*, 78 Conn. App. 111, 124–25, 826 A.2d 241, cert. denied, 266 Conn. 919, 837 A.2d 801 (2003). We reject the defendant's argument in light of this unchallenged precedent.

[12] During the prosecutor's cross-examination of the defendant, the following colloquy took place:

"[The Prosecutor]: Have you ever met at a parking lot? You remember you told [Jefferson] to keep his girl's mouth shut?

"[The Defendant]: Never.

"[The Prosecutor]: Never? You never threatened [Draper's] son . . . ? You know where [her son] goes to school?

"[The Defendant]: No, I don't.

"[The Prosecutor]: [Do] you remember telling . . . Jefferson that?

"[The Defendant]: Nope."

[13] During the prosecutor's cross-examination of the defendant, the prosecutor asked about alleged inconsistencies between the defendant's trial testimony and his video-recorded interrogations with the police:

"[The Prosecutor]: And you said [Jefferson and Draper] both got in the car?

"[The Defendant]: I don't remember saying that.

"[The Prosecutor]: But you could have said it?

"[The Defendant]: Maybe, yeah.

"[The Prosecutor]: Okay. *We'll play it out later.*

* * *

"[The Prosecutor]: Didn't you tell [the police] later on you saw [Jefferson] getting out of the car with a gun?

"[The Defendant]: I assumed he got out with a gun in his hand.

not in evidence. See *State* v. *Sharpe*, 195 Conn. 651, 657, 491 A.2d 345 (1985). A cross-examiner may ask questions that are "designed to rebut, impeach, modify, or explain any of the defendant's direct testimony"; (internal quotation marks omitted) id.; "if he or she has a good faith belief that a factual predicate for the question exists." *State* v. *Barnes*, 232 Conn. 740, 747, 657 A.2d 611 (1995); see also *State* v. *Annulli*, 309 Conn. 482, 492, 71 A.3d 530 (2013) ("[t]he law in Connecticut on impeaching a witness' credibility provides that a witness may be cross-examined about specific acts of misconduct that relate to his or her veracity"). Our review of the record reveals that the prosecutor's questions were designed to test the defendant's credibility and to rebut, impeach, modify, or explain the defendant's direct testimony. The defendant does not claim that the prosecutor lacked a good faith basis to ask the challenged questions or that the questions themselves or the information sought was inflammatory, inadmissible, unduly prejudicial, or in violation of a court order. We therefore conclude that the prosecutor's questions were not improper.

The prosecutor's commentary indicating that the inconsistent statements in the defendant's video-recorded interrogations would be played later presents a closer question. Gratuitous commentary[14] during cross-examination can be improper, particularly if it is sarcastic,

"[The Prosecutor]: You said you saw it in the waistband, sir. You recall that?

"[The Defendant]: I don't recall that.

"[The Prosecutor]: *I'll play that for you, too.*

* * *

"[The Prosecutor]: You told the police you saw him get out of the car with a gun on Wall Street, correct? In his waistband?

"[The Defendant]: I never said that. I don't recall saying that.

"[The Prosecutor]: Okay. *We'll play that for you.* You don't recall that?

"[The Defendant]: No." (Emphasis added.)

[14] Gratuitous commentary includes, but is not limited to, statements, remarks, and asides that are argumentative or editorial in nature.

provocative, or aggressive. See, e.g., *State* v. *Wilson*, 308 Conn. 412, 443–44, 64 A.3d 91 (2013) ("the prosecutor's sarcastic 'congratulations,' offered three times over defense counsel's objection, constituted 'an excessive and inappropriate use of sarcasm' "); *State* v. *James R.*, 138 Conn. App. 181, 192, 50 A.3d 936 (state acknowledged that prosecutor's editorial comment " '[o]f course you do' " during defendant's cross-examination was improper commentary), cert. denied, 307 Conn. 940, 56 A.3d 949 (2012). However, although objectionable, not all gratuitous prosecutorial commentary during cross-examination rises to the level of impropriety. See, e.g., *State* v. *Andrews*, 313 Conn. 266, 292, 96 A.3d 1199 (2014) (concluding that prosecutor's remark, " '[c]ome on,' " was not improper because it was intended "to encourage the defendant to testify truthfully as to his prior experience in giving, or understanding the purpose of, written statements to the police"); *State* v. *Grant*, 154 Conn. App. 293, 322, 112 A.3d 175 (2014) (concluding that prosecutor's remark " 'really?' " was not improper because it was "an attempt to confirm the truth or to clarify the defendant's responses to his questions"), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). To determine whether an impropriety exists, we must "consider each alleged impropriety in the context in which it occurred," while remaining aware that our review is "constrained by our inability to assess the tone and body language of the prosecutor . . . and the limitations necessarily imposed by our reliance on the cold, printed record." *State* v. *Andrews*, supra, 284.

Viewing the prosecutor's comments ("[w]e'll play it out later," "I'll play that for you, too," and "[w]e'll play that for you") in the context of the entire trial, we conclude that the defendant has failed to establish that these remarks rose to the level of impropriety. It is true that the defendant's video-recorded interrogations ultimately were not offered into evidence, but the jury

was well aware of their existence and the fact that many of the defendant's statements therein were inconsistent with his trial testimony. Indeed, on direct examination, the defendant candidly testified that he had lied to the police multiple times when he was interviewed regarding his involvement in the charged crimes. On cross-examination, the prosecutor questioned the defendant extensively about these inconsistencies, and the defendant freely admitted to many inconsistent statements, although he could not recall making at least two of them. See footnote 13 of this opinion. The defendant does not claim that these two inconsistent statements were inadmissible for impeachment purposes or that the prosecutor lacked a good faith intent to play them at the time he made the challenged remarks. Additionally, the defendant does not claim, and the record does not reflect, that the prosecutor's comments were delivered in a sarcastic, provocative, or aggressive manner. We caution all lawyers, including prosecutors, that the purpose of cross-examination is to pose questions, not to interject argumentative commentary, but we cannot conclude on the present record that the prosecutor's remarks constituted improprieties.

The judgment is affirmed.

In this opinion the other justices concurred.

ANTHONY J. MARSHALL III *v.* COMMISSIONER OF MOTOR VEHICLES
(SC 20703)

Robinson, C. J., and McDonald, Mullins, Ecker and Dannehy, Js.

Syllabus

Pursuant to statute (§ 14-227b (c)), when a person has been arrested for operating a motor vehicle while under the influence of intoxicating liquor or any drug, the arresting officer "shall prepare a report of the incident and shall mail or otherwise transmit . . . the report and a copy

of the results of any chemical test [of such person's blood, breath or urine] to the Department of Motor Vehicles within three business days."

Pursuant further to *Volck* v. *Muzio* (204 Conn. 507), an incident report prepared in accordance with § 14-227b (c) is admissible at a motor vehicle operator's license suspension hearing, as an exception to the hearsay rule, without the need for testimony from the arresting officer.

The plaintiff, who had been arrested for operating a motor vehicle while under the influence of intoxicating liquor, appealed to the trial court from the decision of the defendant, the Commissioner of Motor Vehicles, who temporarily suspended the plaintiff's license to operate a motor vehicle. At the plaintiff's license suspension hearing, the plaintiff's attorney objected to the admission of an incident report that was prepared by the arresting officer on the ground that it was not prepared and mailed to the Department of Motor Vehicles within three business days, as required by § 14-227b (c). The arresting officer had not completed the report until five business days after the plaintiff's arrest. The department hearing officer overruled the objection and admitted the report, which was the only evidence submitted at the hearing. On appeal to the trial court from the hearing officer's decision, that court dismissed the appeal, concluding that strict adherence with the preparation and mailing requirement of § 14-227b (c) was not necessary for the report to be admissible because the report bore indicia of trustworthiness and reliability. The Appellate Court affirmed the trial court's judgment, concluding that, because § 14-227b (c) is not accompanied by any negative or prohibitory language, the preparation and mailing requirement is directory, and, therefore, strict compliance with that requirement is not necessary for a report to be admissible at a license suspension hearing. The Appellate Court further determined that there were sufficient indicia of reliability of the report at issue. Accordingly, the Appellate Court held that the hearing officer did not abuse her discretion in admitting the report. On the granting of certification, the plaintiff appealed to this court.

Held that the hearing officer abused her discretion in admitting an incident report that did not strictly comply with the preparation and mailing provision of § 14-227b (c) in the absence of testimony from the arresting officer, and, accordingly, this court reversed the Appellate Court's judgment and remanded with direction to reverse the trial court's judgment and to direct the trial court to sustain the plaintiff's appeal:

Contrary to the Appellate Court's conclusion that the preparation and mailing requirement in § 14-227b (c) is directory, this court concluded that that requirement was mandatory because, even though the statute contained no negative or prohibitory language, the substantive nature of the statutory provision was clear, insofar as it plainly promoted the accuracy and reliability of the information that ultimately will be used at a license suspension hearing.

The legislature enacted § 14-277b to protect the public from drivers who are under the influence by authorizing the temporary revocation of their operating privileges prior to conviction while also affording them due process, to achieve that purpose, the legislature authorized the admission of incident reports at license suspension hearings without the need to produce the arresting officer, provided that the procedures set forth in the hearsay exception created by § 14-277b (c) are followed to ensure the reliability of the information contained in the report, and the legislature determined that requiring the arresting officer to prepare the report within three business days, while the officer's recollection of the incident remains fresh, is an appropriate time frame to imbue the report with sufficient reliability.

Having concluded that the preparation and mailing requirement of § 14-227b (c) is mandatory, this court clarified that § 14-227b (c) describes substantive requirements that incident reports must meet, and the failure to meet those requirements renders a report inadmissible insofar as it fails to satisfy the exception for the report to be admitted without the need to produce the arresting officer at the suspension hearing.

In the present case, it was undisputed that the arresting officer failed to comply with the three business day requirement prescribed by § 14-227b (c), the plaintiff's attorney objected to the admission of the report on the grounds that that requirement was not met and that the arresting officer was not present at the hearing to offer testimony, and, by admitting the report without hearing testimony from the arresting officer, the hearing officer abused her discretion.

Moreover, the Appellate Court's conclusion that an incident report that fails to strictly comply with § 14-227b (c) nevertheless may be admissible if it meets some of that provision's requirements was based on that court's incorrect determination that the preparation and mailing requirement is directory, and, therefore, that conclusion could not stand.

Argued October 27, 2023—officially released April 9, 2024

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's license and requiring the installation of an ignition interlock device in the plaintiff's vehicle, brought to the Superior Court in the judicial district of New London and transferred to the judicial district of New Britain, where the case was tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to the Appellate Court, *Alexander* and *DiPentima*, *Js.*, with *Pres-*

cott, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Drzislav Coric, with whom was *Brandon H. Marley*, for the appellant (plaintiff).

Drew S. Graham, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

Opinion

MULLINS, J. Connecticut law provides that an incident report prepared in accordance with General Statutes § 14-227b (c)[1] is admissible in an administrative proceeding to suspend a motor vehicle operator's license without the need for testimony from the arresting officer. See *Volck* v. *Muzio*, 204 Conn. 507, 517–18, 529 A.2d 177 (1987). The question presented in this case is whether such a report is nevertheless admissible if the arresting officer fails to comply with the statute's requirement that the officer prepare and mail[2] the report to the Department of Motor Vehicles (department) within three business days of the incident. In answering this question, we are mindful that license suspension hearings are not strictly bound by the rules of evidence and are aimed at expeditiously protecting the public from individuals arrested for driving under the influence of alcohol or drugs prior to any conviction. At the same

[1] Although § 14-227b has been amended since the date of the incident in question; see, e.g., Public Acts 2022, No. 22-40, § 14; Public Acts, Spec. Sess., June, 2021, No. 21-1, § 118; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, unless otherwise indicated, we refer to the current revision of the statute.

[2] Section 14-227b (c) requires the police officer to "mail or otherwise transmit" the report to the Department of Motor Vehicles within three business days. For convenience, we use the term "mail" even though the statute provides that the police report may be mailed or electronically transmitted.

time, we must be cognizant of the fact that license suspension hearings seek to revoke a privilege, and, thus, the state may not revoke that privilege without furnishing the holder of the license due process as required by the fourteenth amendment to the United States constitution. See, e.g., *Bell* v. *Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); see also, e.g., *Fishbein* v. *Kozlowski*, 252 Conn. 38, 50–51, 743 A.2d 1110 (1999).

Our legislature balanced these concerns in § 14-227b (c) by setting forth the requirements a police report must meet to be used as evidence to suspend an operator's license.[3] We previously have explained that the requirements of § 14-227b (c) provide sufficient indicia of reliability such that the report may be introduced into evidence at a license suspension hearing without the need to call the arresting officer. See *Volck* v. *Muzio*, supra, 204 Conn. 517–18. Consistent therewith, we conclude that the failure to comply with the three business day preparation and mailing provision of § 14-227b (c) renders the report inadmissible in the absence of testimony from the arresting officer.

The following facts and procedural history are relevant to this appeal. On July 14, 2019, Jeffrey H. Hewes, an officer with the Stonington Police Department, heard an announcement over the police radio describing a vehicle that had allegedly been involved in a hit-and-

[3] The police report typically contains the arresting officer's rendition of the four issues required to prove a license suspension. See General Statutes § 14-227b (g) (2) ("[a] hearing based on a report submitted under subsection (c) of this section shall be limited to a determination of the following issues: (A) [d]id the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug, or both; (B) was such person placed under arrest; (C) did such person (i) refuse to submit to such test or nontestimonial portion of a drug influence evaluation, or (ii) submit to such test, commenced within two hours of the time of operation, and the results of such test indicated that such person had an elevated blood alcohol content; and (D) was such person operating the motor vehicle").

run accident. Shortly thereafter, he stopped a vehicle matching that description. Upon approaching the vehicle, Officer Hewes identified the plaintiff, Anthony J. Marshall III, as the driver and observed that his eyes were bloodshot, his speech was slow, and his breath smelled of alcohol. Officer Hewes requested that the plaintiff perform three standardized field sobriety tests, all of which the plaintiff failed.

Officer Hewes then arrested the plaintiff and transported him to police headquarters, where the plaintiff took two breath tests for alcohol. Those tests revealed that the plaintiff had an elevated blood alcohol content. As a result, the plaintiff was charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a (a).[4] Officer Hewes prepared a report of this incident that consisted of an A-44 form and two attachments—a narrative police report and the results of the plaintiff's breath tests.[5] Officer Hewes initially entered the narrative police report on July 15, 2019. He later modified, completed, signed, and dated the report on July 19, 2019—five business days after the plaintiff's arrest. The department did not receive the report until July 23, 2019.

On August 9, 2019, a department hearing officer held an administrative hearing to determine whether the

[4] Although § 14-227a has been amended since the date of the incident in question; see Public Acts, Spec. Sess., June, 2021, No. 21-1, §§ 116 and 117; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[5] An A-44 form is a form used by the police to report an arrest related to the operation of a motor vehicle while under the influence of intoxicating liquor or drugs. See *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 655 n.4, 200 A.3d 681 (2019). With respect to the narrative and the breath test results, § 14-227b-10 (b) of the Regulations of Connecticut State Agencies provides in relevant part that "[a]dditional statements or materials necessary to explain any item of information in the report may be attached to the report" and "shall be considered a part of the report . . . ."

Thus, we consider the A-44 form and its two attachments to collectively constitute the "report," as referenced in General Statutes § 14-227b (c) and § 14-227b-19 (a) of the Regulations of Connecticut State Agencies.

plaintiff's license to operate a motor vehicle should be suspended pursuant to § 14-227b. At the hearing, the plaintiff's attorney objected to the admission of the report on the ground that it was not prepared and mailed to the department within three business days, as required by § 14-227b (c). The hearing officer summarily overruled the objection and admitted the report, which was the only evidence submitted at the hearing.

Solely on the basis of the report, the hearing officer found that the four issues necessary to support a license suspension were satisfied, namely, (1) Officer Hewes had probable cause to arrest the plaintiff for operating a motor vehicle while under the influence of intoxicating liquor, (2) the plaintiff was arrested, (3) the plaintiff submitted to breath tests for alcohol, which indicated that he had an elevated blood alcohol content, and (4) the plaintiff was operating the motor vehicle. See General Statutes § 14-227b (g) (2). Accordingly, on the basis of the hearing officer's findings, the defendant, the Commissioner of Motor Vehicles (commissioner), suspended the plaintiff's license to operate a motor vehicle for forty-five days and required the installation of an ignition interlock device in his vehicle for six months.

Thereafter, the plaintiff appealed from the commissioner's decision to the Superior Court pursuant to the Uniform Administrative Procedure Act (UAPA). See General Statutes § 4-183. In that appeal, the plaintiff argued that the hearing officer abused her discretion by admitting the report into evidence because the report did not comply with the preparation and mailing requirement of § 14-227b (c). The plaintiff further argued that, because the improperly admitted report was the only evidence submitted at the administrative hearing, there was not substantial evidence on which to base the suspension of his license. The trial court rejected the plaintiff's arguments, concluding that adherence to the

preparation and mailing requirement of § 14-227b (c) is not necessary for the report's admissibility, so long as the report is "reasonably found to bear indicia of trustworthiness and reliability." Therefore, the trial court dismissed the plaintiff's appeal.

The plaintiff appealed to the Appellate Court, again claiming that the report was improperly admitted because the police had failed to comply with the statutory preparation and mailing requirement. See *Marshall* v. *Commissioner of Motor Vehicles*, 210 Conn. App. 109, 111, 269 A.3d 816 (2022). In a divided decision, the Appellate Court affirmed the judgment of the trial court. Id., 121. The majority concluded that, because § 14-227b (c) is not accompanied by any negative or prohibitory language, the preparation and mailing requirement is directory. See id., 117–18. As such, it determined that strict compliance with the preparation and mailing provision of § 14-227b (c) is not necessary for a report to be admissible at a hearing to suspend an operator's license. See id., 116–18. The majority further reasoned that there were sufficient indicia of reliability to ensure that the report was both reliable and trustworthy, and, thus, the hearing officer did not abuse her discretion in admitting it. Id., 120–21.

In his dissenting opinion, Judge Prescott concluded that, in the absence of testimony by the author of the report, a police report is not admissible if it fails to comply with the strictures of § 14-227b (c). Id., 129 (*Prescott*, *J.*, dissenting). Because the report was prepared five days after the incident, Judge Prescott would have concluded that it was inadmissible absent testimony from the arresting officer. See id., 122–23, 129 (*Prescott*, *J.*, dissenting). This appeal followed.[6]

[6] We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly determine that a [d]epartment . . . hearing officer conducting a motor vehicle operator's license suspension hearing had the discretion to admit into evidence an A-44 form and its attachments, including a narrative police report, notwith-

We begin by articulating the applicable standard of review. "This court reviews the trial court's judgment pursuant to the . . . UAPA . . . . Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [as here] a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] a governmental agency's time-tested interpretation . . . . [Thus] [t]he issue of statutory interpretation presented in this case is a question of law subject to plenary review."[7] (Citations omitted; internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 379–80, 194 A.3d 759 (2018).

Beginning with the language of the statute, as required by General Statutes § 1-2z, we observe that § 14-227b

standing the fact that the form and attachments were neither prepared nor mailed to the [c]ommissioner . . . in compliance with the timelines set forth in . . . § 14-227b (c) and the fact that the officer preparing the form and the attachments was not present for cross-examination?" *Marshall* v. *Commissioner of Motor Vehicles*, 342 Conn. 912, 272 A.3d 198 (2022).

[7] We note that the commissioner does not argue that the interpretation of the department's hearing officer is entitled to deference as a governmental agency's time-tested interpretation.

(c) provides in relevant part: "The police officer shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report and a copy of the results of any chemical test to the Department of Motor Vehicles within three business days. The report shall contain such information as prescribed by the Commissioner of Motor Vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. . . . The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for a violation of section 14-227a . . . ."

By the express terms of § 14-227b (c), the report shall be prepared and mailed to the department within three business days. It is well established that "the use of the word shall, though significant, does not invariably create a mandatory duty." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 757, 104 A.3d 713 (2014). "[T]he test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially [when] the requirement is stated in affirmative terms unaccompanied by negative words." (Internal quotation marks omitted.) *Strand/BRC Group, LLC* v. *Board of Representatives*, 342 Conn. 365, 384–85, 270 A.3d 43 (2022).

It is true, as the Appellate Court pointed out, that the legislative language at issue here is stated in affirmative terms, unaccompanied by any negative or prohibitory

words. See *Marshall* v. *Commissioner of Motor Vehicles*, supra, 210 Conn. App. 117. The absence of such language, however, is not dispositive, particularly when the substantive nature of the statutory provision is clear. See *Strand/BRC Group, LLC* v. *Board of Representatives*, 342 Conn. 387 (concluding that certain requirements in provision of city charter were mandatory despite lack of negative or prohibitory language because substantive nature of requirements was clear); *Blake* v. *Meyer*, 145 Conn. 612, 616, 145 A.2d 584 (1958) ("[i]t is clear that the provision under consideration is mandatory, not merely directory, even in the absence of prohibitory or negative language"). We find that, despite the absence of negative or prohibitory language in § 14-227b (c), the substantive nature of the provision is clear because it plainly promotes "the essence of the thing to be accomplished"; (internal quotation marks omitted) *Strand/BRC Group, LLC* v. *Board of Representatives*, supra, 384–85; namely, the accuracy and reliability of the information that will be used at the license suspension hearing.[8]

We arrive at this conclusion by first looking at what the legislature intended with respect to § 14-227b in general and subsection (c) in particular. In doing so, we do not write on a clean slate. We previously have

[8] The Appellate Court has addressed the admission of reports that did not strictly comply with the preparation and mailing requirement. See, e.g., *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 710 and n.6, 711–12 n.8, 692 A.2d 834 (1997) (upholding admission of report that was mailed to department four days after plaintiff's arrest); see also, e.g., *Packard* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New London, Docket No. KNL-CV-90-0514307-S (September 18, 1991) (5 Conn. L. Rptr. 5, 7) (upholding admission of report that was not mailed to department within three business days), aff'd, 29 Conn. App. 923, 616 A.2d 1177 (1992); *Peters* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 701413 (July 11, 1991) (4 Conn. L. Rptr. 301, 301) (same), aff'd, 26 Conn. App. 937, 601 A.2d 1 (1992). However, this court has never squarely addressed the issue. Now that we do, we conclude that the preparation and mailing provision is mandatory.

explained that, in drafting § 14-227b, the legislature intended "to protect the public by temporarily revoking, prior to conviction, the operating privileges of those who have demonstrated a reckless disregard for the safety of others, while at the same time providing procedures to afford due process to those [who] come within its ambit." *State* v. *Hickam*, 235 Conn. 614, 626, 668 A.2d 1321 (1995) (overruled on other grounds by *State* v. *Crawford*, 257 Conn. 769, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002)), cert. denied, 517 U.S. 1221, 116 S. Ct. 1851, 134 L. Ed. 2d 951 (1996); see also *Fishbein* v. *Kozlowski*, supra, 252 Conn. 50. To achieve these purposes, the legislature permitted the admission of police reports at the license suspension hearing without the need to produce the arresting officer, provided that certain procedures are followed to ensure the reliability of the information contained in the report.

Section 14-227b (c) provides those procedures by describing the specific information that must be contained in the report, and that information is both detailed in nature and crucial to the determination that must be made in the license suspension hearing. The provision requires that the arresting officer not only mail the report within three business days, but also *prepare* the report within that time frame, while the officer's recollection of the incident remains fresh. Our law recognizes that time is a key indicator of the reliability, and subsequent admissibility, of evidence. See, e.g., E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.4.2 (b) (1), p. 507 ("[s]tatements are frequently admitted under an exception when made while observing events or shortly thereafter because there is little time to forget or little opportunity to prevaricate or fabricate"). Statements are often admitted under a hearsay exception when they are made temporally near the event. See, e.g., *Calcano* v. *Calcano*, 257 Conn. 230, 240,

777 A.2d 633 (2001) (business records are admissible only if made "at the time of the act described . . . or within a reasonable time thereafter" (internal quotation marks omitted)); *Gigliotti* v. *United Illuminating Co.*, 151 Conn. 114, 124, 193 A.2d 718 (1963) (written statement is admissible as past recollection recorded only if "made at or about the time of the events"); *Martin* v. *Sherwood*, 74 Conn. 475, 482, 51 A. 526 (1902) (statements about then existing physical condition are admissible, but statements regarding past conditions are inadmissible).

Here, the legislature determined that the appropriate time frame to imbue the report with sufficient reliability is three business days. So long as the preparation and mailing requirement is met, the report is automatically admissible in a license suspension proceeding without any further inquiry into its reliability for admission. See *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 668–69, 200 A.3d 681 (2019).

Additionally, preparation of the report, by the terms of the statute, must include both the results of any blood, breath or urine test and the basis for probable cause; see General Statutes § 14-227b (a) and (c); which are two of the four issues that must be established at a license suspension hearing. See General Statutes § 14-227b (g) (2). Thus, those issues and their timely preparation and subsequent mailing go to the essence of the license suspension hearing. Consequently, the preparation and mailing requirement in § 14-227b (c) is mandatory, despite the lack of negative or prohibitory language. See *Strand/BRC Group, LLC* v. *Board of Representatives*, supra, 342 Conn. 387.

This very point underlies our decision in *Volck*, in which this court stated that "[s]ubsection (c) was added to § 14-227b . . . when the issues related to license suspension were removed from the criminal setting and

transferred . . . to the department . . . for administrative determination. . . . Its evident purpose is to provide sufficient indicia of reliability so that the report can be introduced [into] evidence *as an exception to the hearsay rule*, especially in license suspension proceedings, *without the necessity of producing the arresting officer*." (Emphasis added; citation omitted.) *Volck* v. *Muzio*, supra, 204 Conn. 517–18.

Furthermore, this court has previously noted that "§ 14-227b-19 (a) of the Regulations of Connecticut State Agencies, which has the force and effect of a statute . . . provides in clear and straightforward terms that a police officer's report concerning the arrest of a drunk driving suspect shall be admissible into evidence at [a license suspension] hearing *if* it conforms to the requirements of subsection (c) of [§] 14-227b . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 668.

Thus, the statutory language, the purpose of the statute, and the applicable regulations demonstrate that the legislature intended for the report to meet the requirements of § 14-227b (c) before the report could be automatically admissible, thereby providing a regulatory scheme to remove reckless drivers from the road expeditiously while also affording the operator the necessary due process. Permitting the admission of the report without the need for police officer testimony accomplishes that legislative aim. Requiring the arresting officer to be present at a license suspension hearing to establish a report's reliability and admissibility would substantially slow the process and interfere with the legislative goal of quickly protecting the public from intoxicated drivers—hence, the creation of § 14-227b (c) and the automatic admissibility of a report that is in compliance therewith without the need for an arresting office's presence.

The issue posed by the present case, however, is whether the failure to comply with the preparation and mailing requirement of § 14-227b (c) renders the report inadmissible in a license suspension hearing. Because we have now determined that the requirement is mandatory, we conclude that, in the absence of the testimony of the arresting officer, it does. Although this court has not directly addressed whether a report may be admissible even if it does not comply with the preparation and mailing requirement of § 14-227b (c), on two occasions, we have suggested that the failure to meet the requirements of the provision would be a basis to exclude a report from admission into evidence at a license suspension hearing, unless the arresting officer testifies.

First, in *Volck*, the plaintiff refused to submit to a blood, breath or urine test that would help determine whether he had been operating a motor vehicle while under the influence of intoxicating liquor or drugs. See *Volck* v. *Muzio*, supra, 204 Conn. 508–509. Under those circumstances, General Statutes (Rev. to 1987) § 14-227b (c) required that a report be endorsed by a third person who witnessed the refusal. See id., 516; see also General Statutes (Rev. to 1987) § 14-227b (c) ("[i]f the person arrested refuses to submit to such test or analysis . . . a written report of such refusal . . . shall be endorsed by a third person who witnessed such refusal"). The report at issue did not include that third person's endorsement. *Volck* v. *Muzio*, supra, 509–10, 516. We noted that "[t]he absence of the endorsement of a third person who witnessed the [plaintiff's] refusal of testing *would have rendered* [*the police officer's*] *report inadmissible if the plaintiff had objected thereto*. No objection was raised, however, to its use at the license suspension hearing." (Emphasis added.) Id., 518. Because there was no objection, the report was properly considered like any unobjected to hearsay evi-

dence. Id. We further explained that "[t]he restriction of the license suspension hearing to the four issues contained in [what is now § 14-227b (g) (2)] indicates that compliance with [§ 14-227b (c)] was not intended to be a prerequisite for a suspension." Id., 517.

Second, more recently, in *Do*, in which the police report satisfied all of the statutory requirements of § 14-227b (c), but the report itself contained several significant factual errors, the plaintiff claimed that the discrepancies rendered the report unreliable despite its compliance with the statute. See *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 655–56. Again, even though compliance with the admissibility requirements of § 14-227b (c) was not the issue, in addressing whether a police report with internal inconsistencies bearing on the report's reliability was nevertheless admissible, we noted that subsection (c) sets forth "admissibility requirements"; id., 668; and that "[n]either this court nor the Appellate Court has ever recognized any basis for excluding a police report from evidence at a license suspension hearing *other than the failure to comply with § 14-227b (c)*. Indeed, we consistently have rejected claims that a report should be excluded for *any other reason*." (Emphasis added.) Id., 669.

We now make clear what we suggested in *Volck* and *Do*. That is, § 14-227b (c) describes substantive requirements that police reports must meet, and the failure to meet those requirements renders a report inadmissible because it fails to satisfy the exception for the report to be admitted without the need to produce the arresting officer at the license suspension hearing. The provision serves an "obvious and important purpose"; *Strand/BRC Group, LLC* v. *Board of Representatives*, supra, 342 Conn. 380; namely, to hasten the speed with which unsafe drivers can be removed from the road without posing due process concerns to the formal dispossession of an operator's license. The provision is thus sub-

stantive and mandatory, and the failure to comply with it means that the report has not met the requirements for admissibility.

Consequently, a report that does not comply with the hearsay exception created by § 14-227b (c) cannot be admitted into evidence without producing the arresting officer. We acknowledge that a license suspension hearing is limited to the four issues identified in § 14-227b (g) (2) and that compliance with subsection (c) was not intended to be a prerequisite to proving those elements. See *Volck* v. *Muzio*, supra, 204 Conn. 517; see also *Do* v. *Commissioner of Motor Vehicles*, supra, 330 Conn. 674–75. Our conclusion today that a report is inadmissible if it fails to comply with § 14-227b (c) is not inconsistent with the fact that license suspension hearings are limited to the four inquiries of § 14-227b (g) (2). Rather, we point out that § 14-227b (c) speaks not to the proof necessary to support a license suspension but, rather, to the admissibility requirements of a report used to prove the four issues identified in § 14-227b (g) (2). In other words, compliance with subsection (c) is not a prerequisite for license suspension, but it is a procedural hurdle that must be cleared if the report is the means by which the four inquiries are sought to be proven.

Turning now to the present case, we note that the arresting officer did not complete the report until he signed and dated it five business days after the plaintiff's arrest. It is undisputed that the arresting officer failed to comply with the three business day preparation and mailing requirement of § 14-227b (c). The plaintiff's attorney objected to the admission of the report on that ground. The hearing officer simply overruled the objection and admitted the report without hearing testimony from the arresting officer. Because the report failed to satisfy the preparation and mailing requirement, we conclude that the hearing officer abused her

discretion by admitting the noncompliant report without the testimony of the arresting officer.

Although the Appellate Court concluded that the report was admissible because there were other indicia of reliability; see *Marshall* v. *Commissioner of Motor Vehicles*, supra, 210 Conn. App. 120; we disagree that a report that fails to comply with § 14-227b (c) is nevertheless admissible. Specifically, the Appellate Court concluded that, because the report met some of the requirements of § 14-227b (c)—in particular, the arresting officer signed the report, set forth the grounds for his belief that there was probable cause to arrest the plaintiff, and stated that the plaintiff had submitted to breath tests—the report was sufficiently reliable to be admissible, even though it was not in strict compliance with subsection (c). Id., 120–21. That conclusion was based on the Appellate Court's determination that the preparation and mailing requirement is directory. Id., 118. However, in light of our determination that the requirements of subsection (c) are mandatory, this conclusion, which allows a report to be admissible if it meets *some* of the requirements of § 14-227b (c), cannot stand. Accordingly, we conclude that a report must comply with the preparation and mailing requirement of § 14-227b (c) to be admitted without the necessity of producing the arresting officer.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court with direction to sustain the plaintiff's appeal.

In this opinion the other justices concurred.

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Barash *v.* Lembo. 264
Breach of fiduciary duty; trusts; summary judgment; whether plaintiffs were collaterally estopped from litigating issue of whether defendant had breached her fiduciary duty, when appeal of Probate Court decree denying petition to remove executor was pending; whether pending probate appeal that was to be conducted as trial de novo suspended preclusive effect of otherwise final judgment for purposes of collateral estoppel doctrine; whether trial court incorrectly concluded

that defendant had not owed trust beneficiaries fiduciary duty to collect and protect assets that were not yet part of trust res but that were to be distributed to trust from decedent's residuary estate when estate settled; whether there was genuine issue of material fact as to whether defendant had breached her fiduciary duty; whether trial court's judgment could be affirmed on alternative ground that plaintiffs' complaint had failed to state claim, as matter of law, that defendant had breached her fiduciary duty as trustee; elements of claim for breach of fiduciary duty against trustee, discussed; Rendahl *v.* Peluso *(173 Conn. App. 66), to extent that it required allegation of self-dealing as element of claim of breach of fiduciary duty against trustee, overruled.*

Baun *v.* Grandison Management, Inc. (Order) 934
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Bill of discovery; request for production of certain information by defendant, who published Internet blog, and search of defendant's electronic devices, which purportedly would enable plaintiff to ascertain identifies of anonymous commenters who posted allegedly defamatory comments about plaintiff on defendant's blog; claim that trial court improperly granted plaintiff's bill of discovery; whether trial court's decision to grant plaintiff's bill of discovery was final judgment under second prong of State *v.* Curcio *(191 Conn. 27).*
Bonds *v.* Commissioner of Correction (Order) 956
Bridgeport *v.* Freedom of Information Commission (Order). 936
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Canner *v.* Governors Ridge Assn., Inc. 726
Breach of contract; negligence; alleged violations of Connecticut Common Interest Ownership Act (CIOA) (§ 47-200 et seq.); certification from Appellate Court; claim that defendant condominium association breached condominium association's declaration and bylaws by failing to repair common elements of common interest community; whether Appellate Court improperly affirmed trial court's judgments in favor of defendant on ground that statute of limitations (§ 52-577) generally applicable to tort actions barred plaintiffs' CIOA claims seeking recovery for alleged negligence during construction process; whether Appellate Court incorrectly concluded that contractual CIOA claims were untimely under statute of limitations (§ 52-576) applicable to contract actions.
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Companions & Homemakers, Inc. *v.* A&B Homecare Solutions, LLC. 132
Tortious interference with contractual relations; alleged violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); claim that trial court improperly found that defendant had tortiously interfered with plaintiff's provider enrollment agreement with Department of Social Services on ground that defendant did not owe plaintiff duty to disclose; claim that trial court improperly found that defendant had tortiously interfered with noncompete agreements between plaintiff and its employees; whether evidence was sufficient to support trial court's finding that defendant's tortious conduct caused plaintiff to sustain damages; claim that trial court improperly found that defendant had violated CUTPA.
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Freedom of information; administrative appeal; appeal to trial court from decision of defendant, Freedom of Information Commission, ordering disclosure of certain documents from homicide investigation files of town's police department; whether requested documents fell within exception from disclosure of law enforcement records pursuant to provision of Freedom of Information Act (§ 1-210 (b) (3) (D)) that exempts from disclosure records compiled in connection with criminal investigation if disclosure of those records would result in disclosure of information to be used in prospective law enforcement action that would be prejudicial to such action; correct legal standard governing claims of exemption under § 1-210 (b) (3) (D), discussed; whether administrative record was sufficient to permit this court to apply newly adopted reasonable possibility standard as matter of law; whether case should be remanded to trial court.
Dusto *v.* Rogers Corp. (Order) . . . 939
DXR Finance Parent, LLC *v.* Theraplant, LLC (Order) . . . 957
E & I Investments, LLC *v.* Hecht (Order) . . . 908
Ebron *v.* Commissioner of Correction (Order) . . . 935
Elwell *v.* Kellogg (Order) . . . 927
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Habeas corpus; certification from Appellate Court; judgment of habeas court dismissing petitioner's habeas petition on grounds that it was untimely filed and there was no good cause to excuse delay; claim that term "prior petition" in statute (§ 52-470 (d)) was not limited to habeas petitions filed in state court and, therefore, that petitioner's second state habeas petition was timely because it was filed within two years of final judgment rendered in connection with petitioner's federal habeas petition; whether Appellate Court correctly concluded that federal habeas petition is not "prior petition," as contemplated by § 52-470 (d); whether habeas court properly exercised its discretion in determining that petitioner had failed to establish good cause for untimely filing of his second state habeas petition and properly dismissed it pursuant to § 52-470 (e).
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Gainty *v.* Infantino (Order) . . . 948
GenConn Energy, LLC *v.* Public Utilities Regulatory Authority . . . 532
Administrative appeal; appeal to trial court from final decision of defendant, Public Utilities Regulatory Authority (PURA), which reduced plaintiff electric supplier's proposed return on capital with respect to two of plaintiff's peaking generation facilities that were designed to provide additional electric supply to Connecticut consumers at times of increased demand; claim that PURA must use specific rate-making methodology of statute (§ 16-243u) applicable to peaking generation and not general rate-making principles found in statute (§ 16-19e) that is applicable to all energy generators in state; whether trial court correctly determined that PURA had acted within its statutory authority when it lowered plaintiff's debt rate in PURA's decision on plaintiff's 2021 Annual Fixed Revenue Requirements application; whether PURA's action in lowering debt rate was arbitrary and capricious.
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Medical malpractice; wrongful life; sovereign immunity; notice of claim; claim that trial court's judgment should be set aside because claims on which plaintiffs prevailed at trial were barred by sovereign immunity; whether certain claims were outside scope of Claims Commissioner's statutory ((Rev. to 2015) § 4-160 (b)) waiver of sovereign immunity; whether claims sounded in informed consent rather than in medical malpractice; whether waiver of sovereign immunity was invalid due to plaintiffs' failure to submit to Claims Commissioner physician's opinion letter addressing certain claims and certificate of good faith in accordance with statute (§ 52-190a); claim that plaintiffs' minor child was not entitled to recover damages based on claims brought by plaintiffs on his behalf because he did not suffer any legally cognizable injuries; whether claims brought by plaintiffs on child's behalf must be construed as wrongful life claims; whether wrongful life claims should be recognized in Connecticut; whether plaintiffs established valid, conventional medical malpractice claim with respect to child's injuries; whether trial court abused its discretion in admitting certain expert testimony under State *v.* Porter *(241 Conn. 57).*
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Administrative appeal; labor law; claim that plaintiff town violated Municipal Employee Relations Act (§ 7-467 et seq.) by unilaterally changing way in which it calculates pension benefits for members of named defendant union; certification from Appellate Court; whether Appellate Court improperly upheld trial court's dismissal of plaintiff's administrative appeal from decision of defendant State Board of Labor Relations; whether State Board of Labor Relations acted unreasonably, illegally, arbitrarily, or in abuse of its discretion when it decided to retain long-standing standard pursuant to which union's waiver of its right to bargain

collectively must be clear and unmistakable and when it declined to follow National Labor Relations Board's decision in MV Transportation, Inc. *(368 N.L.R.B. No. 66), and to adopt federal contract coverage standard; whether Appellate Court improperly deferred to labor board's decision to apply clear and unmistakable waiver standard.*

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Tortious interference with expected inheritance; summary judgment; collateral estoppel; certification from Appellate Court; whether Appellate Court properly dismissed for lack of subject matter jurisdiction defendant's appeal from trial court's partial denial of his motion for summary judgment on ground that there was no appealable final judgment; whether trial court correctly concluded that plaintiff was collaterally estopped from litigating issue of whether defendant had exerted undue influence over decedent when decedent created her will, when appeal of Probate Court decree admitting will to probate and rejecting undue influence claim was pending; whether pending probate appeal that was to be conducted as trial de novo suspended preclusive effect of otherwise final judgment for purposes of collateral estoppel doctrine.

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Raynor *v.* Commissioner of Correction (Order) . . . 944
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Retained Realty, Inc. *v.* Selke (Order) . . . 950
Reyes *v.* State (Order) . . . 944
Robotham *v.* Commissioner of Correction (Order) . . . 958
Roman *v.* Commissioner of Correction (Order) . . . 952
Rose *v.* Commissioner of Correction . . . 333

Habeas corpus; certification from Appellate Court; claim that habeas court improperly dismissed untimely filed habeas petition on ground that petitioner had failed to establish good cause to overcome rebuttable presumption of unreasonable delay imposed by statute (§ 52-470 (c) and (e)); whether habeas court's conclusion that petitioner had failed to establish good cause for late filing was predicated on clearly erroneous factual finding; whether petitioner's claim that trial counsel rendered ineffective assistance by failing to advise him of filing time constraints imposed by § 52-470 (c) and (e) can serve to establish good cause under that statute.

Sacor Financial, Inc. *v.* Wright (Order) . . . 922
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Probate appeal; appeal to Superior Court from Probate Court's decision declining plaintiff's request to enforce against defendant in terrorem clauses contained in will and trust to which plaintiff and defendant were beneficiaries; certification from Appellate Court; whether Appellate Court properly upheld trial court's judgment dismissing plaintiff's probate appeal; whether defendant had violated terms of in terrorem clauses; whether enforcement of in terrorem clauses, which provided that beneficiary would forfeit his or her rights as beneficiary if he or she objected in any manner to any act taken in good faith by any fiduciary, violated public policy.

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Trial court's jurisdiction to decide motion to open judgment dismissing criminal charges following defendant's purportedly successful completion of statutory (§ 54-56l) supervised diversionary program for persons with psychiatric disabilities; certification from Appellate Court; whether Appellate Court correctly concluded that trial court was divested of jurisdiction to decide motion to open when trial court had dismissed defendant's pending criminal charges pursuant to § 54-56l (i); whether statutory (§ 52-212a) "four month rule," which permits trial court to retain jurisdiction over civil judgment for four months after notice of judgment has been sent and to open judgment during that four month period, was applicable in criminal cases; State *v.* Wilson *(199 Conn. 417), to extent that it held that four month rule of § 52-212a applied to criminal judgments, overruled; whether civil rule permitting trial court to open judgment obtained by fraud applied in criminal context; whether record supported finding of fraud or intentional misrepresentation.*
State *v.* Christopher R. (Order) . . . 946
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Felony murder; burglary first degree; conspiracy to commit burglary first degree; attempt to commit robbery first degree; criminal possession of firearm; claim that trial court committed plain error by instructing jury that it could consider defendant's interest in outcome of trial, in violation of supervisory rule adopted in State *v.* Medrano *(308 Conn. 604); whether defendant established that erroneous jury instruction resulted in manifest injustice; claim that prosecutor made certain improper remarks during cross-examination of defendant and during rebuttal argument.*
State *v.* James S. (Order) . . . 932
State *v.* Jeffrey G. (Order) . . . 936
State *v.* Gamer . . . 331
Violation of probation; certification from Appellate Court; whether Appellate Court erred in failing to reverse trial court's judgment revoking defendant's probation on ground that evidence was insufficient to establish that defendant's failure to pay restitution was wilful; whether Appellate Court correctly concluded that trial court had not abused its discretion in imposing term of imprisonment for defendant's violation of probation rather than some lesser sanction; appeal dismissed on ground that certification was improvidently granted.
State *v.* Henderson . . . 648
Home invasion; burglary first degree; burglary third degree as lesser included offense of burglary first degree; claim that home invasion conviction should be vacated or that new trial should be granted because jury's verdict of guilty of home invasion and verdict of not guilty of lesser included offense of third degree burglary was legally inconsistent; whether State *v.* Arroyo *(292 Conn. 558), should be overruled or modified insofar as it held that consistency in verdicts is immaterial and that legally inconsistent verdicts are not reviewable on appeal; claim that trial court committed plain error by accepting legally inconsistent verdicts; claim that trial court abused its discretion in denying defense counsel's motion for mistrial when jury deliberations were delayed for twenty-five days because defendant was exposed to and eventually contracted COVID-19.*
State *v.* Kenneth B. (Order) . . . 952
State *v.* King (Order) . . . 918
State *v.* Kyle A.. . . . 437
Burglary first degree; criminal mischief first degree; threatening second degree; certification from Appellate Court; claim that Appellate Court incorrectly concluded that trial court had not committed plain error in instructing jury; whether

trial court committed plain error in failing to identify specific elements of crime or crimes that defendant allegedly intended to commit when he unlawfully entered residence for purposes of charge of first degree burglary.

State *v.* Martin G. (Order) . . . 944
State *v.* Mieles (Order) . . . 920
State *v.* Perez-Lopez (Order) . . . 902
State *v.* Olivero (Order) . . . 910
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Manslaughter first degree with firearm; criminal possession of firearm; illegal possession of weapon in motor vehicle; claim that trial court violated defendant's constitutional right to confrontation by allowing chief medical examiner to testify about photographs and report from autopsy that former employee of medical examiner's office had performed; whether chief medical examiner's testimony regarding autopsy report was harmless; claim that evidence was insufficient to support defendant's conviction of illegal possession of weapon in motor vehicle insofar as trial court, in finding that defendant could not have had proper permit for weapon for purposes of charge of illegal possession of weapon in motor vehicle, relied on parties' stipulation that defendant had prior felony conviction, when stipulation was admitted only for purposes of another charge and stipulation was only evidence that defendant had previously been convicted of felony.

State *v.* Russo (Order) . . . 938
State *v.* Samuel U. . . . 304

Sexual assault first degree; risk of injury to child; unpreserved claim that defendant's constitutional right to due process was violated by admission of testimony about his prior sexual misconduct to prove propensity under relevant provision (§ 4-5 (b)) of Connecticut Code of Evidence insofar as state's notice of its intent to offer such evidence was inadequate and did not conform to evidence elicited at trial; claim that trial court had abused its discretion in admitting evidence of defendant's prior sexual misconduct on ground that uncharged sexual misconduct, which occurred fourteen years before conduct giving rise to charged offense, was not proximate in time to charged offense and, therefore, was too remote in time to be relevant.

State *v.* Sayles . . . 669

Felony murder; conspiracy to commit robbery first degree; motions to suppress; certification from Appellate Court; whether Appellate Court improperly upheld defendant's conviction; propriety of trial court's denial of defendant's motions to suppress contents of defendant's cell phone; claim that article first, § 8, of Connecticut constitution mandates protection of suspect's rights under Miranda *v.* Arizona *(384 U.S. 436) via adoption of rule that evidence obtained through questioning suspect after suspect has invoked right to counsel must be suppressed and cannot be used in state's case-in-chief at subsequent trial; whether any error in admission into evidence of contents of defendant's cell phone was harmless beyond reasonable doubt.*

State *v.* Sullivan (Order) . . . 927
State *v.* Taveras (Order) . . . 903
State *v.* Thomas S. (Order) . . . 943
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Stiegler *v.* Meriden . . . 452

Breach of contract; collective bargaining; pension benefits for municipal firefighters; interest arbitration award issued pursuant to statute (§ 7-473c) granting Meriden firefighters 2 percent retroactive wage increase; claim that defendant city and defendant municipal pension board had breached collective bargaining agreement between plaintiffs' union and city by failing to recalculate plaintiff retirees' pension benefits based on retroactive wage increase awarded in binding interest arbitration; unpreserved claim that trial court lacked subject matter jurisdiction on basis that plaintiffs had failed to exhaust their administrative remedies by requesting relief directly from pension board before filing present action; whether plain language of collective bargaining agreement, pension plan, and interest arbitration award required defendants to apply 2 percent wage increase only to active employees and not to former employees who voluntarily retired before issuance of arbitration award.

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Stevens *v.* Khalily (Order) . . . 915
Strauss *v.* Strauss (Order) . . . 914
TLOA Acquisitions, LLC-Series 2 *v.* Genevieve, LLC (Order) . . . 935

TLOA of CT, LLC *v.* Taipe (Order) 923
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Valentine *v.* Commissioner of Correction (Order) 913
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Wells Fargo Bank, N.A. *v.* Melahn (Order) 951
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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CHASE HOME FINANCE, LLC *v.* DANIEL J. SCROGGIN (AC 45996)

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

Syllabus

The plaintiff, C Co., sought to foreclose a mortgage on certain real property owned by the defendant, S. Thereafter, A Co. was substituted for C Co., and the trial court granted A Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon, from which S appealed to this court, which reversed in part the trial court's judgment and remanded the case to that court for further proceedings. Following the remand, A Co. filed a motion for summary judgment as to liability only, and, in support of its motion, submitted, inter alia, the affidavit of H, a litigation specialist employed by A Co.'s loan servicer. In her affidavit, H summarized the history of the assignment of the mortgage and further averred that C Co. had been the holder of the note at the time the present action was commenced and that A Co. was the current holder of the note and the mortgagee of record. After the deadline for filing a response to A Co.'s motion for summary judgment expired, S filed a document captioned "Practice Book § 17-47 Motion for Extension of

Time to Respond to the Plaintiff's Motion for Summary Judgment, or Alternatively, Objection to Summary Judgment," which the court denied as untimely. S then noticed the deposition of a designee of A Co., seeking various documents, and A Co. filed a motion for a protective order on the grounds that S's requests were untimely and sought information to which he was not entitled, and the trial court summarily granted the motion for a protective order. When the parties appeared before the court, the court granted A Co.'s motion for summary judgment without a hearing, in the absence of opposition, after S's attorney acknowledged that he had not filed a response to the motion. Subsequently, A Co. filed a motion for a judgment of strict foreclosure, which the trial court granted and rendered judgment thereon, from which S appealed to this court, which reversed in part the trial court's judgment and remanded the case to that court for further proceedings. During the proceedings on remand, A Co. reclaimed for adjudication its summary judgment motion, and S issued notices of two depositions, seeking information nearly identical to the information he had previously sought, which was the subject of the protective order. A Co. then moved for a protective order barring S from deposing its corporate designee and keeper of records. S filed a memorandum of law in opposition to A Co.'s motion for summary judgment, arguing, inter alia, that, because A Co. refused to produce H for a deposition, the court should deny the motion pursuant to the rule of practice (§ 17-47) that permits the court to deny summary judgment when appropriate documents are unavailable. S also filed an affidavit pursuant to Practice Book § 17-47 explaining why he should be granted a continuance to conduct discovery. After a hearing, the court granted A Co.'s motion for summary judgment as to liability and rendered a judgment of strict foreclosure, from which S appealed to this court. *Held*:

1. S could not prevail on his claim that the trial court erred in granting summary judgment as to liability because it improperly relied on H's affidavit in determining that C Co. was the holder of the note at the time the action had been commenced: H averred that she had personal knowledge of the records pertaining to the note and mortgage in this case based upon her review of those records, which were received and maintained in the regular and ordinary practice of A Co.'s loan servicer, such that they constituted competent evidence of C Co.'s status as holder of the note when the action had been commenced; moreover, this court rejected S's claim that the trial court should not have relied on H's affidavit because she failed to attach to it the documents on which her averments were based, noting that our Supreme Court rejected virtually the same argument in *RMS Residential Properties, LLC* v. *Miller* (303 Conn. 224), and reasoning that to be competent to testify, H needed only to have personal knowledge of the business records.
2. S could not prevail on his claim that the trial court erred in granting summary judgment as to liability because it failed to give him, as the

nonmoving party, the benefit of all favorable inferences to be drawn from the evidence by neglecting to draw an adverse inference from A Co.'s refusal to produce witnesses and documents requested by S: S failed to set forth any facts, other than A Co.'s filing of a motion for a protective order, which is permitted by our rules of practice, in support of his contention that A Co. had engaged in extraordinary measures to prevent S from deposing H or any other corporate designees of A Co.; moreover, S's claim that he was entitled to an adverse inference for A Co.'s failure to allow him to depose H on the basis of the missing witness rule adopted in *Secondino* v. *New Haven Gas Co.* (147 Conn. 672) was legally flawed in that the missing witness rule was significantly limited in civil cases by statute (§ 52-216c) after *Secondino* had been issued, and S failed, in his brief to this court, to acknowledge the abrogation of *Secondino*; furthermore, setting aside the fact that S's reliance on *Secondino* was misplaced, S was unable to demonstrate that he would have been entitled to the benefit of the adverse inference permitted by § 52-216c.

3. S could not prevail on his claim that the trial court abused its discretion when it implicitly granted A Co.'s motion for a protective order, resulting in a complete denial of discovery and a denial of his ability to rebut A Co.'s claims: S's claim was belied by the fact that he neither filed a request pursuant to Practice Book § 17-47 with the court nor requested that the court rule on A Co.'s motion for a protective order; moreover, the trial court granted A Co.'s motion for a protective order as to S's request to depose a designee of the plaintiff after the first remand from this court and prior to S's second appeal, and S could have challenged the propriety of the protective order in his second appeal, but chose not to do so; furthermore, further discovery was beyond the rescript order of this court in the second appeal, as this court addressed the discovery issue because it was likely to arise on remand and determined that the trial court did not abuse its discretion in ruling that S's request for an extension of time to conduct discovery to respond to A Co.'s motion for summary judgment was untimely.

Argued January 3—officially released April 9, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant was defaulted for failure to plead; thereafter, Bank of America, N.A., was cited in as a defendant and the plaintiff filed an amended

complaint; subsequently, AJX Mortgage Trust I was substituted as the party plaintiff; thereafter, the court, *Aurigemma, J.*, granted the substitute plaintiff's motion for judgment as to counts two through six of the amended complaint; subsequently, the court granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court, *Keller*, *Prescott* and *Bear*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings; thereafter, the substitute plaintiff withdrew counts five and six of the amended complaint; subsequently, the court, *Aurigemma, J.*, granted the substitute plaintiff's motion for summary judgment as to liability only and granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court, *Keller*, *Moll* and *Bishop*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings; thereafter, the court, *Hon. Edward S. Domnarski*, judge trial referee, granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

Thomas P. Willcutts, for the appellant (named defendant).

Christopher J. Picard, with whom, on the brief, was *Joseph R. Dunaj*, for the appellee (substitute plaintiff).

Opinion

CRADLE, J. The defendant, Daniel J. Scroggin, who is also known as Daniel F. Scroggin or Daniel Scroggin, appeals from the judgment of strict foreclosure rendered by the trial court, for the third time, in favor of the substitute plaintiff, AJX Mortgage Trust I, a Delaware

Trust, Wilmington Savings Fund Society, FSB, Trustee.[1] On appeal, the defendant claims that the court (1) erred in granting summary judgment as to liability in that it improperly relied on an affidavit of a loan officer employed by the plaintiff in determining that the original plaintiff, Chase Home Finance, LLC (Chase), was the holder of the note in this case at the time the action was commenced and failed to draw an adverse inference from the plaintiff's refusal to produce witnesses and documents requested by the defendant, and (2) abused its discretion when it implicitly granted the plaintiff's motion for a protective order, which, he alleges, "resulted in a complete denial of discovery and a denial of [his] ability to rebut the plaintiff's claims." We affirm the judgment of the trial court.

[1] This is the third appeal taken from a judgment rendered in this case. We note that, "[i]n a prior appeal, this court explained that in September, 2010, after the named plaintiff, Chase Home Finance, LLC (Chase), had commenced this action against the defendant, Chase filed a motion to cite in Bank of America, N.A. (Bank of America), as a [third-party] defendant. The court granted this motion. Subsequently, [Chase] served Bank of America with an amended complaint that alleged that Bank of America was a lien holder. In March, 2011, Bank of America was defaulted for failure to appear. In January, 2012, Middconn Federal Credit Union sought to be made a party defendant to the action as a postjudgment lis pendens holder. The court granted the request. Later, Middconn Federal Credit Union was defaulted for failure to plead and failure to disclose a defense.

"In June, 2012, Chase moved to substitute JPMorgan Chase Bank, N.A., as [the] plaintiff in the action. The court granted the motion. In June, 2014, JPMorgan Chase Bank, N.A., moved to substitute Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its trustee, as [the] plaintiff in the action. The court granted the motion. In July, 2015, Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its trustee, moved to substitute AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, FSB, Trustee, as [the] plaintiff in the action. The court granted the motion. *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 729 n.1, 176 A.3d 1210 (2017). As in the prior appeal, we will refer to AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, FSB, Trustee, as the plaintiff. Additionally, because neither Bank of America nor Middconn Federal Credit Union is participating in this appeal, we will refer to Daniel J. Scroggin as the defendant." (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 846 n.1, 222 A.3d 1025 (2019).

The following factual and procedural history is relevant to our resolution of the defendant's claims on appeal. In 2009, Chase commenced the present foreclosure action against the defendant. In its original complaint, Chase alleged that, in 2007, the defendant executed a promissory note in favor of Chase Bank USA, N.A., which was secured by a mortgage on certain real property in Portland owned by the defendant. Chase further alleged that the mortgage was subsequently assigned to it, that it was the holder of the note and mortgage, and that the defendant had defaulted on the note by failing to make the required payments. By way of relief, Chase sought, in relevant part, foreclosure of the mortgage.

In 2010, after the defendant was defaulted for failure to plead, Chase filed a request for leave to amend its complaint along with the proposed amended complaint, to which the defendant did not object. At no time did the defendant move to set aside the default for failure to plead.

In November, 2015, the defendant filed an answer to the original complaint and disclosed a defense challenging the plaintiff's "right and standing to foreclose upon the subject mortgage . . . ." Shortly thereafter, Chase moved for a judgment of strict foreclosure. In April, 2016, the defendant filed an answer to Chase's amended complaint and an objection to the plaintiff's motion for strict foreclosure. Following a hearing, the trial court, *Aurigemma*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure.

The defendant appealed from the judgment of strict foreclosure to this court. This court reversed the judgment, concluding that the trial court had abused its discretion in failing to consider the effect of the amended complaint upon the 2010 default and that the court should have considered the defendant's answer to

the amended complaint as well as his disclosed defense. *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 745–46, 176 A.3d 1210 (2017) (*Chase I*).

In March, 2018, following remand, the plaintiff moved for summary judgment as to liability only on its strict foreclosure claim. In support of its motion, the plaintiff submitted, inter alia, the affidavit of Naomi Hernandez, a litigation specialist employed by the plaintiff's loan servicer. In her affidavit, Hernandez summarized the history of the assignment of the mortgage and further averred, in relevant part, that Chase was the holder of the note at the time the present action was commenced and that the plaintiff is the current holder of the note and is the mortgagee of record.

The deadline for filing a response to the plaintiff's motion for summary judgment expired on May 10, 2018. See Practice Book § 17-45 (b).[2] On May 24, 2018, the defendant filed a document captioned "Practice Book § 17-47 Motion for Extension of Time to Respond to the Plaintiff's Motion for Summary Judgment, or Alternatively, Objection to Summary Judgment."[3] The court, *Aurigemma, J.*, denied that motion as untimely. Also on May 24, 2018, the defendant noticed the deposition

[2] Practice Book § 17-45 provides: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents.

"(b) Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence.

"(c) Unless otherwise ordered by the judicial authority, the moving party shall not claim the motion for summary judgment to the short calendar less than forty-five days after the filing of the motion for summary judgment."

[3] Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

of a designee of the plaintiff, seeking numerous documents, including "[a]ll documents in the deponent's possession, custody or control that the [plaintiff's] affiant relied upon in executing the [plaintiff's] affidavit in support of summary judgment." The plaintiff filed a motion for a protective order on the grounds that the defendant's requests were untimely and sought information to which he was not entitled, to which the defendant objected. The trial court, *Aurigemma*, *J.*, summarily granted the motion for a protective order.

On May 29, 2018, the parties appeared before the court, *Aurigemma*, *J.*, at short calendar. The defendant's attorney acknowledged that he had not filed a response to the motion for summary judgment. The court then proceeded to rule on the motion without a hearing, concluding: " 'Well, there's no opposition, so the motion's granted, absent opposition.' " *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 850, 222 A.3d 1025 (2019) (*Chase II*). The court thereafter granted the plaintiff's subsequent motion for judgment of strict foreclosure.

The defendant appealed that judgment on the grounds, inter alia, that the court (1) erred in granting summary judgment without hearing oral argument as required by Practice Book § 11-18 and (2) abused its discretion in denying his motion for an extension of time to respond to the plaintiff's motion for summary judgment pursuant to Practice Book § 17-47. Id., 846. In *Chase II*, this court concluded that "the defendant had a right to oral argument, which was not waived, with respect to the plaintiff's motion for summary judgment, and, therefore, the trial court improperly adjudicated the motion without permitting oral argument." Id., 859. As to the defendant's second claim, which the court addressed because it was likely to arise on remand; see id., 847 n.2; the court held that, "[b]ecause the defendant did not timely comply with the requirements of § 17-47 [which imports

the forty-five day filing deadline set forth in Practice Book § 17-45] . . . the trial court did not abuse its discretion by denying the defendant's motion for an extension of time to respond to the plaintiff's motion for summary judgment and to conduct discovery related thereto." Id., 862; see also id., 863. This court's rescript stated as follows: "The judgment is reversed and the case is remanded for further proceedings consistent with this opinion." Id., 863. Our decision in *Chase II* was officially released on December 17, 2019.

On April 5, 2021, during the proceedings on remand, the plaintiff reclaimed for adjudication its 2018 summary judgment motion. On that same day, the defendant issued notices of two depositions, seeking information nearly identical to the information he sought in 2018, which was the subject of the protective order.[4] On April 12, 2021, the plaintiff moved for a protective order barring the defendant from deposing the plaintiff's corporate designee and keeper of records. The plaintiff argued that the defendant was seeking information that he was "simply not entitled [to] . . . concerning the trust and the transfers of the loan." The plaintiff also argued that the trial court was limited by this court's 2019 remand order in *Chase II* to hearing oral argument on the summary judgment motion and that, therefore, the defendant was precluded from conducting any further discovery. On April 21, 2021, the defendant filed

[4] The defendant requested that the plaintiff make a corporate designee available for deposition to testify regarding (1) the basis for the averments in Hernandez' affidavit, (2) the identity of the owners of the note and mortgage throughout the pendency of the present action, and (3) the basis for the current substitute plaintiff's claim of ownership of the note and mortgage. The defendant also noticed the deposition of the plaintiff's keeper of records and requested that the deponent produce at the deposition (1) the plaintiff's complete mortgage file, (2) all correspondence to or from the defendant, (3) all documents referenced in the plaintiff's memorandum of law in support of its motion for summary judgment, and (4) all documents that may be referenced in the deposition of the plaintiff's corporate designee.

an objection to the plaintiff's motion, arguing that the plaintiff's motion sought "a complete bar to all discovery" in its efforts to "conceal access to such basic evidentiary matters as being sought by the defendant here . . . ." In response to the plaintiff's argument that the defendant's pursuit of discovery went beyond this court's remand order in *Chase II*, the defendant argued in his memorandum of law in opposition to the motion for a protective order, inter alia, that the plaintiff's motion "mis-cites two Appellate Court cases for the proposition that they place limitations upon the discovery that the defendant is seeking, where the holdings in neither case even addresses the proper scope of discovery, let alone restrict the scope of discovery sought by the defendant here . . . ." (Citations omitted.)

On May 13, 2021, the defendant filed a memorandum of law in opposition to the plaintiff's motion for summary judgment, arguing, in relevant part, that the plaintiff had failed to meet its burden of establishing that it had standing to enforce the subject note and mortgage. The defendant also argued that the trial court should deny the motion pursuant to Practice Book § 17-47 due to the plaintiff's refusal to produce Hernandez for a deposition. Along with his memorandum of law in opposition to the motion for summary judgment, the defendant's counsel also filed an affidavit pursuant to § 17-47 in which he explained why the defendant should be granted a continuance to permit him to conduct discovery to further support his opposition to the plaintiff's motion for summary judgment.

A hearing was scheduled for August 29, 2022, on the plaintiff's motions for a protective order and summary judgment and the defendant's objections to those motions. At that hearing, the court, *Hon. Edward S. Domnarski*, judge trial referee, marked the motion for a protective order off. The court, however, heard oral

argument on the motion for summary judgment and the defendant's objection thereto. On September 28, 2022, the court issued a memorandum of decision granting the plaintiff's motion for summary judgment as to liability only. On the basis of Hernandez' affidavit and copies of the note, mortgage, and assignments, the court concluded that the plaintiff had "provided evidence sufficient to establish that it is the current holder of the note and that [Chase] was the holder of the note at the commencement of this action. The defendant has failed to present any evidence to contravene ownership, thus, there is no genuine issue of material fact as to ownership of the note." The court thereafter rendered a judgment of strict foreclosure. This appeal followed. Additional facts and procedural background will be set forth as necessary.

I

The defendant first challenges the summary judgment as to liability rendered in favor of the plaintiff. "The standard of review of a trial court's decision granting [a motion for] summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . 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 [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Our review of the trial court's decision to grant the [defendants'] motion[s] for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Dusto* v. *Rogers Corp.*, 222 Conn. App. 71, 87, 304 A.3d 446 (2023), cert. denied, 348 Conn. 939, 307 A.3d 274 (2024). Likewise, our review of a court's determination that a party has standing to assert a claim, which implicates the court's subject matter jurisdiction, presents a question of law over which our review is plenary. *Bayview Loan Servicing, LLC* v. *Ishikawa*, 220 Conn. App. 625, 632, 298 A.3d 1276 (2023).

The defendant claims that the court erred in granting summary judgment as to liability in that it improperly relied on an affidavit of a loan officer employed by the plaintiff in determining that Chase was the holder of the note at the time this action was commenced. He further contends that the court failed to give him, as the nonmoving party, the benefit of all favorable inferences to be drawn from the evidence by neglecting to draw an adverse inference from the plaintiff's refusal to produce witnesses and documents requested by the defendant. We address the defendant's claims in turn.

A

The defendant first contends that the court erred in relying on Hernandez' affidavit as proof that Chase was the holder of the note at the time this action was commenced. Specifically, the defendant argues that "[t]here was no foundation for [Hernandez' statement] that [Chase] was in possession of and/or [was] the holder of the note when the action was commenced" in that the statement was not based on Hernandez' personal knowledge, as required by Practice Book § 17-46. The

defendant also argues that Hernandez' statements constitute inadmissible hearsay because the documents Hernandez purportedly relied on in support of her affidavit were not attached to her affidavit. We disagree.[5]

In the affidavit accompanying the plaintiff's motion for summary judgment, Hernandez averred, inter alia: "Gregory Funding LLC maintains records for the Loan in its capacity as Substitute Plaintiff's loan servicer. As part of my job responsibilities for Gregory Funding LLC, I am familiar with the type of records maintained by Gregory Funding LLC in connection with the Loan. . . . The information in this affidavit is taken from Gregory Funding LLC's business records. I have personal knowledge of Gregory Funding LLC's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of Gregory Funding LLC's regularly conducted business activities; and (c) it is the regular practice of Gregory Funding LLC to make such records. To the extent records related to the Loan come from another entity,

[5] The defendant also argues that Hernandez' affidavit was insufficient to establish the plaintiff's standing because it "makes no statement as to when the note was endorsed, nor does the note itself contain a date for the endorsement." He contends that "there is nothing in the record here to indicate when the note was endorsed in blank or that said endorsement was made prior to the commencement of this action . . . ." In so arguing, the defendant ignores the well established principle that "[t]he plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note . . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt." (Internal quotation marks omitted.) *Ditech Financial, LLC* v. *Joseph*, 192 Conn. App. 826, 832, 218 A.3d 690 (2019). Here, after the plaintiff submitted to the court a copy of the note endorsed in blank, the burden shifted to the defendant to impeach the plaintiff's evidence. He failed to do so.

those records were received by Gregory Funding LLC in the ordinary course of its business, have been incorporated into and maintained as part of Gregory Funding LLC's business records, and have been relied on by the Gregory Funding LLC. It is the regular and ordinary practice of the Gregory Funding LLC to make and receive such records. I make this Affidavit based upon personal knowledge that I obtained through the review of and in reliance upon business records concerning the Loan. . . . I have personally reviewed Gregory Funding LLC's business records that relate to the Note and Mortgage and to the servicing of the loan evidenced by the Note, which Note and Mortgage are more particularly described below. . . . In the capacity and by reason of the foregoing, I have personal knowledge of the facts stated in this affidavit. . . . On or before December 4, 2009, [Chase], directly or through an agent, acquired and has continuously had possession of the original promissory note. The promissory note contains an allonge and is endorsed in blank. [Chase] was the holder of the Note at the time of commencement of the instant foreclosure action. Substitute Plaintiff is the current holder of the Note and mortgagee of record. Substitute Plaintiff has the right to foreclose the subject note and mortgage."

The defendant contends that the court erred in relying on Hernandez' affidavit because Hernandez lacked personal knowledge of the facts to which she averred and her reliance on a review of business records rendered the affidavit fatally infirm under Practice Book § 17-46[6] and constituted inadmissible hearsay. Our Supreme Court addressed this issue, albeit in the context of an

[6] Practice Book § 17-46 provides: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto."

affidavit of debt, in *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 222 A.3d 950 (2020) (*Jenzack*). In *Jenzack*, the court explained that "[t]he initial rationale for the [business records] exception was that, although hearsay, business records [are] trustworthy because their creators had relied on the records for business purposes. . . . Because of the trustworthiness of business records, [General Statutes] § 52-180 should be liberally interpreted in favor of admissibility. . . . Section 52-180 (b) provides that a record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. As such, we have held that the witness introducing the document need not have made the entry himself or herself . . . [or] have been employed by the organization during the relevant time period. . . . In addition, [t]here is no requirement in § 52-180 . . . that the documents must be prepared by the organization itself to be admissible as that organization's business records. . . .

"When a party introduces a document that it did not create but that it received from a third party, the business records exception will apply only if the information contained in the document is based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant. . . . Where the prior owner of the note had a legitimate business duty to provide to the next holder the information used to generate the payment history, the printout

of that information was the business record of the present holder. . . . If part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information. . . .

"[R]egardless of whether supporting documentation or testimony from the third party is offered—it is the third party's duty to report [the information] in a business context which provides the reliability to justify [the business records exception to the hearsay rule]. . . . This reliability is further strengthened, in our view, when the entity receiving the information from a third party, with a business duty to report it, subsequently integrates that information into the entity's own business records and has a self-interest in [ensuring] the accuracy of the outside information . . . . By relying on information from a third party, an entity stakes not only its livelihood on the accuracy of the information received but also its reputation as being a trustworthy entity with which to do business in the future. . . .

"Furthermore, a business record is admissible if the information therein is reliable, which, in the case of information provided by a third party, is established by the third party's business duty to report the information. [T]here is no requirement that the accuracy of a business record be proved as a prerequisite to its admission." (Citations omitted; internal quotation marks omitted.) Id., 390–92.

Here, as indicated previously, Hernandez averred that she had personal knowledge of the records pertaining to the note and mortgage in this case based on her

review of those records, which were received and maintained in the regular and ordinary practice of the plaintiff's loan servicer.

We also are unpersuaded by the defendant's argument that the court should not have relied on Hernandez' affidavit because she failed to attach to it the documents on which her averments were based. Our Supreme Court rejected virtually the same argument in *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 235–36, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013). In *RMS Residential Properties, LLC*, the plaintiff, which was seeking a judgment of foreclosure, moved for summary judgment, and, in support of its motion, "filed the affidavit of Thomas Gilmore, vice president with Specialized Loan Servicing, LLC, attorney in fact of [the plaintiff], alleging that, 'prior to the commencement of this action, [the plaintiff], through its attorney . . . became the holder of the note.' " Id., 227. The trial court rendered summary judgment in favor of the plaintiff and subsequently rendered a judgement of foreclosure by sale. Id., 228. The defendant appealed, contending that Gilmore "lacked personal knowledge of necessary facts, and therefore his reliance on a review of business records rendered the affidavit fatally infirm under Practice Book § 17-46." Id., 235. Our Supreme Court rejected that contention, concluding that the trial court properly found that the affidavit was competent evidence in support of summary judgment. Id., 236. The court reasoned that, "[u]nder . . . § 52-180,[7] to be competent to testify, the

[7] "General Statutes § 52-180 provides in relevant part: '(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, or occurrence or event or within a reasonable time thereafter.

affiant need only have personal knowledge of the relevant business records." (Footnote in original.) Id., 235–36. In the present case, because Hernandez' averments in her affidavit were based on her personal knowledge of the business records, they constituted competent evidence of Chase's status as holder of the note when the action was commenced. We therefore conclude that the court did not err in relying on it.

B

The defendant also claims that the court erred in failing to give him, as the nonmoving party, the benefit of all favorable inferences to be drawn from the evidence by neglecting to draw an adverse inference from the plaintiff's refusal to produce witnesses and documents requested by the defendant.[8] Specifically, he argues that the plaintiff "has taken extraordinary measures to shield its own witness from answering questions" and asserts that he was entitled to an adverse inference for the plaintiff's failure to allow him to depose Hernandez on the basis of the "missing witness rule" adopted in *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 165 A.2d 598 (1960), overruled in part by *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999),

" '(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. . . .' " *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 235–36 n.9.

[8] The defendant also argues that "a reasonable inference to be drawn on summary judgment is that the tortured history of this case flows from the failure of the original plaintiff to have proper documentation in place under Connecticut law before initiating this action." The defendant has cited no legal authority, nor are we aware of any, to support this argument. Furthermore, the defendant's suggested inference amounts to little more than speculation in which we will not engage.

cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000).[9] The defendant's argument is both factually and legally flawed.

Factually, the defendant has failed to set forth any facts, other than the plaintiff's filing of a motion for a protective order, which is permitted by our rules of practice, in support of his contention that the plaintiff has engaged in extraordinary measures to prevent the defendant from deposing Hernandez or any other corporate designees of the plaintiff.

Legally, the missing witness rule was significantly limited in civil cases by the enactment of No. 98-50 of the 1998 Public Acts, which is codified at General Statutes § 52-216c, and provides: "No court in the trial of a civil action may instruct the jury that an inference unfavorable to any party's cause may be drawn from the failure of any party to call a witness at such trial. However, counsel for any party to the action shall be entitled to argue to the trier of fact during closing arguments . . . that the jury should draw an adverse inference from another party's failure to call a witness who has been proven to be available to testify."

The defendant failed, in his brief to this court, to acknowledge the abrogation of *Secondino*. When asked about it at oral argument before this court, the defendant's attorney contended that the logic of the missing witness rule applied in the context of summary judgment because this is not a case that would be tried to a jury. Setting aside the fact that the defendant's reliance on *Secondino* is misplaced, we also note that the defendant is unable to demonstrate that he would have been

[9] The "missing witness rule" provided that "[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause." (Internal quotation marks omitted.) *Secondino* v. *New Haven Gas Co.*, supra, 147 Conn. 675.

entitled to the benefit of the adverse inference permitted by § 52-216c. Accordingly, the defendant's claim is unavailing.

II

The defendant also claims that the court abused its discretion when it implicitly granted the plaintiff's motion for a protective order, which, he alleges, "resulted in a complete denial of discovery and a denial of [his] ability to rebut the plaintiff's claims." We are not persuaded.

On August 29, 2022, the parties appeared before the court to argue the plaintiff's motions for summary judgment and a protective order and the defendant's objections to those motions. At that hearing, the court asked the plaintiff's attorney if it was necessary to rule on its motion for a protective order in light of the fact that it was hearing the motion for summary judgment at that time. The plaintiff's attorney responded that he believed it was relevant, but indicated that the defendant might request that the motion for summary judgment be marked off based on the defendant's request to conduct discovery. The defendant's attorney did not address the protective order but confirmed that he would like additional time to conduct discovery. The defendant's attorney acknowledged, however, that there was no request pursuant to Practice Book § 17-47 pending before the court at that time.[10] The court thus marked

[10] At the beginning of the hearing, the parties confirmed that the trial court was scheduled to hear those motions. The court asked the plaintiff's attorney if it was necessary to act on the motion for a protective order, in light of the court's intention to hear the motion for summary judgment that day. The plaintiff's attorney indicated that the defendant's attorney might ask for the motion for summary judgment to be marked off so the defendant could conduct discovery. The court responded that it understood that the defendant's attorney intended to proceed with the argument that day, stating, "I haven't heard anything. There's been nothing filed regarding further discovery. There's been nothing filed by way of extension or a continuance. I'm ready to hear his motion for summary judgment."

The defendant's attorney then stated that, with his objection to the motion for summary judgment, "[t]here is a Practice Book § 17-47 affidavit filed which indicates that we were seeking discovery in connection with the

the motion for a protective order off and heard argument on the motion for summary judgment.

The defendant argues that "[t]he court's failure to rule upon the plaintiff's motion for [a] protective order and its failure to address the relief requested by the defendant under Practice Book § 17-47 resulted in a complete denial of discovery and a denial of [his] ability to rebut the plaintiff's claims . . . ." The defendant's claim is belied by the fact that, as reflected in the transcript quoted previously; see footnote 10 of this opinion; and confirmed by our review of the trial court file, he neither filed a request pursuant to § 17-47 with the court nor

summary judgment and that on the basis of that affidavit the court can deny the summary judgment because of the plaintiff's efforts to not allow their affiant to be cross-examined or the court can continue it. So, those issues are before the court based on our [§] 17-47 filing. I do think that the . . . summary judgment fails without the discovery. But I . . . think that issue is on the table."

The court determined that the motion for summary judgment would be heard that day. The court further stated that the defendant's attorney failed to make a proper request for an extension of time to respond: "I didn't see anything—with all due respect, Attorney Willcutts, I didn't see any formal request for extension pursuant to the Practice Book section that says, hey, we need to extend a—a time to respond in order to do discovery. So, you've gone on and you filed an objection for motion for summary judgment. I know you've raised that.

"But, in terms of the rules of practice, I'm not—unless I'm mistaken, it's a long file, a lot of entries—I don't think there was ever a motion for summary judgment by the plaintiff, and then, the—then the defendant's Practice Book request for an extension of time to respond in order to conduct further discovery.

"If I'm wrong on that, please let me know. I know you're raising that issue now. But let's face it, we're parsing the Practice Book section pretty finely here, and I have to do it in the context of what the Appellate Court did at the status at that time.

"But I think what I'm understanding—unless you—you—and I have misunderstood something—you—the motion for summary judgment was filed at 156. You filed an objection at 176, and you're talking about wanting an extension but it doesn't appear that there's been a compliance with the Practice Book."

The defendant's attorney then acknowledged that he did not have a pending request for an extension of the argument scheduled to be held on the motion for summary judgment.

requested that the court rule on the plaintiff's motion for a protective order.

Moreover, as noted in the procedural history of this case as set forth herein, the trial court granted the plaintiff's motion for a protective order as to the defendant's request to depose a designee of the plaintiff after the remand following *Chase I* and prior to *Chase II*. The defendant could have challenged the propriety of the protective order on appeal in *Chase II* but chose not to do so. In challenging the propriety of a protective order now, the defendant is "obliquely attempting to revive an appeal that has succumbed by being abandoned." (Internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 488, 302 A.3d 339, cert. denied, 348 Conn. 923, 304 A.3d 445 (2023).

Additionally, as the plaintiff aptly points out, further discovery was beyond the rescript order in *Chase II*. As stated previously in this opinion, this court's rescript order in *Chase II* was for "further proceedings consistent with [its] opinion." *Chase Home Finance, LLC* v. *Scroggin*, supra, 194 Conn. App. 863. Although the reversal of the trial court's judgment in *Chase II* was based on the denial of the defendant's right to oral argument on the plaintiff's motion for summary judgment, this court addressed the discovery issue because it was likely to arise on remand, and determined that the court did not abuse its discretion in ruling that the defendant's request for extension of time to conduct discovery to respond to the plaintiff's motion for summary judgment was untimely. Id., 847 n.2, 862. It would be illogical to suggest that this court's remand order encompassed discovery that the court determined was untimely. The fact that this court addressed the discovery issue that was not necessary for the disposition of the appeal in *Chase II*, but was likely to arise on remand, can only be read as a limitation of the proceedings on

remand—namely, that the defendant was not entitled to a further extension of time to conduct discovery.[11] The defendant's claim therefore fails.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

DANIEL FERREIRA *v.* CHARLES W. WARD
(AC 45340)

Alvord, Seeley and Westbrook, Js.

Syllabus

The plaintiff sought to foreclose a judgment lien on certain real property of the defendant in 2018. After the trial court granted the plaintiff's motion for summary judgment as to liability, the plaintiff filed a motion for foreclosure by sale. The defendant objected and argued that the statutory homestead exemption ((Rev. to 2017) § 52-352) of $75,000 in effect at that time applied to preclude a judgment of foreclosure by sale of his primary residence. The court held a hearing on the plaintiff's motion in February, 2022, and rendered a judgment of foreclosure by sale, from which the defendant appealed to this court. After filing his appeal, the defendant discovered that the February, 2022 hearing had not been recorded. Pursuant to an order of this court, the trial court held another hearing in November, 2022, on the plaintiff's motion for a judgment of foreclosure by sale. At the November, 2022 hearing, the defendant's counsel argued, inter alia, that the legislature's amendment (P.A. 21-161, § 1) to the homestead exemption, effective October 1, 2021, and codified by statute (§ 52-352b (21)), which increased the homestead exemption to $250,000, applied to the defendant and precluded the sale of his primary residence. The plaintiff argued that it would be inappropriate for the court to apply the expanded homestead exemption because the statute had been revised after the commencement of the

[11] We also note that the defendant's claim that he was in need of discovery to respond to the plaintiff's motion for summary judgment is somewhat belied by the fact that he waited more than one year from the court's remand in *Chase II* before noticing the deposition of a designee of the plaintiff. Given the history of this case, such a delay would have been sufficient reason for the court, in the exercise of its discretion, to deny a request made pursuant to Practice Book § 17-47.

foreclosure action. The court issued an order affirming its rendering of a judgment of foreclosure by sale. *Held*:

1. This court concluded that the expanded homestead exemption of $250,000 pursuant to § 52-352b (21) applied retroactively to a postjudgment proceeding in which a judgment lien was issued and recorded and an action to foreclose on the judgment lien was commenced at a time when the now repealed statute, § 52-352b (t), was in effect, but the judgment of foreclosure was rendered after the amended statute, § 52-352b (21), had become effective: the expanded homestead exemption could be applied retroactively because it was procedural in nature, as the legislature's intention in expanding the exemption was to focus on the exemptions available to debtors during bankruptcy or postjudgment proceedings and not to create, define, or regulate rights; moreover, the language of P.A. 21-161 did not indicate that the legislature intended to carve out preexisting or other debts from the exemption or to preclude P.A. 21-161 from applying to a postjudgment proceeding in which the action to foreclose on the judgment lien was commenced before it became effective, as the fact that the language of § 52-352b (t) included carve-outs for preexisting debts but the language of § 52-352b (21) did not include such carve-outs indicated a legislative intent not to exclude preexisting debts from the scope of the expanded homestead exemption.
2. The trial court improperly denied the defendant's request for an evidentiary hearing on his claim that the expanded homestead exemption applied to preclude the plaintiff from foreclosing on his primary residence: the defendant raised his homestead exemption claim multiple times before the court rendered a judgment of foreclosure and, although this court had yet to address the specific question of whether a defendant must be afforded an evidentiary hearing on a homestead exemption claim prior to a trial court rendering a judgment of foreclosure, this court concluded, on the basis of persuasive Superior Court cases, that such an evidentiary hearing should be held; moreover, during such an evidentiary hearing, at which the court affords the defendant the opportunity to present support for his claim that the homestead exemption applies, the proper procedure would be for the court to apply the definitions set forth in the statute (§ 52-352a) to the formula contained in § 52-352b (21) and decide, on the basis of the evidence before it, whether to render a judgment of foreclosure; accordingly, the case was remanded to the trial court for an evidentiary hearing as to the applicability of the defendant's homestead exemption claim pursuant to § 52-352b (21) prior to rendering a decision on the plaintiff's motion for a judgment of foreclosure by sale.

Argued November 13, 2023—officially released April 9, 2024

Procedural History

Action to foreclose a judgment lien on certain of the defendant's real property, and for other relief, brought

to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability only; subsequently, the court, *Hon. Arthur A. Hiller*, judge trial referee, rendered judgment of foreclosure by sale, from which the defendant appealed to this court. *Reversed*; *further proceedings*.

Prerna Rao, for the appellant (defendant).

Christopher D. Hite, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Charles W. Ward, appeals from the judgment of foreclosure by sale rendered by the trial court in this action to foreclose a judgment lien brought by the plaintiff, Daniel Ferreira. On appeal, the defendant claims that the court improperly rendered a judgment of foreclosure by sale without first holding an evidentiary hearing, as requested, to determine whether the homestead exemption of $250,000 set forth in General Statutes § 52-352b (21)[1] applied. We reverse the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. On January 8, 2015, in an unrelated civil action, the plaintiff obtained a judgment against the defendant in the amount of $123,533.05. On May 4, 2015, to secure the judgment,

[1] At the time the plaintiff commenced this foreclosure action, the homestead exemption was contained in General Statutes (Rev. to 2017) § 52-352b (t) and exempted from the claims of creditors the value of the debtor's homestead up to the amount of $75,000. Subsequently, in 2021, the legislature enacted No. 21-161 of the 2021 Public Acts, § 1 (P.A. 21-161), which repealed General Statutes (Rev. to 2021) § 52-352b in its entirety effective October 1, 2021, and codified the amended homestead exemption in § 52-352b (21), increasing the homestead exemption to $250,000. For the reasons set forth in part I of this opinion, all references herein to § 52-352b (21) are to the current revision of the statute.

the plaintiff recorded a judgment lien in the town of Milford land records against the defendant's property located at 100 Cinnamon Road in Milford (primary residence). The plaintiff then notified the defendant of the judgment lien pursuant to General Statutes § 52-351a.[2]

In January, 2018, the plaintiff commenced the present action against the defendant seeking to foreclose the judgment lien. The plaintiff also filed in the land records a notice of lis pendens. On June 7, 2018, the defendant filed an answer to the complaint and asserted as a special defense that he "is entitled to the exemptions provided under . . . General Statutes § 52-352a et seq." The plaintiff filed a reply wherein he denied the defendant's special defense.

Thereafter, the plaintiff filed a motion for summary judgment as to liability only and an accompanying memorandum of law in support thereof. The plaintiff appended as exhibits to his motion for summary judgment a certified judgment lien and an affidavit wherein he averred that the judgment lien remains unsatisfied. The defendant did not file an objection to the motion, and the court rendered summary judgment as to liability in favor of the plaintiff.

The plaintiff then filed a motion for a judgment of foreclosure by sale. The defendant filed an objection to the motion and argued, inter alia, that the homestead exemption applied to preclude a judgment of foreclosure by sale of his primary residence. The court, *Hon. Arthur A. Hiller*, judge trial referee, held a remote hearing on the plaintiff's motion on February 22, 2022. The

[2] General Statutes 52-351a provides: "When a lien is placed on any property or when any postjudgment paper, other than a wage execution or property execution levied against property of a natural person, is served on a third person, the judgment creditor shall send a copy of the lien, or of the papers so served, together with a statement as to where the lien was filed or on whom the papers were served, to the judgment debtor at his last-known address by first class mail, postage prepaid."

court subsequently issued an order granting the plaintiff's motion and rendered a judgment of foreclosure by sale. The court found that the debt as of February 22, 2022, was $123,533.05 and the fair market value of the primary residence was $255,000.[3] The court set a sale date of August 27, 2022. This appeal followed.

After the filing of this appeal, the defendant, in ordering a transcript of the February 22, 2022 hearing, discovered that the hearing had not been recorded. The defendant filed a motion for rectification and requested that the court conduct a new hearing on the motion for judgment for purposes of providing this court with an adequate record for review.[4] The court denied the defendant's motion. In response, the defendant filed with this court a motion for review of the court's denial of the motion for rectification. This court issued an order granting the defendant's motion and stated: "Review is granted and the relief requested therein is granted in that the trial court . . . shall hold a hearing, with counsel for the parties in attendance, at which arguments may be heard, evidence taken or a stipulation of counsel received and approved to rectify the record to indicate what arguments were made at the February 22, 2022 hearing on the plaintiff's motion for judgment of foreclosure by sale."[5]

On November 3, 2022, pursuant to this court's order, the trial court held a hearing on the plaintiff's motion for a judgment of foreclosure by sale during which the

[3] The court also found that the defendant owed $3725 in attorney's fees and an appraisal fee of $750.

[4] In support of his motion, the defendant argued that he had preserved issues for appeal during the hearing, including, inter alia, that the homestead exemption precluded the sale of his primary residence.

[5] The rectification hearing ordered by this court was a hearing in which the parties could present arguments concerning the applicability of the homestead exemption and the motion for a judgment of foreclosure by sale. That hearing, like the February 22, 2022 hearing, was not evidentiary in nature.

defendant's counsel argued, inter alia, that the amount of the statutory homestead exemption was amended in 2021 to protect up to $250,000 of the homestead of the exemptioner, that the defendant is entitled to the increased exemption because the statute was amended before the court rendered the judgment of foreclosure by sale, and, thus, that the exemption precludes the sale of the defendant's primary residence. The defendant's counsel also requested that the court hear evidence in the form of the defendant's testimony, which the court denied. The plaintiff then argued that the applicable version of the homestead exemption is found in General Statutes (Rev. to 2017) § 52-352b (t) because that was the revision in effect at the time the plaintiff commenced the foreclosure action. Moreover, the plaintiff asserted that "[t]he proper procedure is for the sale to happen, the proceeds get deposited with the court, and then the defendant files his exemption, if he has one." On December 14, 2022, the court issued an order stating that its "previously entered order" of February 25, 2022 (entry #115.05) "is affirmed with the attached transcript" of the November 3, 2022 hearing.

I

Central to our consideration of this appeal is the defendant's contention that the $250,000 homestead exemption set forth in § 52-352b (21) (expanded homestead exemption) applies. We agree and conclude that the expanded homestead exemption set forth in § 52-352b (21), first contained in Public Acts 2021, No. 21-161, § 1 (P.A. 21-161), applies retroactively to a post-judgment proceeding in which a judgment lien was issued and recorded and an action to foreclose that judgment lien was commenced prior to the effective date of P.A. 21-161, but the court's decision on the motion for a judgment of foreclosure was rendered after P.A. 21-161 became effective.

The following additional procedural history is relevant. In the defendant's March 22, 2021 objection to the plaintiff's motion for judgment of foreclosure by sale, he claimed that the sale of his property was precluded under the original homestead exemption, which was the effective exemption at that time. During the November 3, 2022 hearing on the motion for a judgment of foreclosure, however, the defendant argued that the homestead exemption had been amended and that he should be afforded the $250,000 protection set forth in the expanded homestead exemption. The plaintiff responded that it would be inappropriate for the court to apply the expanded homestead exemption because the statute was amended after the commencement of the foreclosure action and, thus, the plaintiff argued that the court should apply the original homestead exemption.[6]

[6] The following colloquy occurred during the November 3, 2022 hearing:

"[The Defendant's Counsel]: This claim is subject to the Homestead Exemption Act and it's actually—foreclosure would be prohibited by the Homestead Exemption Act for several reasons. First, the Homestead Exemption Act protects up to $250,000—not up to, a minimum of $250,000 of any equity that my client has in his—it's his primary residence. The total amount that's claimed is far less than that. So, automatically foreclosure is barred by the Homestead Exemption Act. Second, this is a—

"The Court: Well, let's do them one at a time. Let's do these one at a time. Let me hear from plaintiff's counsel on the Homestead Exemption Act.

"[The Plaintiff's Counsel]: So Judge, we had filed a reply to that objection that essentially indicates . . . . The exemption is for the equity. . . . And it says that the lien cannot be enforced up to the amount of the exemption. When this judgment entered, the exemption was [$]75,000. So, the subject property had a net equity which far exceeded that $75,000 exemption. And so, the proper procedure, since the amount of the debt is greater than the amount of the homestead exemption at the time this judgment entered, then the proper procedure would be to have a sale. And the defendant can exempt any proceeds of the sale up to [$]75,000 and the rest would go to the plaintiff.

"The Court: The Court agrees.

"[The Defendant's Counsel]: Your Honor?

"The Court: Yes?

"[The Defendant's Counsel]: If I can, for the record, state my response to counsel's arguments. So, first, counsel clearly indicates that the lien cannot be enforced up to the amount of the homestead exemption. So, first of all, I take objection to the fact that counsel is trying to retroactively claim that the homestead exemption is 75 instead of 250,000.

In his appellate brief, the defendant cites as the applicable statute the expanded homestead exemption of $250,000 in § 52-352b (21).[7] At oral argument before this court, the plaintiff's counsel recognized that, "unfortunately for [his] client," decisions issued by the United States Bankruptcy Court for the District of Connecticut suggest that the expanded homestead exemption could be applied retroactively. In response to the defendant's assertion that the expanded homestead exemption applies and the plaintiff's representations at oral argument, this court, sua sponte, ordered supplemental briefing on whether the expanded homestead exemption applies to postjudgment proceedings initiated prior to the effective date of P.A. 21-161.[8] The defendant argues that it does and that the homestead exemption applies retroactively in this case. We agree.

We begin with our standard of review on issues of retroactivity. "Whether a statute applies retroactively raises a question of statutory construction over which our review is plenary." *Walsh* v. *Jodoin*, 283 Conn. 187, 195, 925 A.2d 1086 (2007). "In considering the question of whether a statute may be applied retroactively, we are governed by certain well settled principles, [pursuant to] which our ultimate focus is the intent of the legislature in enacting the statute. . . . [O]ur point of departure is General Statutes § 55-3, which [provides]:

"The Court: Was it 75 at the time of the foreclosure?

"[The Defendant's Counsel]: No, Your Honor, it was changed in 2021, I believe, to $250,000.

"The Court: This case was brought in 2018."

[7] Specifically in his appellate brief, the defendant contends that § 52-352b "was modified via [P.A. 21-161] during the 2020 Covid-19 pandemic, and made effective October 1, 2021, *prior* to the trial court making its decision subject to appeal here." (Emphasis in original.)

[8] The supplemental briefing order requested that the parties address "(1) whether the amended homestead exemption; General Statutes § 52-352b (21); applies retroactively to this case and (2) whether the enactment of the amended homestead exemption would constitute retroactive legislation when applied to a postenactment judgment of foreclosure; see *In re Cole*, 347 Conn. 284 [297 A.3d 151] (2023)."

No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect. . . . [W]e have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation. . . . In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively. . . . While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress. . . . Procedural statutes . . . therefore leave the preexisting scheme intact. . . . [We presume] that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary . . . .'' (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, 333 Conn. 283, 292, 215 A.3d 149 (2019). Further, exemptions, like the homestead exemption, ''are construed liberally in the debtor's favor.'' *Rockstone Capital, LLC* v. *Sanzo*, 332 Conn. 306, 315, 210 A.3d 554 (2019).

''In 1993, the legislature, for the first time, enacted [the] 'homestead act,' whereby a debtor could protect up to $75,000 of the value of a primary residence from attachment in postjudgment proceedings or bankruptcy [original act]. See Public Acts 1993, No. 93-301, § 2 (P.A. 93-301).'' *In re Cole*, 347 Conn. 284, 287, 297 A.3d 151 (2023) (*Cole*). As we have stated, that was amended by

P.A. 21-161, § 1, which expanded the amount of the homestead exemption to $250,000.

In *In re Cole*, supra, 347 Conn. 310, our Supreme Court addressed whether "the expanded homestead exemption contained in P.A. 21-161, § 1, appl[ies] in bankruptcy proceedings *filed on or after the effective date of the act* to debts that accrued prior to that date . . . ."[9] (Emphasis added.) The court answered the question in the affirmative; id., 298; however, it did not address whether the expanded homestead exemption applies retroactively to a proceeding that was commenced before P.A. 21-161 became effective, but in which a judgment of foreclosure was rendered after P.A. 21-161 took effect. See *In re Hotchkiss*, United States Bankruptcy Court, Docket No. 23-20023, *2 (JTT) (Bankr. D. Conn. November 28, 2023) ("[r]ather than engage in a retroactivity analysis, the Connecticut Supreme Court simply decided that, [b]ecause the legislature did not direct otherwise, the expanded homestead exemption in P.A. 21-161 . . . applies in all . . . postjudgment proceedings initiated on or after the effective date of the act, regardless of when the underlying debts accrued" (emphasis omitted; internal quotation marks omitted)).

The present case is factually distinguishable from *Cole* in that the foreclosure action in this matter was commenced prior to the passage of the expanded homestead exemption. As stated previously, *Cole* did not consider whether the expanded homestead exemption

[9] The United States District Court for the District of Connecticut "certified to [the Connecticut Supreme Court] the question of '[w]hether [P.A.] 21-161 applies retroactively to debts incurred by the debtor before [P.A.] 21-161 took effect or prospectively.' [Our Supreme Court] accepted certification but . . . [answered] a slightly modified version of the certified question: does the expanded homestead exemption contained in P.A. 21-161, § 1, apply in bankruptcy proceedings filed on or after the effective date of the act to debts that accrued prior to that date? [Our Supreme Court answered] that question in the affirmative." *In re Cole*, supra, 347 Conn. 289–90.

applies retroactively to postjudgment proceedings initiated prior to the effective date of the act.[10] For the reasons set forth herein, we conclude that the expanded homestead exemption applies retroactively to a postjudgment proceeding where both the judgment lien was recorded and the action to foreclose on the lien was commenced prior to the effective date of P.A. 21-161, but the judgment of foreclosure was rendered after the effective date.

We begin by addressing whether the expanded homestead exemption is procedural or substantive. Our Supreme Court has recognized that "[i]t is clear that the purpose of the [homestead exemption] is to specify the exemptions that are *presently* available to a debtor"; (emphasis in original) *In re Cole*, supra, 347 Conn. 309; and that "the legislature increased the homestead exemption in 2021 to keep pace with inflation." Id., 297. The legislature's intent in enacting the expanded homestead exemption, therefore, was not to create, define, or regulate rights, rather it was to prescribe "the methods of enforcing such rights or obtaining redress." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, supra, 333 Conn. 292. Further, our Supreme Court has explained that the legislature's intent in enacting the homestead exemption was to focus "on the enforcement process—what exemptions are available to the debtor *during the bankruptcy or postjudgment proceeding*." (Emphasis in original.) *In re Cole*,

[10] In *Cole*, the debtor argued that, "[i]f the expanded homestead exemption were applied to a *previously* commenced bankruptcy proceeding, then a retroactivity issue would arise. But, [the debtor] contends, merely to apply the expanded exemption in a . . . proceeding that was commenced after the effective date of P.A. 21-161, § 1, does not raise any retroactivity concerns . . . ." (Emphasis in original.) *In re Cole*, supra, 347 Conn. 303. Our Supreme Court agreed and determined that retroactivity is not implicated when the expanded homestead exemption does not apply retroactively in "postjudgment proceedings *initiated on or after the effective date of the act*, regardless of when the underlying debts accrued." (Emphasis added.) Id., 310.

supra, 309. On the basis of the foregoing, we conclude that the expanded homestead exemption is procedural in nature.[11]

We next examine the text of P.A. 21-161 "to determine whether it contains any expressed intention that it not be applied retroactively." *King* v. *Volvo Excavators AB*, supra, 333 Conn. 295. It does not. Public Act 21-161 "begins by repealing General Statutes (Rev. to 2021) § 52-352b in its entirety. It then provides, with respect to the homestead exemption: 'The following property of any natural person shall be exempt . . . (21) The homestead of the exemptioner to the value of two hundred fifty thousand dollars, provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . .' P.A. 21-161, § 1. Finally, the act provides that it is '[e]ffective October 1, 2021 . . . .' P.A. 21-161, § 1." *In re Cole*, supra, 347 Conn. 294–95. Significantly, "[n]othing in the language of the act indicates that the legislature intended to carve out preexisting (or any other) debts from the reach of the exemption"; id., 295; nor does anything in the language of P.A. 21-161, § 1, suggest that the legislature intended to preclude it from applying to a postjudgment proceeding in which the action to foreclose on the judgment lien was commenced before P.A. 21-161, § 1, became effective. Accordingly, after a thorough review of the text of P.A. 21-161, § 1, we are persuaded that the expanded

[11] Our Supreme Court observed in *Cole* that "the unsecured creditors are presumed to have been aware that the legislature could increase the size of the homestead exemption at any time and that their rights might otherwise be adversely impacted by changes in federal or state law. . . . Any expectation that the debtor would be perpetually limited to a $75,000 exemption [is], in short, unreasonable." (Citations omitted; internal quotation marks omitted.) *In re Cole*, supra, 347 Conn. 308. That observation provides further support for the proposition that the expanded homestead exemption is procedural because it involves the methods by which a judgment debtor is afforded redress.

homestead exemption is available under the facts of this case.

This determination is buttressed by our well settled principles of statutory construction. "As we have stated many times, [when] a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . This principle applies with equal force to reenactments of previous statutes." (Citation omitted; internal quotation marks omitted.) Id., 297. In the present case, P.A. 21-161 omits the carve-out for preexisting debts that was set forth in the original act. Specifically, P.A. 93-301 provided: "This act shall take effect October 1, 1993, and shall be applicable to any lien for any obligation or claim arising on or after said date." P.A. 93-301, § 3. In contrast, P.A. 21-161 provides in relevant part: "Section 52-352b of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2021) . . . ." P.A. 21-161, § 1. "The fact that the legislature included a special carve-out for preexisting debts in the original homestead act but did not include one in the 2021 act indicates an intent *not* to exclude preexisting debts from the scope of the expanded homestead exemption." (Emphasis in original.) *In re Cole*, supra, 347 Conn. 297.

On the basis of the foregoing, we conclude that the expanded homestead exemption applies retroactively to a postjudgment proceeding in which a judgment lien was recorded and the action to foreclose on the judgment lien was commenced at a time when the now repealed statute was in effect, but the judgment of foreclosure was rendered after P.A. 21-161 became effective.

II

We now turn to the defendant's claim on appeal that the court improperly rendered a judgment of foreclosure by sale. Specifically, the defendant maintains that

the court incorrectly denied his request for the court to conduct an evidentiary hearing to determine whether the expanded homestead exemption applies to preclude the plaintiff from foreclosing on the defendant's primary residence.[12] We agree.

The homestead exemption is codified in Chapter 906 of the General Statutes, titled "Postjudgment Procedures," and "relates to the enforcement of money judgments. Under this chapter, a judgment creditor may enforce a money judgment by execution or foreclosure 'against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section . . . 52-352b . . . or any other provision of the general statutes or federal law.' [General Statutes] § 52-350f."[13] *KLC, Inc.* v. *Trayner*, 426 F.3d 172, 175 (2d Cir. 2005).

Section 52-352b sets forth property exempt from postjudgment procedures and provides in relevant part: "The following property of any natural person shall be exempt . . . (21) The homestead of the exemptioner to the value of two hundred fifty thousand dollars, provided value shall be determined as the fair market value

[12] The plaintiff's brief to this court presents fewer than two pages of argument and inexplicably relies on *Spears* v. *Elder*, 156 Conn. App. 778, 115 A.3d 482 (2015). In that case, the defendant did not raise a homestead exemption claim until *after* a judgment of foreclosure had been rendered. Id., 782–83. Accordingly, *Spears* is procedurally different from the present appeal, and we disagree with the plaintiff's contention that it supports his position in this appeal.

[13] General Statutes § 52-350f provides in relevant part: "A money judgment may be enforced against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section . . . 52-352b . . . or any other provision of the general statutes or federal law. The money judgment may be enforced, by execution or by foreclosure of a real property lien, to the amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) interest as provided by chapter 673 on the money judgment and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c."

of the real property less the amount of any statutory or consensual lien which encumbers it . . . .'' Additionally, General Statutes § 52-352a is titled ''Definitions for exempt property provisions'' and provides in relevant part: ''As used in . . . section . . . 52-352b . . . (1) 'Value' means fair market value of the exemptioner's equity or unencumbered interest in the property . . . (3) 'Exempt' means, unless otherwise specified, not subject to any form of process or court order for the purpose of debt collection . . . [and] (5) 'Homestead' means owner-occupied real property . . . used as a primary residence.'' Accordingly, in interpreting Connecticut's statutory homestead exemption, the United States Court of Appeals for the Second Circuit observed that the definitions set forth in § 52-352a ''mean that a judgment lien can attach on a homestead, but that such a lien cannot be enforced up to the amount of the exemption.'' *KLC, Inc.* v. *Trayner*, supra, 426 F.3d 175.

In his appellate brief, the defendant argues that ''Connecticut trial courts have consistently required evidentiary hearings to resolve claims under the homestead exemption . . . prior to issuing foreclosure judgments.''[14] Although our appellate courts have yet to address the specific question of whether a defendant must be afforded an evidentiary hearing on a homestead exemption claim prior to the court rendering a judgment of foreclosure, decisions of the Superior Court support the claim that such a hearing should be held. See *Barker* v. *Bell*, Superior Court, judicial district of Hartford, Docket No. CV-11-6019767-S (June 8, 2012) (54 Conn. L. Rptr. 123, 123), (court determined that, ''[w]hen a party asserts a [h]omestead [e]xemption, the court is required to conduct an evidentiary hearing'' (internal quotation marks omitted)); see also *Unifund CCR Partners* v. *Scheappi*, Superior Court, judicial district of

[14] In his appellate brief, the plaintiff does not respond to the defendant's argument in reliance on these cases.

Hartford, Docket No. CV-06-5007258-S (March 20, 2008) (45 Conn. L. Rptr. 221, 222) (same); *Lienfactors, LLC* v. *Belamour*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5002622-S (November 20, 2007) (same). The Second Circuit noted that "Connecticut Superior Courts . . . uniformly allow the homestead exemption before ordering foreclosure on a judgment lien." *KLC, Inc.* v. *Trayner*, supra, 426 F.3d 177. We agree with the defendant and find these cases persuasive for the proposition that, when a defendant asserts a homestead exemption claim before a judgment of foreclosure is rendered, the proper procedure is for the court to afford the defendant with the opportunity to present support for their claim by way of an evidentiary hearing.

We anticipate that the specific procedure of that evidentiary hearing would include the court applying the statutory definitions set forth in § 52-352a to the formula contained in § 52-352b (21) and deciding, on the basis of the evidence before it, whether to render a judgment of foreclosure. Specifically, the court should find the value of the property, which is "determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it" and subtract from that value the amount of the exemption. General Statutes § 52-352b (21). The result is the amount to which the judgment lien can attach. If the result is negative, the court may determine to withhold foreclosure or deny the motion for a judgment of foreclosure. See *Barker* v. *Bell*, supra, 54 Conn. L. Rptr. 124; see also *Unifund CCR Partners* v. *Scheappi*, supra, 45 Conn. L. Rptr. 223 ("A foreclosure action is equitable in nature. . . . A trial court has discretion, after review of the equities, to withhold foreclosure. . . . When [a] plaintiff could well realize nothing in this action, the court can properly deny the plaintiff a foreclosure judgment." (Citations omitted.)).

In the present case, the defendant raised his homestead exemption claim several times before the court rendered a judgment of foreclosure: (1) as a special defense; (2) in his objection to the plaintiff's motion for a judgment of foreclosure; and (3) during the November 3, 2022 hearing. At the November 3, 2022 hearing, the defendant argued that his homestead exemption claim precludes the court from rendering a judgment of foreclosure with respect to his primary residence. In response, the plaintiff argued that the homestead exemption would apply only after the foreclosure sale had occurred and that "[t]he proper procedure is for the sale to happen, the proceeds get deposited with the court, and then the defendant files his exemption, if he has one."[15] Also at the November 3, 2022 hearing, the defendant's counsel requested to present, and for the court to consider, evidence in support of the defendant's homestead exemption claim.[16] In response, the

[15] At oral argument before this court, the plaintiff's counsel conceded that a remand of the case for a new hearing on the motion for a judgment of foreclosure by sale is necessary, specifically to set a new fair market value of the property. The plaintiff's counsel, however, maintained that the defendant's homestead exemption claim should not be argued at that time and instead, should be argued only after the foreclosure sale of the defendant's primary residence has occurred. Because we conclude that an evidentiary hearing on whether a defendant is entitled to the homestead exemption is to occur prior to a court rendering a decision on a plaintiff's motion for judgment of foreclosure, we disagree with the plaintiff's proposed procedure.

[16] The following colloquy occurred:

"[The Defendant's Counsel]: And my client is also here to testify specifically about the equity as well.

"The Court: Your client is not an appraiser, is he?

"[The Defendant's Counsel]: He is the owner of the property and people are allowed to testify about—

"The Court: As to their feeling of the value. I know that, as to their feeling as to the value of the property. If you want him to, I'll let you, but—

"[The Plaintiff's Counsel]: Judge, if I may be heard . . . . This is not an evidentiary hearing, motions for strict or sale are not evidentiary presentations. It would be improper for the court to hear testimony from the defendant on any subject, but especially on something like value which—

"The Court: I got you. All right. . . .

plaintiff's counsel maintained that it is inappropriate for a court to consider evidence during a hearing on a motion for a judgment of foreclosure by sale. The court agreed with the plaintiff and denied the defendant's request to present evidence. See footnote 5 of this opinion.

On the basis of the foregoing, we conclude that, because the defendant raised his homestead exemption claim before the court rendered a judgment of foreclosure, the court's denial of the defendant's request for an evidentiary hearing on his claim was improper. Accordingly, the appropriate remedy is for this court to reverse the judgment of foreclosure by sale and remand the case to the trial court for an evidentiary hearing, consistent with the procedure set forth previously in this opinion, as to the applicability of the defendant's homestead exemption claim pursuant to § 52-352b (21) prior to rendering a decision on the plaintiff's motion for a judgment of foreclosure by sale.[17]

"[The Defendant's Counsel]: If I may respond to that for the record, Your Honor? The Appellate [Court] order specifically says . . . that the trial court . . . shall hold a hearing with counsel for the parties in attendance at which arguments may be heard, evidence taken . . . . And so, Your Honor, I think that I do have a right to present the witness.

"The Court: But do I know that that argument was made at the February hearing?

"[The Defendant's Counsel]: We don't know because there's no record.

"[The Plaintiff's Counsel]: Judge, that's disingenuous. [The defendant] did not testify at that hearing."

"The Court: Well, that's for sure.

(Simultaneous Speaking)

"[The Defendant's Counsel]: And I'm requesting for him to testify here again.

"The Court: Yeah, but you know he did not testify at the last hearing.

"[The Defendant's Counsel]: But I'm asking for him to testify just like I did last time.

"The Court: I'm going to pass on that. I'm not going to agree to that.

"[The Defendant's Counsel]: Can I ask why, Your Honor?

"The Court: Yeah, because I don't think that's appropriate at this point in what we were sent back to do."

[17] The defendant also argues in his appellate brief that "[t]he trial court improperly refused to take evidence regarding applicable housing laws

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

In this opinion the other judges concurred.

ROBERT J. KRASKO ET AL. *v.* ROBERT KONKOS ET AL.
(AC 45875)

Elgo, Moll and Suarez, Js.

Syllabus

The plaintiffs, owners of certain real property in Easton that is benefitted by a right-of-way easement over the defendants' neighboring property, sought, inter alia, a mandatory injunction requiring the defendants to consent to the removal of a utility pole that provided electrical services to the defendants' property and obstructed the easement and to upgrade the electrical connection between the defendants' house and a new utility pole that had been erected on the plaintiffs' property so that the connection complied with the building code then in effect. Prior to the commencement of trial, the attorneys for the parties attended a pretrial conference before the trial court. Thereafter, pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.* (225 Conn. 804), the plaintiffs filed a motion to enforce a settlement agreement that they claimed the parties had entered into at the pretrial conference. In their motion, the plaintiffs asserted that the parties had discussed and orally agreed on the location of an underground conduit for the defendants' new electrical service at the pretrial conference and that, subsequently, the defendants refused to allow the plaintiffs to perform the work that was agreed on or to implement the settlement agreement. The plaintiffs attached an exhibit to their motion, which they drafted after the pretrial conference to outline the terms of the parties' alleged agreement. The defendants objected to the plaintiffs' motion, asserting that, although the parties had attempted to reach an agreement at the pretrial conference, they never did so, as they failed to reach a consensus regarding the location and scope of the expected work and the length of time it would take. Following a remote status conference, the trial court went on the record to hear arguments from the parties' counsel and then incorporated the additional terms that were discussed by the defendants' counsel into the settlement agreement as it was outlined in

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which lower the permitted resale value of the property." The plaintiff does not respond to this argument in his appellate brief. We need not address this claim in light of our determination that the judgment of foreclosure by sale must be reversed and the case remanded for an evidentiary hearing.

the exhibit. The defendants' counsel discussed the modified settlement agreement with the defendants during a short recess and then informed the trial court that the defendants did not consider the modified settlement agreement to be agreeable. Thereafter, the trial court granted the plaintiffs' motion to enforce the settlement agreement, subject to the terms and conditions of the exhibit, as modified by the court and reflected in the transcript of that day's proceeding. On the defendants' appeal to this court, *held* that the trial court abused its discretion in granting the plaintiffs' motion to enforce a settlement agreement because the parties did not reach a clear and unambiguous agreement either at or following the pretrial conference: the trial court treated the exhibit as an agreement binding on the parties despite the fact that there was nothing in the record, beyond the plaintiffs' reliance on the exhibit, to demonstrate that an agreement had been reached, the agreement was unsworn, and the defendants repeatedly disputed that they had entered into the agreement; moreover, even if the trial court had assumed that the exhibit memorialized an agreement between the parties, when faced with numerous issues concerning the adequacy of the agreement and after acknowledging that a material term of the settlement was not agreed on, the court failed to hold an *Audubon* hearing to determine whether the parties had a clear and unambiguous agreement and, instead, issued an order granting the plaintiffs' motion subject to the terms and conditions as modified by the court; accordingly, this court reversed the judgment of the trial court and remanded the case with direction to deny the plaintiffs' motion to enforce the settlement agreement.

Argued October 3, 2023—officially released April 9, 2024

Procedural History

Action seeking, inter alia, an injunction requiring the named defendant et al. to consent to the relocation of a utility pole that obstructed the plaintiffs' easement, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Stevens, J.*, granted the plaintiffs' motion to cite in Frontier Communications Corporation et al. as party defendants; thereafter, the court, *Hon. Dale W. Radcliffe*, judge trial referee, granted the plaintiffs' motion to cite in Owned Wealth, LLC, et al. as party defendants; subsequently, the plaintiffs withdrew their complaint against the defendant Margaret Mary Kane; thereafter, the court, *Hon. Dale W. Radcliffe*, judge trial referee, granted the

plaintiffs' motion to enforce a settlement agreement, and the named defendant et al. appealed to this court. *Reversed*; *judgment directed*.

Prerna Rao, for the appellants (named defendant et al.).

Alan R. Spirer, for the appellees (plaintiffs).

Opinion

SUAREZ, J. The defendants Robert Konkos and Chelsea Konkos (collectively, Konkos defendants); 105 Honeysuckle Trust, dated March 9, 2021, Owned Wealth, LLC, as trustee; and Owned Wealth, LLC,[1] appeal from the judgment of the trial court granting a motion brought by the plaintiffs, Robert J. Krasko and Francis L. O'Neill, to enforce a settlement agreement allegedly entered into between the parties at a pretrial conference. On appeal, the defendants claim that the trial court erred in granting the plaintiffs' motion to enforce in the absence of a clear and unambiguous agreement. We reverse the judgment of the court.

[1] The plaintiffs initially commenced the underlying action against only the Konkos defendants. On January 22, 2020, the plaintiffs moved to cite in Frontier Communications Corporation (Frontier) and Margaret Mary Kane as defendants in the underlying action. On February 3, 2020, the court, *Stevens*, *J.*, granted the plaintiffs' motions and added Frontier and Kane as defendants to the underlying action. On July 6, 2022, the plaintiffs moved to cite in 105 Honeysuckle Trust, dated March 9, 2021, Owned Wealth, LLC, as trustee, and Owned Wealth, LLC, as additional defendants. In their motion to cite in additional party defendants, the plaintiffs represented that, "[o]n January 27, 2022, [the Konkos defendants] transferred title to [their premises] . . . to 105 Honeysuckle Trust, dated March 9, 2021, Owned Wealth, LLC, as trustee . . . . Although the record owner of the premises is now 105 Honeysuckle Trust, dated March 9, 2021, Owned Wealth, LLC, as trustee . . . [the Konkos defendants] are the beneficial owners of and exercise dominion and control over the premises." On July 18, 2022, the court, *Hon. Dale W. Radcliffe*, judge trial referee, granted the plaintiffs' motion. On September 20, 2022, the plaintiffs withdrew their complaint against Kane. Frontier and Kane are not participating in this appeal. The remaining defendants are all represented by the same counsel. We hereinafter will refer to the remaining defendants collectively as the defendants.

The following procedural history and undisputed facts are relevant to the resolution of this appeal. The plaintiffs are the owners of real property located in Easton (plaintiffs' property). The defendant Owned Wealth, LLC, as trustee, is the legal owner of the abutting property (defendants' property). See footnote 1 of this opinion.

Margaret Mary Kane, a home construction contractor, was the original owner of the plaintiffs' property. Kane filed a proposed site plan, dated December 16, 2015, with the town of Easton for the construction of the plaintiffs' home. In the site plan, Kane specified that a utility pole existing on the plaintiffs' driveway would be removed and relocated. On December 29, 2015, an easement, benefiting the plaintiffs' property and burdening the defendants' property, was set forth in an Easement and Mutual Driveway Agreement and recorded in the Easton land records (easement). The easement granted the plaintiffs' property a perpetual twenty-five foot right-of-way over the defendants' property. The plaintiffs' driveway and the utility pole are located within this right-of-way easement. Frontier Communications Corporation (Frontier), which owns and maintains the utility pole, subsequently erected a new utility pole on the plaintiffs' property in accordance with the site plan. The original utility pole located on the plaintiffs' driveway, however, was never removed and currently is being used to provide electrical services to the defendants' property. On August 9, 2018, Kane entered into a written contract with the plaintiffs for the purchase and sale of the plaintiffs' property.

The plaintiffs commenced the present action on August 9, 2019. In their amended complaint, dated July 18, 2022, the plaintiffs alleged that they "have a perpetual easement over, under, and across a twenty-five . . . foot right-of-way to the plaintiffs' [property] and which easement burdens the defendants' [property] as set

forth in [the easement]. . . . [Frontier] owns an overlapping easement to maintain utility poles . . . . The plaintiffs' ability to use the easement is obstructed by the location of a utility pole owned and maintained by Frontier and located within the right-of-way that is the subject of the easement. . . . The removal of the old utility pole, which obstructs the plaintiffs' driveway, requires that electrical service to the defendants' house be transferred from the old [utility] pole to the new utility pole. . . . The foregoing transfer of the electrical service requires that the defendants upgrade their electrical connection between the new utility pole and [the defendants'] house to comply with the building code currently in force and effect. . . . The defendants have failed and refused to upgrade their electrical connection to comply with the building code currently in effect. . . . Despite due demand, the defendants have failed and refused to consent to allowing Frontier to relocate the said utility pole and have refused to upgrade their electrical connection as required. . . . As a result of the actions of the defendants . . . the plaintiffs have been prevented from enjoying and using the easement." In their prayer for relief, the plaintiffs sought (1) a mandatory injunction requiring the Konkos defendants to consent to the removal of the utility pole that obstructs the easement, (2) a mandatory injunction requiring the Konkos defendants to upgrade their electrical connection between their house and the utility pole so that the electrical connection complies with the current building code, and (3) such other relief to which the plaintiffs may be entitled. On September 4, 2019, the Konkos defendants, who were self-represented litigants at that time but subsequently were represented by counsel, filed answers and what they characterized as special defenses. Beyond disputing several of the factual allegations in the complaint, they alleged what they considered to be numerous obstacles that made the relief sought by the plaintiffs not feasible at that time.

A bench trial was scheduled for September 22, 2022. On August 18, 2022, the attorneys for the parties attended a remote pretrial conference held before the court, *Hon. Dale W. Radcliffe*, judge trial referee.[2] On September 15, 2022, just seven days before the date on which the trial was scheduled to commence, the plaintiffs filed, pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 812, 626 A.2d 729 (1993) (*Audubon*),[3] a motion to enforce a settlement agreement that they claimed the parties entered into at the August 18, 2022 pretrial conference. The plaintiffs did not represent in their motion, however, that the purported agreement had been reduced to writing or articulated on the record. Instead, the plaintiffs stated that the parties had discussed and agreed on the location of an underground conduit for the defendants' new electrical service. Specifically, the plaintiffs asserted that the defendants initially "wanted the conduit to be located under their driveway." They further asserted that, at the pretrial conference, the defendants "agreed that the conduit would be installed by crossing the driveway and would be located exclusively in the lawn areas of their property." Attached to their motion, the plaintiffs submitted an exhibit (exhibit A), which they drafted after the pretrial conference to outline the terms of the parties' agreement.[4] Last, the plaintiffs represented in their

[2] The attorneys for the parties participated in the August 18, 2022 pretrial conference; the parties, themselves, were available by telephone.

[3] "In *Audubon*, our Supreme Court shaped a procedure by which a trial court could summarily enforce a settlement agreement to settle litigation. . . . The court held that a trial court may summarily enforce a settlement agreement within the framework of the original lawsuit as a matter of law when the parties do not dispute the terms of the agreement. . . . [S]ee also *Reiner* v. *Reiner*, 190 Conn. App. 268, 270 n.3, 210 A.3d 668 (2019) ([a] hearing pursuant to *Audubon* . . . is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law . . .)." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Bemer*, 215 Conn. App. 504, 523, 283 A.3d 1074 (2022).

[4] Exhibit A, which is unsigned and titled "Settlement Agreement re: *Krasko* vs. *Konkos*," states in relevant part: "The plaintiffs and the defendants accept Judge Radcliffe's settlement recommendations as follows:

motion to enforce that the defendants "now advise that they will not allow the plaintiffs to perform the agreed upon work and have refused to implement the settlement agreement."

On September 15, 2022, the plaintiffs filed a motion to continue the September 22, 2022 trial date. The motion to continue was based on the filing of the motion to enforce the purported settlement agreement. The defendants objected to the motion to continue, characterizing it as a delay tactic. On September 19, 2022, the court, *Tyma*, *J.*, granted the plaintiffs' motion to continue the trial but ordered that a remote status conference be held before Judge Radcliffe.

On September 20, 2022, the defendants filed an objection to the plaintiffs' motion to enforce the settlement

"(1) The plaintiffs, at [their] expense, will expeditiously undertake the following actions to enable [Frontier] to remove a utility pole which obstructs the plaintiffs' use of a right-of-way shared by the plaintiffs and the defendants . . . and allow the plaintiffs and the . . . defendants to utilize a new utility pole (already in place): (a) Engage a reasonable contractor to upgrade the electrical service connection between the [defendants'] house and the new utility pole to comply with the current building code by installing an underground conduit for the said electrical service; (b) Designate a location for the installation of the said conduit which location will avoid any adverse impact of the said installation on the [defendants'] subsurface sewage disposal system or mature trees on the [defendants'] property; (c) Allow [the defendants] to review the location for the said installation prior to installation; (d) Apply for all necessary permits and approvals for the said installation; (e) Make arrangements with utility providers to transfer utility service/connections to the new utility pole; and (f) Arrange for [Frontier] to remove the old utility pole. . . .

"(2) The defendants . . . will consent to the plaintiffs and [their] agents, servants, contractors, and employees to enter onto [the defendants'] property to designate the location for the installation of the conduit and to perform the work set forth in paragraph 1; will cooperate in all permits and applications for the work; and will consent to [Frontier] removing the old utility pole.

"(3) Upon the completion of the work set forth in paragraph 1, the plaintiffs shall pay to counsel for [the defendants], the sum of $2500 and . . . Kane will pay to counsel for [the defendants], the sum of $7500.

"(4) Upon the completion of the work, all parties to the action . . . will exchange releases and all claims and counterclaims in the action will be withdrawn."

agreement. In their objection, the defendants asserted that, at the pretrial conference held on August 18, 2022, "the court made recommendations and provided instructions to the parties that if they could reach an agreement based on those recommendations, then to alert the court clerk but that otherwise, the trial date would remain on the court calendar . . . . The parties attempted to reach an agreement but never did. Importantly, the parties never reached an agreement on two material terms inter alia: the location/scope of the expected work[5] and the length of time it would take." (Footnote in original.) On September 22, 2022, the court held a remote status conference off the record. Thereafter, the court went on the record and the following colloquy among the defendants' counsel, the plaintiffs' counsel, and the court took place:

"The Court: All right. . . . [W]e have discussed this matter off the record at length. I did ask the court reporter to log on so that we would be on the record. I indicated that this matter had been the subject of extensive discussions on a prior occasion where there was . . . an agreement . . . . I have before me a motion to enforce a settlement agreement and an objection thereto. The motion [to enforce] a settlement agreement contains an exhibit, which I propose to read into the record, because I believe that there was a meeting of the minds the last time we were here. The only matter that was left pending was the location of the conduit, and that would await the selection of a contractor. . . . [Defendants' counsel], you have filed an objection to that motion, I will . . . hear you at this time.

[5] "Interestingly, the plaintiffs insisted throughout the negotiations on inserting a drawing dictating the location of the conduit as an attachment to the proposed agreement, to which the defendants objected repeatedly—that attachment is missing from the plaintiffs' attempt at representing that some agreement was reached and is also not the last iteration of drafts exchanged. Other material terms regarding warranty, right of entry on the defendants' property by the plaintiffs, and other such terms are also missing from the attachment."

"[The Defendants' Counsel]: Thank you, Your Honor. I vehemently disagree with the court's characterization of our discussion that occurred at the last pretrial as an agreement. It . . . was a pretrial. Your Honor made recommendations based on the discussions that were had. And then further instructed us to see if we could hammer out an agreement based on those recommendations. I would like to note that the trial date was kept on, after that pretrial. And part of Your Honor's instructions to us were to contact the clerk's office, or file a caseflow request, if an agreement was reached to mark off the trial date. Otherwise to keep the trial date on for the time being . . . in case we [were not] able to reach an agreement. . . .

"[T]he clients never presented themselves during the pretrial. This was just a discussion amongst lawyers, where we presented our arguments and . . . tried to see if there was a way forward based on those discussions. Without waiving any objections, even if the court did find that there was some sort [of] agreement, the court still instructed us to come up with some sort of written agreement that included additional terms. . . .

"The Court: What terms were not . . . discussed? . . .

"[The Defendants' Counsel]: . . . [P]art of my issue, Your Honor . . . is that this exhibit, that was attached to the motion, is not the most recent iteration of the . . . drafts that were exchanged by the parties. . . .

"The Court: What is included in the more recent iteration that is not included in exhibit A?

"[The Defendants' Counsel]: For example, Your Honor, the discussions that we had about the warranty that . . . would be provided by the contractor for the work that would be done, or contemplated to be done. . . .

"The Court: What is the language? You said that they were not included in the . . . latest draft. What language

is included in that paper that was not included in exhibit A? . . .

"[The Defendants' Counsel]: In paragraph 1 where it says . . . 'which obstructs the plaintiffs' use of a right of a way.'

"The Court: All right.

"[The Defendants' Counsel]: We had specifically removed that because there was never an agreement. . . . [T]hese proceedings have been about . . . whether or not there's an obstruction. . . .

"The Court: . . . You object to the words, 'which obstructs the plaintiffs' use of the right-of-way.' . . .

"[The Defendants' Counsel]: . . . [T]here was an additional paragraph G. . . . That the plaintiffs shall complete the work within four months of the receipt of all required electrical components by the electrician. And to use all reasonable efforts to complete the work by the end of January, which deadline is subject to supply chain issues. . . . And importantly there was a paragraph H; the plaintiff[s] shall restore all areas to the [defendants'] property that are disturbed by the work to their original condition.

"The Court: Well, I think that goes without saying. . . . [The exhibit] appears to include everything that was included with the exception of that four month period, which certainly appears to be reasonable because it's subject to supply chain issues.

"[The Defendants' Counsel]: . . . [T]hat the funds be paid within thirty days of signing the agreement, which there . . . was no signing or an agreement. . . .

"The Court: . . . [T]hat wasn't part of the original agreement that we discussed . . . last time. It was that the payment would be made when the work was . . . completed. And . . . a reasonable time is implied. But we can say within thirty days, that's easy. . . .

"[The Defendants' Counsel]: There was . . . an added paragraph 5, where the defendants and their . . . tenants or invitees will have access to the property, and ingress or egress throughout the duration of the project without interruption. . . .

"The Court: . . . [N]obody would object to that. May I say, I don't think they have the ability to . . . stop them, that's up to your client.

"[The Defendants' Counsel]: Part of the draft also included an added paragraph 6, that downtime . . . as far as interruption of services, shall be reduced to a minimum . . . . [W]hat we had asked for was . . . in any instance where the [defendants'] property is left without power for longer than two hours. And I believe that there was some understanding or contemplation of a generator being provided for any interruption of services beyond two hours to prevent flooding or other damages. . . .

"The Court: . . . [T]hat was not part of our agreement, when we were here before. But this whole agreement can be subject to minimizing any downtime due to lack of electrical services.

"[The Defendants' Counsel]: Other language that was in the draft, Your Honor . . . to ensure that the . . . defendants will be given at least twenty-four hours' notice with a description of the work anticipated to be performed prior to entry on their property by anyone performing the work.

"The Court: What? No, that wasn't discussed.

"[The Defendants' Counsel]: . . . [T]hat's part of my objection, Your Honor, is that . . . there were recommendations, and we attempted to find an agreement . . . .

"The Court: We set forth . . . everything that had to be done. Now we're getting . . . to a point where this is frivolous. We set forth . . . an agreement that the money

. . . would be paid. . . . [I]t was agreed upon. The amount of money was agreed upon. It was agreed that the work would be done, a new pole would be installed, that has been [done]. And the electrical equipment would be relocated to that pole. And a conduit would be dug, not in a specific location, but would be dug in a way that did not impact several things on the property. That's what we discussed, and that's what I'm prepared to order because each of you indicated that you had the authority of your client[s] to enter into that agreement. . . .

"[The Defendants' Counsel]: Part of the additional discussion was a release of the lis pendens[6] that was filed against my clients' property on land records . . . the release to be filed immediately.

"[The Plaintiffs' Counsel]: That will be done, Your Honor.

"The Court: All right. . . . It's agreed. . . .

"[The Defendants' Counsel]: And if I may for the record, Your Honor . . . I also respectfully disagree with any characterization that any of these requests are frivolous. . . . [T]here are far more detailed items that are requested by people who are simply asking for work by contractors for their own property, which are considered contractual terms, material terms, and . . . enforceable terms. We never came to an agreement on . . . a number of these items. And these drafts were being exchanged back and forth pursuant to recommendations made at a pretrial, which is a normal occurrence that happens during the course of every litigation. And sometimes we don't come to an agreement.

[6] "[A] notice of lis pendens . . . when properly recorded, warns third parties, such as prospective purchasers, that the title to the property is in litigation . . . ." (Internal quotation marks omitted.) *Gibson* v. *Jefferson Woods Community, Inc.*, 206 Conn. App. 303, 312, 260 A.3d 1244, cert. denied, 339 Conn. 911, 261 A.3d 747 (2021).

"The Court: But each of you . . . were [specifically] asked if you had the authority of your client to enter into an agreement on these terms and conditions, and you each said yes. . . . Now he's adding additional terms.

"[The Defendants' Counsel]: . . . I believe that my client's entitled to his . . . reasonably short day in court . . . and to be able to state these things . . . as to why there was no agreement reached . . . .

"The Court: No, he won't be able to . . . tell them why . . . an agreement was not reached, because pretrial negotiations are not part of any trial. . . . [H]e will not get an opportunity to vent on that issue." (Footnote added.)

After hearing arguments by counsel, the court incorporated the additional terms that were discussed by the defendants' counsel into the settlement agreement as outlined in exhibit A. The court stated: "All right. Well, there is before me a motion to enforce a settlement agreement. Now this . . . motion references [our] Supreme Court['s] decision in *Audubon* . . . that if a settlement agreement is reached, that the court can enforce the settlement agreement by an order.

"Now I believe that . . . exhibit A does set forth the basis on which the agreement was completed. And the last time the parties were here, this was discussed at length. And there was a . . . meeting of the minds regarding certain basic terms and conditions. Now there have been some additional terms and conditions . . . or clarification, I should say, of the terms and conditions that were not included in this . . . exhibit. And I'm going to set them forth for the . . . record at this point.

"The [defendants] have objected to the language in exhibit A, which says that the utility pole . . . obstructs [the plaintiffs'] use of a right-of-way. . . . That is of course an ultimate issue in the case, and as part of the

agreement, they did not necessarily agree that the right-of-way would be obstructed. So, the first paragraph of the exhibit would read that . . . at the plaintiffs' expense will undertake the following actions to enable Frontier . . . to remove a utility pole and to allow the plaintiffs and the . . . defendants to utilize a new utility pole, which is already in place. There . . . is no agreement that they concede that the pole obstructs access to the property. . . . [Second], design a location for the installation of the conduit, which location would avoid any adverse impact . . . on the [defendants'] subservice disposal system or mature trees on the property. . . . Third, to allow the defendants . . . to review the location of the installation prior to the [conduit] installation.

"This is where I have a . . . problem with granting the motion . . . to enforce a settlement in its entirety. Because the . . . specific location was not agreed upon. The only thing that was agreed upon was that the conduit would go over the lawn or grass area—over the driveway and—not under the driveway . . . and would be in a location chosen by the contractor . . . . And the defendants agreed that they would consent to the location over the grass, provided those conditions were met. The plaintiffs would apply for the necessary permits, would make arrangements to transfer the utility service, and arrange for Frontier to remove the utility pole. . . .

"Now there was also some discussion about the time. And the plaintiffs have indicated here, and I'll make it a part of any agreement, that they complete the work within four months of the pulling of any permits and the receipt of any components subject to supply chain issues. So, that four month period is certainly a reasonable request. The . . . exhibit did not say, but I believe it's implied in the agreement, that the contractor will restore all disturbed areas to their prior condition. And the court will order that as . . . part of any agreement. . . .

"The defendant[s] [have] asked that there be no restrictions upon tenants or presumably real estate agents or anyone else at the request of the defendant[s] being refused entry to the property. And that certainly would go without . . . saying. That the . . . plaintiffs agree to minimize any disruption of electrical power to the home during the course of the installation of the conduit, and it's expected that that can be done within a few hours. . . .

"Now finally any lis pendens on the property would be released. I believe those were the terms that were agreed to the last time, I believe that the additions were implicit in what was agreed to. But I am explicitly stating them for the record at this point."

Following the court's clarification of the additional terms that were not in plaintiffs' exhibit A, the court took a recess and the defendants' counsel discussed the modified settlement agreement with her clients. After the recess, the defendants' counsel reported to the court that her clients did not consider the modified settlement agreement, with the additions made by the court, to be agreeable. The court then issued an oral decision, granting the plaintiffs' motion to enforce the settlement agreement, subject to the terms and conditions in the plaintiffs' exhibit, as modified by the court and as reflected in the September 22, 2022 transcript. The court held that, "when this matter was last here [on August 18, 2022] . . . there was a meeting of the minds as to all material terms, that the matters to be resolved did not go to the essence of the agreement, but were matters subject to further discussion among the parties. The essential terms, which were agreed to, involve the relocation of . . . the electrical services, the path that a conduit would take to the property. And those terms were agreed to by all of the . . . parties. And I've read them into the record, including the additional clarifications, which of course don't go to the essence of the agreement but are incorporated by . . . reference."

Thereafter, on September 22, 2022, the court issued a written order granting the plaintiffs' motion to enforce the settlement agreement. Specifically, the court ordered that the "[m]otion is granted as to terms and conditions set forth in exhibit A, as more fully explained and clarified in a transcript of September 22, 2022, which will be signed as the decision of the court. It is found that a meeting of the minds occurred, and that issues remaining to be discussed did not impact the essence of the agreement at an earlier pretrial conference. The agreement has been partially performed, through the deposit of certain monies into escrow, which monies are being held by [the plaintiffs' attorney]. Enforcement of the settlement agreement, under these circumstances is warranted. *Wittman* v. *Intense Movers, Inc.*, 202 Conn. App. 87, [245 A.3d 479, cert. denied, 336 Conn. 918, 245 A.3d 803] (2021)." This appeal followed.

On appeal, the defendants claim that the court erred in granting the plaintiffs' motion to enforce. In support thereof, they assert that the parties did not reach a clear and unambiguous agreement either at or following the August 18, 2022 pretrial conference. We agree and, accordingly, reverse the judgment of the court.

We begin our analysis by setting forth the relevant standard of review and legal principles that govern our review. "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit. . . . Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively

contracting for the right to avoid a trial. . . . Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. The key element with regard to the settlement agreement in *Audubon* . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement. . . . The rule of *Audubon* effects a delicate balance between concerns of judicial economy on the one hand and a party's constitutional rights to a jury and to a trial on the other hand. . . . To use the *Audubon* power outside of its proper context is to deny a party these fundamental rights and would work a manifest injustice." (Citations omitted; internal quotation marks omitted.) *Reiner* v. *Reiner*, 190 Conn. App. 268, 276–77, 210 A.3d 668 (2019).

"A settlement agreement is a contract among the parties. . . . In order to form a binding and enforceable contract, there must exist an offer and an acceptance based on a mutual understanding by the parties. . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, [i]n order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make. . . . Meeting of the minds is defined as mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation. . . . This definition refers to fundamental misunderstandings between the parties as to what are the essential elements

or subjects of the contract. It refers to the terms of the contract, not to the power of one party to execute a contract as the agent of another." (Citations omitted; internal quotation marks omitted.) *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 824–25, 277 A.3d 200 (2022).

"A contract is not made so long as, in the contemplation of the parties, something remains to be done to establish the contractual relation. The law does not . . . regard an arrangement as completed which the parties regard as incomplete. . . . In construing the agreement . . . the decisive question is the intent of the parties *as expressed*. . . . The intention is to be determined from the language used, the circumstances, the motives of the parties and the purposes which they sought to accomplish. . . . Furthermore, [p]arties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated. . . .

"Finally, [t]he fact that parties engage in further negotiations to clarify the essential terms of their mutual undertakings does not establish the time at which their undertakings ripen into an enforceable agreement . . . [and we are aware of no authority] that assigns so draconian a consequence to a continuing dialogue between parties that have agreed to work together. We know of no authority that precludes contracting parties from engaging in subsequent negotiations to clarify or to modify the agreement that they had earlier reached. . . . More important . . . [when] the general terms on which *the parties indisputably had agreed* . . . included all the terms that were essential to an enforceable agreement . . . [u]nder the modern law of contract . . . the parties . . . may reach a binding agreement even if some of the terms of that agreement are still indefinite." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Wittman* v. *Intense Movers, Inc.*, supra, 202 Conn. App. 98–99.

"In *Vance* v. *Tassmer*, 128 Conn. App. 101, 16 A.3d 782 (2011), appeal dismissed, 307 Conn. 635, 59 A.3d 170

(2013), this court considered whether, in summarily enforcing a settlement agreement, a trial court had exceeded the scope of the agreement . . . . In reviewing that claim, this court explained that [i]t is axiomatic that courts do not rewrite contracts for the parties. . . . In determining whether the court went beyond the scope of the settlement agreement . . . we review the court's decision for an abuse of discretion. . . . [T]he court's authority in such a circumstance is limited to enforcing the undisputed terms of the settlement agreement that are clearly and unambiguously before it, and the court has no discretion to impose terms that conflict with the agreement." (Citations omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 210 Conn. App. 725, 761, 271 A.3d 141 (2022).

"Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . Inherent in the concept of judicial discretion is the idea of choice and a determination between competing considerations. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court . . . . Under that standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Palumbo* v. *Barbadimos*, 163 Conn. App. 100, 110–11, 134 A.3d 696 (2016). "It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, supra, 210 Conn. App. 757.

As previously indicated in this opinion, a court has the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. *Reiner* v. *Reiner*, supra, 190 Conn. App. 276. The court may, under *Audubon*, hold a hearing to determine whether the terms of an agreement are clear and unambiguous. Id., 270 n.3. The court is limited, however, to enforcing clear and unambiguous terms. See id., 277. The court does not have the discretion to impose terms that conflict with the agreement. See id.

As a preliminary consideration in our analysis, we note that the procedural history set forth previously in this opinion reflects that the defendants asserted in response to the plaintiffs' motion to enforce that, despite their efforts at and following the August 18, 2022 pretrial conference, they never reached a settlement agreement with the plaintiffs. Thus, this is not a situation in which the sole issue before the court was whether one or more terms of a settlement agreement that had been indisputably entered into between the parties was clear and unambiguous. Rather, the defendants' objection to the motion to enforce put before the court the factual issue of whether a settlement agreement existed in the first place. "The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence. . . . To form a valid and binding contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties. . . . In order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make." (Citation omitted; internal quotation marks

omitted.) *Rosenblit* v. *Laschever*, 115 Conn. App. 282, 288, 972 A.2d 736 (2009).

The plaintiffs relied on exhibit A as evidence of a settlement agreement reached between the parties. The defendants repeatedly disputed that they had entered into such agreement.[7] The court, however, appears to have treated exhibit A—a disputed and unsworn submission of one party—as an agreement binding the parties. It is not clear from the record what led the court to this determination. The court did not conduct a hearing on the motion to enforce to thereby afford the parties an opportunity to present evidence with respect to the inherently fact bound issue of whether the parties had, in fact, entered into a contract to avoid a trial.[8] The failure to thoroughly explore the issue of whether a settlement agreement existed was all the more glaring in this case because the parties had not reported such an agreement to the court on the record

[7] Before this court, the defendants aptly argue that "[t]here is no evidence in the record that the proposed settlement terms [in exhibit A] were anything more than recommendations by Judge Radcliffe meant as a starting point to complete an agreement in the future. Nothing was put on the record at the time of the pretrial. The trial remained on the schedule. The defendants even issued a trial subpoena prior to the filing of the motion to enforce, showing they clearly did not believe there was an agreement. The only 'evidence' [of an agreement] before the trial court was argument from counsel."

[8] We note that the court heard only arguments by counsel during the status conference, and the court referenced this court's decision in *Wittman* v. *Intense Movers, Inc.*, supra, 202 Conn. App. 98, for the principle that, if a settlement agreement is reached, the court may enforce the agreement by an order. We note that *Wittman* is factually distinct from the present case. In *Wittman*, the trial court granted a motion to enforce a settlement agreement, but only after holding a hearing during which the parties presented evidence with respect to the existence and nature of the agreement. Id., 92–93. Specifically, the defendants offered email correspondence between themselves and the plaintiff's attorney to establish that the parties had reached a settlement agreement. Id., 91–92. The court entered the emails into evidence as full exhibits; id., 92; and relied on them in determining that the parties had reached a settlement agreement. Id., 93–94, 96. In the present case, unlike in *Wittman*, the trial court did not have any evidence before it to conclude that the parties had entered into a settlement agreement. Therefore, the court's reliance on *Wittman* in enforcing a settlement agreement between the parties was misplaced.

during the course of a court proceeding prior to the time at which the plaintiffs sought to enforce the purported agreement. "A court's authority to enforce a settlement by entry of judgment in the underlying action is especially clear where the settlement agreement is reported to the court during the course of a trial or other significant courtroom proceedings." (Internal quotation marks omitted.) *Audubon Parking Associates, Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, supra, 225 Conn. 811.[9] Here, it appears to be undisputed that the parties made attempts to reach an agreement after the August 18, 2022 pretrial conference. Beyond the plaintiffs' reliance on exhibit A, there was nothing on the record to demonstrate to the court that an agreement had been reached.

Moreover, even assuming that exhibit A memorialized an agreement between the parties, the court, faced with numerous issues concerning the adequacy of the agreement, thereafter did not hold a hearing pursuant to *Audubon* to determine whether the parties had a clear and unambiguous agreement. Rather, after hearing argument

[9] "In the majority of cases where settlement agreements have been summarily enforced pursuant to *Audubon*, the agreement at issue was either read directly into the record or otherwise reported to the court. In the cases where a settlement agreement was not directly presented to the court in full, it nevertheless was in some sense placed before the court during pending litigation. *Ackerman* v. *Sobol Family Partnership, LLP*, [298 Conn. 495, 499, 4 A.3d 288 (2010)] ('[a]t the time the [pretrial] mediation was concluded, a settlement had not been reached . . . although [the mediating judge] did remain active in further negotiations between the parties,' which ultimately resulted in a settlement agreement reached through out-of-court letters and phone calls, one week before trial . . .); see id., 517; *Maharishi School of Vedic Sciences, Inc. (Connecticut)* v. *Connecticut Constitution Associates Ltd. Partnership*, 260 Conn. 598, 600–601, 799 A.2d 1027 (2002) (after '[t]rial on the matter commenced . . . the parties informed the court that they had reached an agreement in principle' but finalized details later, during out-of-court negotiations); *Tirreno* v. *The Hartford*, 161 Conn. App. 678, 681, 129 A.3d 735 (2015) ('[f]ollowing a pretrial conference . . . [settlement] terms were agreed to orally, memorialized in a series of e-mails exchanged between counsel, and later testified to by [the reneging party's] counsel [before the court at an *Audubon* hearing]')." (Footnote omitted.) *Matos* v. *Ortiz*, 166 Conn. App. 775, 806–808, 144 A.3d 425 (2016).

from the parties, and after acknowledging that a material term of the settlement was "not agreed upon," the court issued an order granting the plaintiffs' motion to enforce a settlement agreement subject to the terms and conditions as modified by the court. The record is clear that the parties did not reach a clear and unambiguous agreement. Therefore, the court abused its discretion in granting the motion to enforce.

The judgment is reversed and the case is remanded with direction to deny the plaintiffs' motion to enforce a settlement agreement.

In this opinion the other judges concurred.

CAITLYN BOUCHARD ET AL. *v.* CHEYANNE E. WHEELER ET AL.
(AC 45627)

Elgo, Moll and Suarez, Js.

Syllabus

Pursuant to statute (§ 38a-336 (e)), an underinsured motor vehicle is a motor vehicle with respect to which the sum of the limits of liability under insurance policies applicable at the time of the accident is less than the applicable limits of liability under the uninsured motorist portion of the policy against which the claim is made.

The plaintiffs, who sustained injuries in a motor vehicle accident, sought to recover underinsured motorist benefits under an automobile insurance policy issued to them by the defendant S Co. At the time of the accident, the plaintiffs' policy and the insurance policy of the defendant tortfeasors each provided liability coverage of up to $100,000 per person and $300,000 per accident. The tortfeasors' insurer thereafter made payments to the plaintiffs and to others injured in the accident that exhausted the $300,000 per accident limit of the tortfeasors' policy. After the plaintiffs settled their claims with the tortfeasors and withdrew their action as against them, S Co. moved for summary judgment, claiming that the plaintiffs were not entitled to underinsured motorist benefits because, under our Supreme Court's precedent, their underinsured motorist coverage did not exceed the liability limits of the tortfeasors' policy. The plaintiffs contended that the tortfeasors' vehicle was an underinsured motor vehicle and that they were entitled to underinsured motorist

benefits because a legislative amendment (P.A. 14-20, § 1) to the underinsured motorist statute (§ 38a-336) had overruled that precedent. The trial court denied S Co.'s motion for summary judgment, concluding that the plaintiffs were entitled to underinsured motorist benefits because the total recovery they obtained from the tortfeasors was less than the $300,000 per accident limit in the tortfeasors' policy. The court reasoned that P.A. 14-20 required that the proper comparison of the applicable limits of the policies of the tortfeasor and the claimant must be between the amount of liability insurance actually available to a plaintiff under a tortfeasor's policy, after other claimants under that policy are paid, with the amount of a plaintiff's underinsured motorist coverage. The plaintiffs and S Co. then entered into a stipulation that reserved S Co.'s right to appeal the propriety of the court's denial of its motion for summary judgment and in which they agreed, inter alia, that the plaintiffs' policy and the tortfeasors' policy contained identical coverage limits and that the $300,000 per accident limit of liability coverage in the tortfeasors' policy had been exhausted. The court then rendered judgment for the plaintiffs in accordance with the parties' stipulation, from which S Co. appealed to this court. *Held* that the trial court improperly denied S Co.'s motion for summary judgment, as the tortfeasors' vehicle plainly was not an underinsured motor vehicle within the meaning of that term in § 38a-336 (e) because their underinsured motorist coverage was not less than, but identical to, the plaintiffs' liability coverage: although the language of § 38a-336, as amended by P.A. 14-20, was ambiguous as applied to the facts of this case, this court determined that the legislature, in P.A. 14-20, did not intend to alter the definition of an underinsured motor vehicle in § 38a-336 (e) or to overrule the precedent of our Supreme Court concerning that definition but, rather, intended to clarify that an insurer may offset from its insured's underinsured motorist coverage, pursuant to § 38a-336 and the applicable regulation (§ 38a-336-4), only that amount their insured actually received from the tortfeasor's coverage for bodily injury; moreover, this court was hard-pressed to conclude that the legislature intended to amend the definition of an underinsured motor vehicle in § 38a-336 (e) and overrule sub silentio a substantial body of our Supreme Court's precedent pertaining to that definition, as this court was required to presume that the legislature was aware that the court repeatedly has held that the application of § 38a-336 involves separate inquiries involving, first, whether the tortfeasor's vehicle is underinsured pursuant to § 38a-336 (e), which requires a comparison of the coverage limits contained in the respective insurance policies of the tortfeasor and the claimant, and, if so, the calculation of the amount, if any, to be paid to the claimant; furthermore, the legislative history of P.A. 14-20 indicated that it was enacted to preclude the practice condoned by this court in *Allstate Ins. Co.* v. *Lenda* (34 Conn. App. 444) that an insurance carrier could offset underinsured motorist benefits owed to its insured by all amounts paid

by or on behalf of the tortfeasor to the insured and others for bodily injury and property damage; additionally, although the plaintiffs contended that § 38a-336 is a remedial statute that must be construed liberally to protect people injured by uninsured motorists, our Supreme Court has expressly declined to apply that maxim to decide whether a vehicle met the statutory definition of an underinsured motor vehicle.

Argued October 3, 2023—officially released April 9, 2024

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where Safeco Insurance Company was cited in as a defendant; thereafter, the action was withdrawn as against the named defendant et al.; subsequently, the court, *Hon. Joseph M. Shortall*, judge trial referee, denied the motion for summary judgment filed by the defendant Safeco Insurance Company; thereafter, the court, *Morgan, J.*, rendered judgment for the plaintiffs in accordance with the parties' stipulation, from which the defendant Safeco Insurance Company appealed to this court. *Reversed*; *judgment directed.*

Philip T. Newbury, Jr., for the appellant (defendant Safeco Insurance Company).

James J. Walker, for the appellees (plaintiffs).

Opinion

ELGO, J. This case concerns the proper application of General Statutes § 38a-336, commonly known as the underinsured motorist statute. See *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 676, 189 A.3d 99 (2018). The defendant Safeco Insurance Company[1] appeals from the judgment of the trial court rendered in accordance with the stipulation that it entered into with the

[1] Although Cheyanne E. Wheeler and Russell Wheeler also were named as defendants, the plaintiffs withdrew their complaint against them approximately seven months after this action commenced. We therefore refer to Safeco Insurance Company as the defendant in this opinion.

plaintiffs Caitlyn Bouchard, Kayla Bouchard and Madalyn Bouchard.[2] On appeal, the defendant claims that the court improperly concluded that the automobile in question constituted an underinsured motor vehicle, as that term is used in § 38a-336. We agree and, accordingly, reverse the judgment of the trial court.

The relevant facts are not in dispute. On February 16, 2018, Caitlyn was operating a vehicle insured by the defendant on East Main Street in Thomaston. Among her passengers were her daughters, Kayla and Madalyn. At that time, Cheyanne E. Wheeler was operating a vehicle owned by Russell Wheeler (Wheeler vehicle). As she approached an intersection, Cheyanne E. Wheeler negligently turned the Wheeler vehicle into Caitlyn's lane of traffic, causing a collision that injured the plaintiffs and other individuals.

The plaintiffs thereafter commenced the present action, alleging negligence and recklessness on the part of Cheyanne E. Wheeler, as well as family car doctrine liability; see *Matthiessen* v. *Vanech*, 266 Conn. 822, 836 n.14, 836 A.2d 394 (2003); on the part of Russell Wheeler pursuant to General Statutes § 52-182. In addition, the plaintiffs alleged that, at all relevant times, the Wheeler vehicle was an underinsured motor vehicle and that they were entitled to underinsured motorist benefits from the defendant, their insurer. After the plaintiffs settled their claims with the tortfeasors' insurer and withdrew their action against Cheyanne E. Wheeler and Russell Wheeler, the defendant moved for summary judgment on the ground that "the plaintiffs are not

[2] Caitlyn Bouchard appeared before the court in both her individual capacity and as parent and next friend of Kayla Bouchard and Madalyn Bouchard. Although Caitlyn Bouchard also appeared on behalf of the plaintiff Tristan Bouchard, as parent and next friend, Tristan Bouchard was not a party to the stipulation and is not participating in this appeal.

For clarity, we refer to Caitlyn Bouchard, Kayla Bouchard and Madalyn Bouchard individually by first name and collectively as the plaintiffs.

entitled to underinsured benefits [because their] underinsured coverage is equal to the tortfeasor's liability coverage."

In its January 5, 2021 memorandum of decision, the court, *Hon. Joseph M. Shortall*, judge trial referee, acknowledged the precedent of our Supreme Court holding that a motor vehicle is not underinsured where the liability limits in the tortfeasor's policy are equal to or greater than the underinsured benefits in the claimant's policy. See *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, 252 Conn. 79, 87–91, 743 A.2d 156 (1999); *Florestal* v. *Government Employees Ins. Co.*, 236 Conn. 299, 301, 673 A.2d 474 (1996); *American Motorists Ins. Co.* v. *Gould*, 213 Conn. 625, 632–33, 569 A.2d 1105 (1990), overruled in part on other grounds by *Covenant Ins. Co.* v. *Coon*, 220 Conn. 30, 594 A.2d 977 (1991). The court nevertheless concluded that a 2014 amendment to § 38a-336 (b) legislatively overruled that Supreme Court precedent. Whereas the pertinent inquiry under that precedent entailed comparison of the applicable limits of the respective insurance policies of the tortfeasor and the claimant, the trial court held that, following passage of No. 14-20, § 1, of the 2014 Public Acts (P.A. 14-20), "the comparison must be between the amount of liability insurance *actually available* to the plaintiff under the tortfeasor's liability insurance policy, after other claimants under that policy are paid, with the amount of the plaintiff's underinsured motorist coverage." (Emphasis in original.) Because the total recovery obtained by the plaintiffs was less than the $300,000 per accident limit for coverage under the automobile policy issued by the defendant (Bouchard policy), the court concluded that they were entitled to additional underinsured motorist benefits. For that reason, the court denied the defendant's motion for summary judgment.

The parties thereafter entered into a stipulated judgment that reserved the defendant's right to appeal the

propriety of the court's denial of its motion for summary judgment. That stipulation set forth the following additional facts. At the time of the accident, the Wheeler vehicle was insured for automobile liability by State Farm Mutual Automobile Insurance Company (Wheeler policy). The Wheeler policy provided coverage of up to $100,000 per person and $300,000 per accident. State Farm Mutual Automobile Insurance Company subsequently made payments to the plaintiffs and other individuals injured in the accident, thereby exhausting the $300,000 per accident limit of the Wheeler policy.[3]

At all relevant times, the plaintiffs were insured under the Bouchard policy. As the parties noted in their stipulation, "the uninsured and underinsured motorist limits of the [Bouchard] policy are $100,000 per person and $300,000 per accident *without* conversion coverage . . . ."[4] (Emphasis added.) It therefore is undisputed

[3] The stipulated judgment indicates that State Farm Mutual Automobile Insurance Company paid "$80,500 to settle the claim by Caitlyn," "$60,000 to settle the claim by Kayla," "$50,000 to settle the claim by Madalyn," and "$109,500 to settle claims by additional injured persons who are not parties to this agreement . . . ."

[4] In their operative complaint, the plaintiffs alleged that the Bouchard policy "provided underinsured motorist conversion coverage." They nevertheless agreed, in the stipulated judgment entered into with the defendant and approved by the court, that the Bouchard policy did *not* provide conversion coverage. The record before us contains a copy of the Bouchard policy, which was appended as an exhibit to the defendant's memorandum of law in support of its motion for summary judgment. That exhibit confirms that the Bouchard policy did not provide underinsured motorist conversion coverage.

"[C]onversion coverage is an option [that] is available for an additional premium to consumers who wish to purchase it in lieu of standard underinsured motorist coverage under § 38a-336 [and] provides enhanced protection to victims of underinsured motorists . . . . In contrast to traditional underinsured motorist coverage, underinsured motorist conversion coverage is not reduced by the amount of any payment received by or on behalf of the tortfeasor or a third party. . . . As our Supreme Court succinctly explained, conversion coverage . . . means that any [uninsured] motorist benefits [a plaintiff] is entitled to from the defendant will not be reduced by the amount recovered from the legally responsible parties." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Russbach* v. *Yanez-Ventura*,

that the Wheeler policy and the Bouchard policy contain identical coverage limits.

By order dated June 27, 2022, the court rendered judgment in accordance with the stipulation of the parties. The defendant then commenced this timely appeal.

The issue presented in this appeal is whether the court correctly determined that the Wheeler vehicle constituted an underinsured motor vehicle, as that term is used in § 38a-336. The proper construction of § 38a-336 presents a question of law, over which our review is plenary. See *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 84.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 83, 282 A.3d 1253 (2022). Pursuant to General Statutes § 1-2z, "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

I

In ascertaining the proper meaning of § 38a-336, we do not write on a blank slate, but rather are guided by our Supreme Court's prior decisions construing that

213 Conn. App. 77, 103–104, 277 A.3d 874, cert. denied, 345 Conn. 902, 282 A.3d 465 (2022).

statute. See *Connecticut Ins. Guaranty Assn.* v. *Drown*, 314 Conn. 161, 173, 101 A.3d 200 (2014); *New England Road, Inc.* v. *Planning & Zoning Commission*, 308 Conn. 180, 186, 61 A.3d 505 (2013). In *American Motorists Ins. Co.* v. *Gould*, supra, 213 Conn. 625, the Supreme Court addressed the question of whether a tortfeasor's vehicle constituted an underinsured motor vehicle, as that term was used in General Statutes (Rev. to 1983) § 38-175c, the precursor to § 38a-336. The court first noted that the statute contained an explicit definition of the term "underinsured motor vehicle"; id., 629; and explained that § 38-175c "requires that the insured's *uninsured motorist coverage limits* be greater than the total liability limits for a [tortfeasor's] vehicle before it may be deemed underinsured." (Emphasis in original.) Id., 631. The court then continued: "[T]he legislative objective was simply to give an insured who is injured in an accident the same resource he would have had if the tortfeasor had carried liability insurance equal to the amount of the insured's uninsured motorist coverage. Where an underinsured motor vehicle is statutorily defined as an insured motor vehicle with applicable liability limits less in amount than the injured person's uninsured motorist's limits, it is clear that the underinsured motorist coverage is not applicable if the insured person's uninsured motorist limits are equal to, or less than, the tortfeasor's liability limits." (Internal quotation marks omitted.) Id., 632.

Six years later, the Supreme Court was asked to overrule its decision in *Gould*. In *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 301, the court declined to do so and expressly reaffirmed its holding in *Gould*. The plaintiffs in *Florestal* argued that "a strict construction of [the definition of 'underinsured motor vehicle' set forth in] § 38a-336 (e) is inconsistent with the legislative purpose underlying the enactment of our uninsured and underinsured motorist statutes, which,

they assert, is to ensure 'that automobile accident victims receive fair, just and reasonable compensation for their injuries.' " Id., 305. The court acknowledged that "broadly stated . . . the purpose of underinsured motorist coverage is to protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile." (Internal quotation marks omitted.) Id. The court continued: "It does not follow, however, that the legislature, in providing for underinsured motorist coverage, necessarily intended to guarantee that each and every accident victim would be fully, or even adequately, compensated for injuries caused by an underinsured motorist. . . . [*T*]*he legislative objective* [*in enacting § 38a-336*] *was simply to give an insured who is injured in an accident the same resource he would have had if the tortfeasor had carried liability insurance equal to the amount of the insured's uninsured motorist coverage.*" (Emphasis in original; internal quotation marks omitted.) Id., 306. The Supreme Court also emphasized that "the purpose of underinsured motorist coverage is neither to guarantee full compensation for a claimant's injuries nor to ensure that the claimant will be eligible to receive the maximum payment available under any applicable policy. Indeed, underinsured motorist protection is not intended to provide a greater recovery than would have been available from the tortfeasor . . . ." (Internal quotation marks omitted.) Id., 310.

Notably, the tortfeasor's automobile liability policy in *Florestal*—like the Wheeler policy here—was exhausted by payment to multiple claimants. Id., 301. For purposes of determining whether the tortfeasor's vehicle was an underinsured motor vehicle under § 38a-336, our Supreme Court held that this was a distinction without a difference, stating: "The fact that [the tortfeasor's] liability coverage has . . . been exhausted because of multiple

claims does not change the effect of the statute in activating uninsured motorist coverage only when the liability insurance of the tortfeasor is less in amount." (Internal quotation marks omitted.) Id., 306.

The court further recognized that, "several years after [its] decision in *Gould*, the legislature enacted the Automobile Insurance Reform Act; Public Acts 1993, No. 93-297; which, among other things, requires any insurance company licensed to sell automobile liability insurance in this state to offer a type of underinsured motorist coverage known as underinsured motorist conversion coverage . . . . This option, which is available *for an additional premium* to consumers who wish to purchase it *in lieu of standard underinsured motorist coverage under § 38a-336*, provides enhanced protection to victims of underinsured motorists because, in contrast to coverage under § 38a-336, it is activated when the sum of all payments received by or on behalf of the covered person from or on behalf of the tortfeasor are less than the *fair, just and reasonable damages of the covered person*. . . . By retaining the standard option under § 38a-336 and providing for another, different kind of underinsured motorist coverage . . . it is apparent that the legislature chose to address the coverage issue raised in *Gould* not by overruling our holding therein but, rather, by mandating the availability of a more comprehensive, and more expensive, optional form of underinsured motorist coverage." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 306–308.

In *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 84, the Supreme Court again adhered to its earlier precedent, and *Florestal* in particular, stating that, "[i]n all of these cases, we reasoned that the determination of whether there was underinsured motorist coverage available to the plaintiff was to be determined by comparing the amount of liability

insurance potentially available to the plaintiff from the tortfeasor with the amount of underinsured motorist coverage potentially available to the plaintiff under his or her underinsured motorist policy. These potential availabilities were calculated, moreover, by comparing the respective stated policy limits—liability and underinsured motorist. That comparison is mandated by the specific language of § 38a-336 (e) . . . . Furthermore, this simple comparison—of potentially available liability insurance with potentially available underinsured motorist coverage—was to be done, we held, irrespective of whether the liability coverage had been fully or partially exhausted by other claimants . . . .'' Id., 87–88.

The court also reiterated the proper analytical framework that governs claims involving § 38a-336, stating: ''Application of § 38a-336 involves two separate inquiries. First, it must be determined whether the tortfeasor's vehicle is an 'underinsured vehicle' within the meaning of the statute. Second, after this determination is made and underinsured motorist coverage is found to be applicable, the finder of fact calculates the amount of the award to be paid the victim.'' (Internal quotation marks omitted.) Id., 84. As an intermediate appellate tribunal, this court is bound by that precedent. See *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010).

II

With that context in mind, we turn to the statutory language at issue. Section 38a-336 requires automobile insurance policies in this state to include underinsured motorist coverage, which pertains to bodily injuries caused by owners and operators of underinsured motor vehicles. Importantly, the statute contains a detailed

definition of that term. Section 38a-336 (e) provides: "For the purposes of this section, an 'underinsured motor vehicle' means a motor vehicle with respect to which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the uninsured motorist portion of the policy against which claim is made under subsection (b) of this section."[5]

On appeal, the defendant claims that the plain language of § 38a-336 (e) indicates that an automobile qualifies as an "underinsured motor vehicle" only if the claimant's uninsured motorist coverage exceeds the liability limits of the tortfeasor's policy, as our Supreme Court repeatedly has held. See *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 87–88; *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 301; *American Motorists Ins. Co.* v. *Gould*, supra, 213 Conn. 632.

The plaintiffs, by contrast, submit that the enactment of P.A. 14-20 served to amend not only § 38a-336 (b), but also altered the definition of "underinsured motor vehicle" contained in § 38a-336 (e). As amended by P.A. 14-20, § 38a-336 (b)—which pertains to underinsured motorist coverage limits—provides in relevant part: "In no event shall there be any reduction of uninsured or underinsured motorist coverage limits or benefits payable . . . for amounts paid by or on behalf of any tortfeasor for bodily injury to anyone other than individuals insured under the policy against which the claim is made, or [for] amounts paid by or on behalf of any

[5] The Bouchard policy contains a definition of an "underinsured motor vehicle" that largely mirrors the statutory definition provided in § 38a-336 (e), stating: " 'Underinsured motor vehicle' means a land motor vehicle or trailer of any type for which the sum of the limits of liability under all bodily injury bonds or policies applicable at the time of the accident is less than the limit of liability for this coverage."

tortfeasor for property damage. . . .'' In this regard, the plaintiffs emphasize that the definition of ''underinsured motor vehicle'' set forth in § 38a-336 (e) explicitly incorporates § 38a-336 (b) by reference.[6] They thus argue that, for purposes of the comparison mandated by § 38a-336 (e), the applicable limits of liability under an underinsured motorist policy that was in effect at the time of the accident ''means the amount of liability coverage *actually*, not just *potentially*, available'' to individuals insured under that policy pursuant to § 38a-336 (b).[7] (Emphasis in original.)

Under our rules of statutory construction, ambiguity arises whenever statutory language is subject to more than one plausible interpretation. See, e.g., *Redding* v. *Georgetown Land Development Co., LLC*, 337 Conn. 75, 84 n.9, 251 A.3d 980 (2020) (''[o]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation'' (internal quotation marks omitted)); *State* v. *Pond*, 315 Conn. 451, 468, 108 A.3d 1083 (2015) (''[b]ecause the statutory language is subject to multiple, plausible interpretations, and it does not expressly

[6] General Statutes § 38a-336 (e) provides: ''For the purposes of this section, an 'underinsured motor vehicle' means a motor vehicle with respect to which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than *the applicable limits of liability under the uninsured motorist portion of the policy against which claim is made under subsection (b) of this section.*'' (Emphasis added.)

[7] That construction was adopted by the trial court in the present case. In its memorandum of decision, the court stated in relevant part: ''[Section] 38a-336 . . . defines an 'underinsured motor vehicle' as one with respect to which the limits of liability coverage 'applicable at the time of the accident' is less than the applicable limits of the underinsured motorist coverage of the policy under which claim is made 'under subsection (b) of this section.' Interpreting subsection (e) so that it is consistent with the statute as a whole, including the amended subsection (b), as the court must . . . the limits of liability coverage '*applicable at the time of the accident*' must mean the amount of liability coverage *actually* not just *potentially* available to the plaintiff.'' (Citation omitted; emphasis in original.)

address or resolve the certified question, [the language] is facially ambiguous"); *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language [in question] is ambiguous"). We conclude that the statutory language in question is subject to more than one plausible interpretation. For that reason, § 38a-336 is ambiguous as applied to the facts of this case.[8] Accordingly, resort to extratextual materials is warranted. See, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 17, 981 A.2d 427 (2009).

III

The parties agree that, prior to the enactment of P.A. 14-20, a motor vehicle was not deemed underinsured pursuant to the definition set forth in § 38a-336 (e) where the liability limits in the tortfeasor's policy were equal to or greater than the underinsured benefits in the claimant's policy. Their fundamental disagreement concerns whether the legislature, in enacting P.A. 14-20, intended to alter that definition of an "underinsured motor vehicle."

[8] Multiple judges of the Superior Court have determined that § 38a-336 is ambiguous in similar factual scenarios, necessitating consideration of the legislative history of P.A. 14-20. See, e.g., *Rasimas* v. *Kemper Independence Ins. Co.*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. CV-20-6053945-S (December 16, 2021) (*Ozalis*, *J.*) (reviewing P.A. 14-20 and its legislative history to ascertain "what portion of the tortfeasor's liability limits are 'applicable' to the plaintiff's underinsured motorist claim" and concluding that, "[i]t is clear . . . after examining the text of § 38a-336 (e), that the 'applicable' liability coverage in this context is the amount actually available and paid to the insured, after other claimants are paid"); *Ismail* v. *Sanchez*, Superior Court, judicial district of New Britain, Docket No. CV-18-6045272-S (September 22, 2020) (*Aurigemma*, *J.*) ("After reviewing . . . the legislative history of P.A. 14-20, the court agrees with the [defendant] that the public act did not change the definition of 'underinsured motorist' [set forth in § 38a-336 (e)] but, rather, intended to clarify the law concerning deduction to payments due to underinsured motorists. Since the plaintiff and the tortfeasor had identical insurance coverage, the plaintiff was not an underinsured motorist for purpose[s] of P.A. 14-20 . . . .").

The legislative history of P.A. 14-20 is illuminating in this regard. On March 4, 2014, the Connecticut Trial Lawyers Association (association) submitted a letter to the legislature's Insurance and Real Estate Committee in support of what ultimately became P.A. 14-20. It stated in relevant part: "Following last year's legislative session, a joint study group comprised of both members of the [association] and the Insurance Association of Connecticut . . . was formed under the auspices of the Connecticut Department of Insurance. Senate Bill number 280 is the product of that working committee. *The legislation was drafted, and is agreed to by both the* [*association and the Insurance Association of Connecticut*] . . . . Under the current state of the law, an underinsured motorist carrier is entitled to reduce its coverage for any payments made to the injured party pursuant to the liability policy issued to the [tortfeasor]. The proposed bill does not seek to change this rule. However, the Connecticut Appellate Court interpreted this rule as allowing underinsured motorist carriers to also claim a reduction for payments made to individuals other than the claimant by the liability carrier for the [tortfeasor]. *Allstate* [*Ins. Co.* v. *Lenda*, 34 Conn. App. 444, 642 A.2d 22, cert. denied, 231 Conn. 906, 648 A.2d 149 (1994), and cert. denied, 231 Conn. 906, 648 A.2d 149 (1994)]. A result of this ruling is that the claimant's uninsured motorist coverage can be reduced by payments they never received which were paid by the liability carrier for the [tortfeasor] to other individuals, totally unrelated to the claimant. . . . [This bill] seeks to correct this inequity by disallowing any reduction in underinsured/uninsured motorist coverage for amounts paid by or on behalf of any tortfeasor for bodily injury to anyone other than the individuals insured under the policy against which the claim is being made. [It] further prohibits any reductions for payments made by the tortfeasor on behalf of property damage." (Emphasis

added.) That letter was admitted into the record of the hearing of the Insurance and Real Estate Committee on March 4, 2014.

On that date, the president of the association, Mike Walsh, testified before the Insurance and Real Estate Committee and reiterated that "the purpose of this . . . proposed legislation . . . is to essentially correct what we perceived to be an inequity . . . that was created by the Connecticut Appellate Court [in *Lenda*] that allowed [underinsured motorist] carriers to reduce their coverage for payments made by the liability carrier." Conn. Joint Standing Committee Hearings, Insurance and Real Estate, Pt. 2, 2014 Sess., p. 489. Walsh was the only person who testified before the committee on that bill, and the letter from the association was the only correspondence entered into the record. That testimony and documentation indicate that the bill that ultimately became P.A. 14-20 was drafted not in response to the precedent of our Supreme Court such as *Gould*, *Florestal* and *Doyle* but, rather, in response to a decision of this intermediate court decided in 1994—four years *after* our Supreme Court's pronouncement in *Gould* regarding the proper meaning of the term "underinsured motor vehicle." That Appellate Court decision, therefore, demands closer scrutiny.

In *Lenda*, the defendant was injured in a five car collision caused solely by the negligence of Peter Seymour, the tortfeasor. *Allstate Ins. Co.* v. *Lenda*, supra, 34 Conn. App. 445. Seymour's automobile insurance policy provided a total of $100,000 in liability coverage, which was exhausted through payments to the defendant and four other injured individuals for both personal injuries and property damage they sustained. Id., 445–46 and 446 n.3. The defendant was paid $73,071.51 as compensation for personal injuries and $6987.45 for property damage. Id., 446 n.3.

The defendant's underinsured motorist policy in effect at that time provided $100,000 in coverage. Under the terms of that policy, the plaintiff insurer was "entitled to reduce the amount of underinsured motorist benefits payable to [the defendant] by all the amounts paid by or on behalf of Seymour to *all* injured parties both for personal injury *and* for property damages." (Emphasis added.) Id., 453. On appeal, the parties disagreed as to "whether [that] reduction is allowed under § 38a-334-6 of the Regulations of Connecticut State Agencies." Id. After examining the language of that regulation, this court concluded that, "[u]nder the terms and provisions of [the defendant's underinsured motorist policy], [the plaintiff] was entitled to reduce the amount owed to [the defendant] for underinsured motorist coverage by all amounts paid by or on behalf of Seymour to [the defendant] *and to others* . . . ." (Emphasis added.) Id., 456. Although the defendant also argued that "the limit of coverage should not be reduced by the amounts paid for property damages," this court disagreed, stating: "From our review of the language of the regulation, we conclude that the 'damages' for which there may be a reduction of limits are not limited to bodily injury. Therefore, under the language of the regulation, damages paid for property damages as well as damages paid for bodily injury may be deducted for the purpose of reducing limits of coverage." Id., 455. The court thus concluded that "the language of § 38a-334-6 of the Regulations of Connecticut State Agencies authorizes [the] type of policy provision" contained in the defendant's underinsured motorist policy. Id., 456.

In *Lenda*, this court was presented with a question regarding the proper application of § 38a-334-6 of the Regulations of Connecticut State Agencies. *Lenda* did not concern, and did not address, the proper construction of the term "underinsured motor vehicle."

The legislative history of the debate in the House of Representatives demonstrates that the intent of P.A. 14-20 was to clarify the proper meaning of § 38a-334-6 of the Regulations of Connecticut State Agencies with respect to offsets taken by underinsured motorist carriers. As our Supreme Court has observed, "the statement of the legislator who reported the bill out of committee carries particular weight and deserves careful consideration." *Robinson* v. *Unemployment Security Board of Review*, 181 Conn. 1, 15 n.4, 434 A.2d 293 (1980). In moving for acceptance of the Insurance and Real Estate Committee's favorable report and passage of the bill that became P.A. 14-20, Representative Robert W. Megna, the chairman of that committee, introduced the bill by stating that "this is a bill that's been around our committee for the last several years. . . . It has to do with what we refer to as offsets when it comes to uninsured and underinsured motorists claims. . . . [T]he Department of Insurance had established regulations talking about the application of that section of the statute . . . and offsets. . . . We had several complaints. The trial attorneys came in front of our committee and it . . . became apparent that . . . there was . . . some wiggle room [in the regulations] and some insurers may have been taking offsets greater than what was really intended under the statute . . . . It was a few insurance companies that were taking additional offsets. And what this language represents is an agreement between the industry and the trial attorneys on how the correct application of that regulation put out by the Department of Insurance should apply." See 57 H.R. Proc., Pt. 11, 2014 Sess., pp. 3714–15.

Shortly thereafter, Megna reiterated that the bill was "just really a clarification about the regulation that the Department of Insurance had put out." Id., pp. 3719–20. Megna explained that, as a matter of practice under § 38a-336, "most carriers . . . would simply take an

offset for . . . what part of the coverage of the tortfeasor that was paid to . . . the insured. And [what] happened was when the Department of Insurance drafted the regulation one . . . or more carriers had interpreted it in such a way that they can take several offsets for several individuals that were making claim[s] . . . that were passengers of the car or were injured in some manner. So essentially it's really just clarifying . . . the intent of the existing statute." Id., p. 3720.

In his remarks, Representative Richard A. Smith noted that "[t]his is an area of the law that I do practice in so I'm interested in hearing the dialogue. I'm actually happy to hear [that] this bill [is] being proposed. It's been an issue that we have dealt with . . . over the past several years where the offsets have been reduced just based on the number of claimants disregarding who actually received the money." Id., p. 3732. The following colloquy then ensued:

"[Representative Smith]: But just so I'm sure and for the colleagues out there who might be interested in what [is] in this bill . . . if there is [a] $100,000 [underinsured] policy and a tortfeasor policy of $20,000 how much available coverage then would be available to the insured? . . .

"[Representative Megna]: . . . I believe $80,000. . . .

"[Representative Smith]: And thank you for that. And then if there were several claimants against that [$]20,000 policy which probably would be a $40,000 multiple claim policy. If [$]40,000 of that policy was paid out to various parties and the insured . . . actually received $30,000 total, how much then would be left pursuant to his underinsured policy? . . .

"[Representative Megna]: . . . [H]is offset would be the $30,000 . . . which would leave $70,000 collectible under his [underinsured] policy . . . .

"[Representative Smith]: . . . Thank you. And that's how I . . . came to the same answer and we're not using hard math here so . . . I'm trying to keep it simple. But the [$]70,000 that's available now to the insured because he received [$]30,000 from the tortfeasor, that [$]70,000 under this bill would still be available regardless of how much else the tortfeasor's insurance company paid out. As long as the insured received [$]30,000 then the only offset would be that [$]30,000. Just want to be clear. . . .

"[Representative Megna]: . . . [T]hat's the way I understand it. . . . [T]he intent would be for those carriers not to take an offset greater than that [$]30,000 hypothetical if there were somebody else in the vehicle that also collected from the tortfeasor's policy. And that's really . . . the essence of the bill before us." Id., pp. 3732–35.

Megna then explained that P.A. 14-20 "comes out of a regulation that the Department of Insurance had [that provided] wiggle room for those few carriers that took other injured [parties'] offsets off of the insured's limit of liability. . . . [The carriers] got that ability . . . through a department regulation . . . . But yes the intent is to clarify the statute so to speak. . . . [B]ut the argument [for this bill] seemed to have come out of . . . the drafting of this regulation by the Department of Insurance that had to do with offsets under that section of the statute." Id., p. 3736.

Shortly thereafter, another pertinent colloquy occurred between Representatives Smith and Megna:

"[Representative Smith]: . . . [L]adies and gentlemen of the Chamber, this is a significant point so for legislative intent purposes what I'm hearing [from] the good Chairman is that . . . the intent of the current legislation is that the offset should be only that amount which the insured actually received. That was the intent

then, that is the intent now and that will be the intent moving forward . . . . Is that fair to say? . . .

"[Representative Megna]: . . . Absolutely. That is the intent. . . . That is the intent of this bill. That's the intent of the legislation. . . .

"[Representative Smith]: . . . I appreciate the Chairman's confirmation of the intent of this statute, the intent of the existing law . . . . The intent being that offsets are only those amounts that the insured actually received. That's our current law. This bill just clarifies that law." Id., pp. 3743–45.

Furthermore, although the legislative history contains several hypothetical scenarios that outline when such offsets properly may be taken, none involved the scenario at issue here, in which the tortfeasor and the claimant had identical coverage limits in their respective insurance policies. In every such hypothetical, the claimant's underinsured motorist coverage exceeded the limits of tortfeasor's liability coverage.[9]

The legislative history thus confirms that the intent of P.A. 14-20 was to clarify the extent to which underinsured motorist carriers properly may take offsets pursuant to § 38a-334-6 of the Regulations of Connecticut State Agencies and § 38a-336 (b). Indeed, the title of P.A. 14-20 is "An Act Concerning Uninsured and Underinsured Motorist Coverage Offsets." See *Peck* v. *Jacquemin*, 196 Conn. 53, 68 n.17, 491 A.2d 1043 (1985) ("[t]he title and stated purpose of legislation are, while not conclusive, valuable aids to construction").

[9] There was one instance in which Representative Megna began to reference a situation in which both the tortfeasor's liability coverage and the claimant's underinsured motorist coverage were $100,000. Megna stopped himself midsentence when he realized that, in such a scenario, "if [the claimant] had [a] $100,000 limit it would cancel it out," and then immediately altered the hypothetical to one in which the claimant had a $200,000 limit. 57 H.R. Proc., supra, p. 3754, remarks of Representative Megna.

We have carefully reviewed the legislative history of P.A. 14-20. Nothing in it suggests that the General Assembly intended to alter the definition of "underinsured motor vehicle" contained in § 38a-336 (e).[10] If the legislature wanted to amend that statutory definition, it certainly knew how to do so. See *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183 ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly"), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). The legislature nevertheless made no changes to § 38a-336 (e).

We also are mindful that "[t]he legislature is presumed to know the judicial interpretation placed upon a statute . . . and [is] presumed . . . to be cognizant of judicial decisions relevant to the subject matter of a statute . . . and to know the state of existing relevant law . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Fernando A.*, supra, 294 Conn. 19; see also *Alvarez* v. *New Haven Register, Inc.*, 249 Conn. 709, 722, 735 A.2d 306 (1999) ("[t]he legislature is presumed to be aware of [our Supreme Court's] decisions"). We therefore must presume that the legislature, in enacting P.A. 14-20, was aware that our Supreme Court repeatedly has held that the "[a]pplication of § 38a-336 involves two separate inquiries. First, it must be determined whether the tortfeasor's vehicle is an 'underinsured vehicle' within the meaning of the statute. Second, after this determination is made and underinsured motorist coverage is found to be applicable, the finder of fact calculates the amount of the award to be paid the victim." *Covenant Ins. Co.* v. *Coon*, supra, 220 Conn. 33; see also *Doyle* v. *Metropolitan Property &*

[10] Although the legislative history is replete with references to underinsured motorist coverage, the term "underinsured motor vehicle" does not appear once in that history.

Casualty Ins. Co., supra, 252 Conn. 84. We also must presume that the legislature was aware that our Supreme Court consistently has held that the former inquiry entails application of the definition of "underinsured motor vehicle" set forth in § 38a-336 (e); see *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 87–88; *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 301; *American Motorists Ins. Co.* v. *Gould*, supra, 213 Conn. 632; which requires a comparison of the coverage limits contained in the respective insurance policies of the tortfeasor and the claimant. In light of the foregoing, we are hard-pressed to conclude that the legislature intended to amend that critical statutory definition—and overrule that substantial body of Supreme Court precedent—sub silentio.[11]

IV

We therefore conclude that the legislature, in enacting P.A. 14-20, did not intend to alter the definition of an "underinsured motor vehicle" or to overrule the precedent of our Supreme Court in *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 79, *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 299, and *American Motorists Ins. Co.* v. *Gould*, supra, 213 Conn. 625, as the plaintiffs suggest. To the contrary, our review of the legislative history reveals that P.A. 14-20 was enacted in direct response to this court's decision in *Lenda*, which held that § 38a-334-6 of the Regulations of Connecticut State Agencies permitted insurance carriers to offset underinsured motorist benefits owed to an insured claimant "by all amounts

[11] See, e.g., *Gilmore* v. *Pawn King, Inc.*, 313 Conn. 535, 569–72, 98 A.3d 808 (2014) (*Espinosa, J.*, dissenting) (noting that our Supreme Court "consistently [has] required clear evidence in the legislative record to support [the] conclusion" that "a legislative amendment was intended to overrule our prior decision construing a statute" and "that in the absence of clear and unequivocal evidence of legislative intent to overrule one of our prior interpretive decisions, that decision continues to control the meaning of the relevant statutory provision"); see id. (*Espinosa, J.*, dissenting) (discussing case law construing "clear evidence").

paid by or on behalf of [the tortfeasor] to [the insured claimant] *and to others* for both bodily injury *and* property damages." (Emphasis added.) *Allstate Ins. Co.* v. *Lenda*, supra, 34 Conn. App. 456. As the association emphasized in its March 4, 2014 letter to the legislature's Insurance and Real Estate Committee, the bill that became P.A. 14-20 was drafted "to correct this inequity by disallowing any reduction in underinsured/uninsured motorist coverage for amounts paid by or on behalf of any tortfeasor for bodily injury to anyone other than the individuals insured under the policy against which the claim is being made. [It] further prohibits any reductions for payments made by the tortfeasor on behalf of property damage." Simply put, § 38a-336 (b), as amended by P.A. 14-20, precludes the practice affirmatively condoned by this court in *Lenda*.

The plaintiffs nonetheless contend that, because our Supreme Court has held that § 38a-336 is a remedial statute, it must be construed liberally to protect people injured by underinsured motorists. See, e.g., *Tannone* v. *Amica Mutual Ins. Co.*, supra, 329 Conn. 673 ("public policy dictates that every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist [responsible for the insured's injury] had maintained a policy of liability insurance" (internal quotation marks omitted)); but see *Smith* v. *Safeco Ins. Co. of America*, 225 Conn. 566, 573, 624 A.2d 892 (1993) ("underinsured motorist protection is not intended to provide a greater recovery than would have been available from the tortfeasor"). In so doing, they overlook the fact that our Supreme Court has expressly declined to apply that maxim of liberal construction in the specific context now before us. As the court explained: "[I]n other contexts we have described our uninsured and underinsured motorist coverage statute as having a broad and remedial purpose. . . . In none of those cases, however, did we

employ that description in order to decide *whether* a vehicle met the statutory definition of an underinsured motor vehicle. Furthermore, such a description cannot override the purpose of the statute to put the injured party in no better or worse a position than he would have been in had the tortfeasor carried adequate insurance. Thus, the description of the statute as remedial cannot convert an adequately insured motor vehicle into an underinsured motor vehicle." (Citations omitted; emphasis in original.) *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 88 n.5. That logic applies equally here.

There may well be cases in which an inequity results from the application of the underinsured motorist laws of this state when an accident involves multiple claimants. As our Supreme Court aptly noted, "redress from any such unfairness must be sought from the legislature, not from the courts . . . ."[12] *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 310; see also *Dugas* v. *Lumbermens Mutual Casualty Co.*, 217 Conn. 631, 647, 587 A.2d 415 (1991) ("even if the plaintiff is correct that this result [under the statute in question] is anomalous, his remedy lies with the legislature or the insurance commissioner, not with this court"); *Roy* v. *Centennial Ins. Co.*, 171 Conn. 463, 476, 370 A.2d 1011 (1976) ("[t]his court cannot . . . by a tortured construction of the statutory . . . provisions, indirectly eliminate possible inequities in coverage, where

[12] For example, Colorado previously defined an underinsured motor vehicle in relevant part as a motor vehicle with liability coverage limits that were less than the insured's underinsured motorist limits *or* less than the insured's underinsured motorist limits after having been "[r]educed by payments to persons other than an insured in the accident . . . ." Colo. Rev. Stat. § 10-4-609 (1995); see also *Leetz* v. *Amica Mutual Ins. Co.*, 839 P.2d 511, 512–13 (Colo. App. 1992) (interpreting § 10-4-609 and concluding that its reduction provision was not applicable to payments made to persons who were insureds under underinsured motorist policy). In 2007, the Colorado legislature amended § 10-4-609 and deleted that reduction provision. See 2007 Colo. Sess. Laws 1921.

the legislature has failed to do so directly"). Principles of judicial restraint constrain this court from adopting a judicial construction of § 38a-336 that is not supported by either the plain language of that statute or extratextual sources.

In light of the foregoing, and applying the well established precedent of our Supreme Court to the present case, the Wheeler vehicle plainly is not an underinsured motor vehicle as that term is used in § 38a-336. See *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 87–88; *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 301; *American Motorists Ins. Co.* v. *Gould*, supra, 213 Conn. 632. The tortfeasor's liability coverage is not less than, but rather is identical to, the plaintiffs' underinsured motorist coverage. See General Statutes § 38a-336 (e). For that reason, the trial court improperly denied the defendant's motion for summary judgment.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

JAMES P. *v.* COMMISSIONER OF CORRECTION*
(AC 46227)

Cradle, Seeley and Norcott, Js.

Syllabus

The petitioner, who had been convicted of various crimes pursuant to a plea agreement reached in accordance with *State* v. *Garvin* (242 Conn. 296), sought a writ of habeas corpus, claiming that his trial counsel

* 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.

rendered ineffective assistance. In accordance with the *Garvin* agreement, the trial court agreed to a specific sentence for the petitioner as long as the petitioner, inter alia, was not arrested for any offense for which a court made a finding of probable cause while awaiting sentencing. If there was a violation of the agreement, the petitioner would no longer be entitled to the agreed upon sentence and would face a longer period of incarceration. Before the petitioner was sentenced, he was arrested on subsequent charges. The sentencing court found a *Garvin* violation as a result and sentenced him accordingly. Before the habeas court, the petitioner alleged that his trial counsel performed deficiently by improperly advising him with respect to whether the sentencing court could deviate from the plea agreement, providing him with unrealistic expectations as to the sentence he would face, and that he was prejudiced by this advice because he would not have accepted the plea deal but for his counsel's deficient performance. After a trial, the habeas court rendered judgment denying the petition, and the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly denied the operative petition as to the petitioner's claim of ineffective assistance of his trial counsel: the petitioner failed to prove that he was prejudiced by any alleged deficient performance of his trial counsel in advising him of the remote possibility that the trial court could deviate from the plea agreement at the time of sentencing, as the trial court's swift response when this notion was raised by trial counsel made it clear that there was no real possibility of that outcome, and the petitioner's bald assertion in his appellate brief that there was a reasonable probability that, but for counsel's improper advice, he would have rejected the plea agreement and proceeded to trial, without more, was insufficient to establish that the petitioner was prejudiced by his trial counsel's performance; moreover, the plea canvass conducted by the trial court established that the petitioner understood the sentencing possibilities and made the strategic decision to plead guilty to ensure that he would receive a shorter period of incarceration and to avoid the risk of being exposed to the maximum possible sentence for the charges if he went to trial; furthermore, the petitioner failed to present any credible evidence at the habeas trial that he would have gone to trial but for trial counsel's allegedly deficient performance in inducing him to plead guilty.

Argued January 16—officially released April 9, 2024

Procedural History

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

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

Nathan J. Buchok, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Christopher A. Alexy*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. Following the granting of his petition for certification to appeal, the petitioner, James P., appeals from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus, in which he alleged a claim of ineffective assistance of his criminal trial counsel, Douglas Ovian. On appeal, the petitioner, who had been convicted of various crimes pursuant to a guilty plea, claims that (1) his trial counsel performed deficiently by informing him that it was possible for the sentencing court to reject the plea agreement if the court determined that the agreed upon sentence was too high and (2) he was prejudiced by his trial counsel's deficient performance. We disagree with the petitioner's second claim and, accordingly, affirm the judgment of the habeas court.

The following facts, as set forth in the record and by the habeas court in its memorandum of decision, and procedural history are relevant to this appeal. In June, 2015, the petitioner was arrested for assaulting his elderly mother in the parking lot of a grocery store and charged with various crimes (2015 case).[1] On March 10, 2016, pursuant to a plea agreement reached in accordance with *State* v. *Garvin*, 242 Conn. 296, 300–302,

[1] The state initially charged the petitioner with breach of the peace in the second degree in violation of General Statutes § 53a-181, assault of an elderly person in the third degree in violation of General Statutes § 53a-61a (a), and criminal violation of a protective order in violation of General Statutes § 53a-223.

699 A.2d 921 (1997),[2] the petitioner appeared before the trial court and pleaded guilty in the 2015 case to charges of assault of an elderly person in the third degree and criminal violation of a protective order, and to a part B information charging him with being a persistent offender to crimes involving assault pursuant to General Statutes § 53a-40d. In accordance with the *Garvin* agreement, the court agreed to sentence the petitioner to a total effective sentence of seven years to serve, execution suspended after three years, of which one year was mandatory, followed by five years of probation, with the right to argue down to a sentence of seven years to serve, execution suspended after the one year mandatory minimum, followed by five years of probation, so long as he (1) appeared in court and was sober for sentencing and (2) was not arrested while out on bond for any offense for which a court made a finding of probable cause between the dates of his guilty plea and his sentencing. The court advised the petitioner that if he violated any condition of the *Garvin* agreement, he would no longer be entitled to the agreed upon sentence and that, instead, he would "face . . . fifteen years and six months because the state's not going to nolle the breach of peace [charge]." The petitioner stated that he understood the terms of the *Garvin* plea agreement.

[2] "A *Garvin* agreement is a conditional plea agreement. . . . Typically, a defendant who enters into a *Garvin* agreement agrees to a particular sentence of incarceration, but wishes to be at liberty pending sentencing. Thus, the court will release the defendant on bond prior to sentencing and, in exchange, the defendant agrees to abide by certain conditions. Oftentimes, those conditions include a requirement that the defendant appear at the sentencing hearing and refrain from being arrested. If the defendant violates a condition of the *Garvin* agreement, the court may impose a longer sentence than that to which the defendant originally agreed." (Citation omitted.) *State* v. *Hudson*, 182 Conn. App. 833, 835 n.4, 191 A.3d 1032 (2013). "A *Garvin* agreement . . . has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Hurdle*, 217 Conn. App. 453, 456 n.3, 288 A.3d 675, cert. granted, 346 Conn. 923, 295 A.3d 420 (2023).

During the court's thorough plea canvass, the following colloquy transpired:

"The Court: All right. Any reason for the pleas not to be accepted?

"[The Prosecutor]: No, Your Honor.

"[Trial Counsel]: None, Your Honor. Except, I would just indicate that, although it's maybe not common for it to happen, just as it's possible for a court to decide not to abide by the agreement and allow a [withdrawal] of the plea because the court's going to exceed the agreement, it's also possible that the court can choose to allow the state to withdraw from the agreement because of a decision to undercut the agreement. So, I just wanted to make sure that the court was willing to include that concept in the canvass, as well.

"The Court: The idea that, if the state reads the presentence investigation [report], [it] might reach out to the defense and, say, let's modify the agreement, based on what [it] read.

"[Trial Counsel]: Or, that the court might encourage that in the same way that it could choose after reading and hearing everything to exceed it. So—

"The Court: It's possible. I've never done it. Frankly, I don't think it's quite fair to everybody . . . without notice to start changing offers.

"[Trial Counsel]: I understand, Your Honor. I . . . will just say that typically when I describe . . . the plea agreement involving a [presentence investigation report], I made that reference that it's not without—beyond the realm of possibility for it to go the other way, since I've seen it. But I'm glad the court has said it hasn't seen it in its own work.

"The Court: I have not—I have not done it. And I'm trying to search my memory for an incidence where it

happened without the parties coming to the judge and suggesting it.

"[Trial Counsel]: I see . . .

"The Court: My point is, don't count on it. You shouldn't—you shouldn't hang your hopes on that would be happening. And I see [the prosecutor] shaking her head in the negative at the possibility. Is that correct, counsel?

"[The Prosecutor]: That's correct.

"The Court: Anything can happen, but you shouldn't entertain any thoughts other than the one year floor is going to happen.

"[The Petitioner]: Doug Flutie Hail Mary might be out of the question,[3] I guess, then.

"The Court: Exactly right, sir." (Footnote added.)

The court found that the plea was made "voluntarily [and] understandingly . . . with the assistance of competent counsel," and accepted the plea. The matter was continued to May 13, 2016, for sentencing.

[3] The habeas court provided context for the petitioner's statement at the plea canvass in its memorandum of decision: "Any true college football fan from the 1980s remembers the November 23, 1984, Boston College v. [University of] Miami game. With six seconds remaining on the clock, Boston College quarterback Doug Flutie took the final snap of the game against the defending national champions, dropped back, scrambled away from pressure to his right, and heaved a 'Hail Mary' from his own thirty-seven yard line that was caught by teammate Gerard Phelan as he fell across the goal line. The catch resulted in a 47-45 Boston College victory . . . ." See also P. Attner, "Flutie's Miracle Pass Still Amazing to Phelan After All These Years," Los Angeles Times, December 31, 1995, available at https://www.latimes.com/archives/la-xpm-1995-12-31-sp-19732-story.html (last visited April 1, 2024); see also *Commonwealth* v. *Camuti*, 493 Mass. 500, 510 n.8, 226 N.E.3d 868 (2024) ("a 'Hail Mary' " is long forward pass in football made in desperation into end zone with little time remaining in game and small chance of success, and Flutie's pass in game between Boston College and University of Miami in 1984 arguably represents most famous example).

Thereafter, on April 4, 2016, before sentencing for the 2015 case, the petitioner was arrested after he accosted his elderly mother in a parking lot of a store (2016 case).[4] On May 27, 2016, the petitioner appeared before the court, *Oliver*, *J.*, for sentencing with respect to the 2015 case. The court heard argument from the prosecutor and the petitioner's criminal trial counsel. The court found a *Garvin* violation as a result of the petitioner's arrest in the 2016 case and sentenced him to a total effective sentence of ten years of incarceration, execution suspended after seven years, followed by five years of probation. The petitioner did not appeal from the judgment of conviction in the 2015 case.

On May 25, 2018, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus, alleging ineffective assistance by his trial counsel. On August 4, 2022, with the assistance of habeas counsel, the petitioner filed the operative second amended petition for a writ of habeas corpus, which alleged two counts of ineffective assistance of trial counsel, one count of prosecutorial impropriety, and one count of a due process violation.[5]

The ineffective assistance of counsel claim in count one pertained to trial counsel's representation of the

[4] In connection with the 2016 case, the petitioner entered a guilty plea on March 9, 2018, to a charge of violation of a protective order pursuant to the *Alford* doctrine, under which "[a] defendant who pleads guilty . . . does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept entry of a guilty plea. See generally *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)." *Love* v. *Commissioner of Correction*, 223 Conn. App. 658, 663 n.3, 308 A.3d 1040 (2024).

[5] The habeas court denied the habeas petition as to the petitioner's claims of prosecutorial impropriety and a due process violation in counts three and four, and the petitioner does not challenge the court's ruling concerning those counts. Moreover, the petitioner's claim on appeal does not relate to the ineffective assistance of counsel claim in count two, which pertains to trial counsel's representation of the petitioner concerning the 2016 case. Therefore, the only claim of ineffective assistance of counsel that is at issue in this appeal relates to trial counsel's representation in the 2015 case, as alleged in count one.

petitioner in the 2015 case. Specifically, in count one, the petitioner alleged, inter alia,[6] that his trial counsel performed deficiently by "providing improper advice with respect to whether the trial court could deviate from the plea agreement and sentence the petitioner to less time than agreed upon." The petitioner argued further that, in doing so, trial counsel provided him with unrealistic expectations as to the sentence he would face, and that he was prejudiced thereby.

A trial was held before the habeas court, *Newson*, *J.*, on November 17, 2022, during which the petitioner was represented by counsel. The petitioner's trial counsel

[6] The petitioner also alleged in count one that his trial counsel was ineffective by failing to adequately explain to the petitioner the offenses with which he was charged; allowing the petitioner to enter his plea despite the fact that the petitioner was noticeably under the influence of alcohol at the time, which thereby impaired his judgment regarding his decision to plead guilty; failing to object to the prosecutor's threat to raise the maximum exposure she would seek to fifteen and one-half years if the petitioner did not enter a guilty plea that day; incorrectly assuring the petitioner that he would receive 120 days of jail credit for time he served while he was incarcerated on another charge in 2015; urging and pressuring the petitioner to plead guilty; and inadequately arguing, at the May 27, 2016 sentencing hearing, to put off sentencing for the 2015 case until an agreement could be reached to dispose of both the 2015 and 2016 cases together. The petitioner does not challenge the habeas court's decision as to count one with respect to these other grounds; therefore, we deem any claim related thereto abandoned. See *New Milford* v. *Standard Demolition Services, Inc.*, 212 Conn. App. 30, 34 n.1, 274 A.3d 911 (declining to review claim that was not briefed and, therefore, was deemed abandoned), cert. denied, 345 Conn. 908, 283 A.3d 506 (2022). We do note, however, that, as to the petitioner's claim that he was under the influence of alcohol at the time of the plea canvass, the habeas court concluded that nothing in the transcript revealed that the petitioner was unable to provide appropriate and responsive answers to every one of the court's questions, and there was no "evidence in the trial court record that would lead any reasonable person to believe that the petitioner was not in full control of his mental faculties or that he did not 'knowingly, intelligently, and voluntarily' enter his guilty [plea] . . . ." The court also found credible trial counsel's testimony that "he had no memory of the petitioner smelling of alcohol or appearing to be under the influence on the day of the plea" hearing or that, as the petitioner alleged, the prosecutor approached the petitioner and his trial counsel in the lobby and made a comment about the petitioner smelling like alcohol.

and the petitioner each testified at the habeas trial. In a memorandum of decision dated December 8, 2022, the habeas court rendered judgment denying the operative habeas petition. With respect to the claim of ineffective assistance of trial counsel in count one, the court concluded that the petitioner had failed to meet his burden of demonstrating that his trial counsel performed deficiently and that he was prejudiced by counsel's allegedly deficient performance. Thereafter, the court granted the petition for certification to appeal, and this appeal followed.

On appeal, the petitioner asserts that the habeas court improperly rejected his claim that his trial counsel performed deficiently by inducing him to enter his guilty plea in the 2015 case with unrealistic expectations about the outcome of the sentencing. Specifically, the petitioner argues that trial counsel made "false representations about his ability to argue for a sentence below the agreed upon parameters" and that he might also have an opportunity to argue for lesser charges. With respect to the issue of prejudice, the petitioner argues that the habeas court erroneously determined that he failed to sustain his burden of proving that he would not have accepted the plea deal but for the constitutionally deficient performance of his trial counsel. We are not persuaded.

We first set forth our standard of review and general principles governing claims of ineffective assistance of counsel resulting from guilty pleas. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary . . . ." (Internal quotation marks omitted.) *Martinez* v. *Commissioner of Correction*, 221

Conn. App. 852, 863, 303 A.3d 1196 (2023), cert. denied, 348 Conn. 939, 307 A.3d 273 (2024); see also *Love* v. *Commissioner of Correction*, 223 Conn. App. 658, 667, 308 A.3d 1040 (2024). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and prejudice prong. . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 780, 272 A.3d 189 (2022). "[B]ecause a successful petitioner must satisfy both prongs of the *Strickland* test, failure to satisfy either prong is fatal to the habeas petition." (Internal quotation marks omitted.) *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 667, 289 A.3d 1206, cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023).

In the present case, the habeas court denied the petitioner's habeas petition on the grounds that the petitioner failed to demonstrate both deficient performance and prejudice with respect to his claim of ineffective assistance of counsel in count one. We need not decide whether the petitioner's trial counsel rendered deficient performance because, even if we assume that counsel's performance was deficient, we conclude, for the following reasons, that the petitioner has failed to demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance. See, e.g., *Martinez* v. *Commissioner of Correction*, supra, 221 Conn. App. 864.

"To establish prejudice in cases involving guilty pleas, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Love* v. *Commissioner*

of Correction, supra, 223 Conn. App. 667; see also *Hill* v. *Lockhart*, 474 U.S. 52, 58–59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Moreover, a petitioner "must make more than a bare allegation that he would have pleaded differently and gone to trial . . . ." (Internal quotation marks omitted.) *Carraway* v. *Commissioner of Correction*, 144 Conn. App. 461, 473, 72 A.3d 426 (2013), appeal dismissed, 317 Conn. 594, 119 A.3d 1153 (2015). "Additionally, a petitioner's assertion after he has accepted a plea that he would have insisted on going to trial suffers from obvious credibility problems . . . and should be assessed in light of the likely risks that pursuing that course would have entailed." (Citations omitted; internal quotation marks omitted.) Id., 475–76; see also *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 51–52, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695 (2021).

In the present case, the habeas court, in addressing the petitioner's claim that his trial counsel performed deficiently "by inducing him to enter his [guilty plea] with unrealistic expectations about the possible outcomes of the sentencing," stated: "Under the particular circumstances of this case, where the petitioner was facing one charge that required the imposition of a minimum of one year in prison, there was no legal sentence that could be imposed by Judge Oliver that would have been less than the minimum sentence called for under the terms of the plea agreement. Therefore, even if Judge Oliver were to have taken this rarest of action [of deviating from the terms of a plea agreement], he had no power to reduce the petitioner's minimum prison exposure below what was called for under the plea agreement without the consent of the prosecutor. . . . In the end, raising this miniscule possibility with the petitioner, if it had not been checked by the court, would likely have warranted a finding that [trial counsel's] conduct was unreasonable. . . .

"Luckily . . . [trial counsel's] information did not go unchecked. [Trial counsel] raised the issue in court and Judge Oliver informed the petitioner in no uncertain terms, which the petitioner acknowledged, that such an outcome was not a real possibility. The petitioner also heard Judge Oliver confirm with the [prosecutor] that she would not agree to modify any charges. Because [trial counsel's] reference to the possibility of the court deviating from the plea agreement at the time of sentencing in the petitioner's favor was immediately addressed and corrected in court, this court does not find that the petitioner has established that [trial counsel's] conduct was constitutionally unreasonable. . . . Further, given the fact that the petitioner acknowledged his understanding when Judge Oliver and the [prosecutor] immediately notified him that there was no real possibility of such an outcome, the petitioner has failed to prove that he was prejudiced, because there is no reasonable basis to believe that he was under any false pretenses about the charges or the real possible outcome he could expect at [the] time of sentencing." (Citations omitted; footnote omitted.)

After our careful review of the record, we agree with the habeas court that the petitioner was not prejudiced by any alleged deficient performance of his trial counsel in advising the petitioner of the remote possibility that the court could deviate from the plea agreement at the time of sentencing in the petitioner's favor. We first note that the trial court's swift response when this notion was raised by the petitioner's trial counsel, which made it clear that there was no real possibility of that outcome, renders the petitioner's claim that counsel's advice caused him to have unrealistic expectations about the outcome of sentencing and thereby prejudiced him dubious.[7] Nevertheless, we must determine whether the petitioner has demonstrated "a reasonable probability that, but for counsel's errors, he

[7] As the habeas court found, any misunderstanding about the possible outcomes at sentencing caused by trial counsel's conversation with the

would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Love* v. *Commissioner of Correction*, supra 223 Conn. App. 667. For the following reasons, we conclude that he has not done so.

Although the petitioner devotes a portion of his appellate brief to his argument that he was prejudiced by his trial counsel's deficient performance, most of the arguments raised therein relate to the adequacy of counsel's performance and advice to the petitioner about accepting the plea offer, not to whether the petitioner would have proceeded to trial but for counsel's deficient performance. For example, the petitioner asserts that "[t]he habeas court failed to account for the impact of the petitioner learning that his assumptions regarding the plea agreement were inaccurate and the pressure this placed upon him to make a decision regarding the plea agreement without full faith in his counsel and, thus, without making a voluntary decision to accept the plea." See *Hill* v. *Lockhart*, supra, 474 U.S. 56–57 (when "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases,' " which relates to performance prong of *Strickland* test). He also asserts that "the improper advice of trial counsel with regard to the possibility that the trial court

petitioner was quickly resolved, as the trial court made it clear "[i]n no uncertain terms" that there was no chance of varying from the plea agreement at sentencing. This was also confirmed by the prosecutor and acknowledged by the petitioner. Additionally, at the plea hearing when the court specifically stated to the petitioner that the one year minimum portion of the sentence was "mandatory based on the conviction of assault [in the] third degree of an elderly victim," the petitioner replied, "I do understand that." Therefore, the sentencing court had no power to reduce the petitioner's minimum sentence exposure below what was called for in the plea agreement.

would deviate from the sentencing guidelines and offer a sentence lower than the floor established by the agreement prejudiced the petitioner by forcing him to make a decision to accept a plea agreement without proper advice or preparation . . . .'' This argument, however, focuses on the ''improper advice'' given to the petitioner by his trial counsel and the impact it had on his decision to plead guilty, and does not in any way establish that the petitioner would have gone to trial if counsel had not given him ''unrealistic'' expectations about his sentencing possibilities with the plea agreement.

In one sentence in his principal appellate brief, the petitioner asserts that ''there remains a reasonable probability that but for the improper advice of counsel he would have decided to reject the plea agreement and proceed to trial.'' This bald assertion, without more, is not sufficient to establish that the petitioner was prejudiced by his trial counsel's performance.[8] As we have stated previously, ''[w]ith respect to the prejudice prong, a petitioner 'must make more than a bare allegation that he would have pleaded differently and gone to trial . . . .' '' *Shaheer* v. *Commissioner of Correction*, 207 Conn. App. 449, 469, 262 A.3d 152, cert. denied, 340 Conn. 903, 263 A.3d 388 (2021). ''[C]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences. *Lee* v. *United States*, [582] U.S. [357], 137 S. Ct. 1958 . . . 198 L. Ed. 2d 476 (2017).'' (Internal quotation marks omitted.)

[8] We also note that the petitioner did not allege in his operative habeas petition that, had counsel correctly informed him about his sentencing possibilities, he would have pleaded not guilty and insisted on going to trial. Instead, in count one, the petitioner alleges that ''there is reasonable probability that, but for counsel's acts and omissions, the petitioner would have received a more favorable outcome than he did receive with [trial counsel] as his attorney.''

Kondjoua v. *Commissioner of Correction*, 194 Conn. App. 793, 801, 222 A.3d 974 (2019), cert. denied, 334 Conn. 915, 221 A.3d 908 (2020).

Our review of the relevant transcript from the petitioner's plea canvass establishes that the petitioner understood the sentencing possibilities and wanted to plead guilty. On two separate occasions during the plea canvass, the trial court expressly advised the petitioner that the charges to which he was pleading guilty carried a mandatory minimum sentence of one year of incarceration. See, e.g., *Williams* v. *Commissioner of Correction*, 120 Conn. App. 412, 421–22, 991 A.2d 705 (because trial court fully informed petitioner of terms of plea agreement and petitioner acknowledged that he understood those terms, petitioner was unable to demonstrate prejudice despite counsel's inaccurate advice), cert. denied, 297 Conn. 915, 996 A.2d 279 (2010); see also *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 285, 149 A.3d 185 (2016) ("[a] court is permitted to rely upon a defendant's answer given in response to a plea canvass"), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017). The petitioner's statements during the plea canvass demonstrate that he understood there was "no real possibility" that he would receive a sentence below the one agreed upon in the plea agreement. Moreover, when the court asked the petitioner whether "anyone forced, threatened, or promised [him] anything to make" him enter his guilty plea, he responded: "Well, I really don't want fifteen years. So, I'd rather just cut my losses . . . ." The court followed with the question of whether the petitioner "essentially [was making] a strategic decision based on the nature of the exposure and what [he] thought the state [could] prove," to which the petitioner answered: "Yeah, I don't want to be fifty-two years old and getting out of jail if I roll the dice on those [charges]." These statements demonstrate that

the petitioner made the strategic decision to plead guilty to ensure that he would receive a shorter period of incarceration and that he did not want to risk being exposed to the maximum possible sentence for the charges if he went to trial.

Additionally, there is nothing in the petitioner's testimony at the habeas trial suggesting that the petitioner would have gone to trial but for trial counsel's allegedly deficient performance in inducing him to enter his guilty plea with unrealistic expectations about the possible outcomes of the sentencing. Trial counsel testified at the habeas trial that, after the petitioner entered his guilty plea in the 2015 case, the petitioner informed trial counsel that he wanted to withdraw the plea. Trial counsel then advised the petitioner that, if he withdrew his plea, he would be facing "the same negative implications that caused him to decide to [plead guilty] to begin with." Ultimately, the petitioner did not seek to withdraw his plea, which lends further support to the petitioner's statement that he did not want to "roll the dice" with a trial on the charges and the maximum possible sentence he would be subjected to if he did not plead guilty. We agree with the habeas court that the petitioner "failed to present any credible evidence that . . . he would not have gone forward with the plea agreement and was prepared to proceed to trial" but for trial counsel's allegedly deficient advice and performance.

Accordingly, the petitioner failed to prove that he was prejudiced by his trial counsel's allegedly deficient performance. We conclude, therefore, that the habeas court properly denied the habeas petition as to the petitioner's claim of ineffective assistance of counsel in count one.

The judgment is affirmed.

In this opinion the other judges concurred.

MIGUEL VEGA *v.* COMMISSIONER OF CORRECTION (AC 46077)

Moll, Clark and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted, after a jury trial, of various crimes in connection with a home invasion and the shooting of two victims, sought a writ of habeas corpus, claiming that the state had suppressed exculpatory information in violation of *Brady* v. *Maryland* (373 U.S. 83) and that his trial counsel, K, had rendered ineffective assistance by failing to consult with or retain an expert on eyewitness identification and by failing to impeach P, one of the eyewitnesses who testified for the state. After an altercation with the two victims at a bar hours earlier, the petitioner and another man entered an apartment where a group of individuals had gathered, including the two victims, several of whom had known the petitioner for years. Both men were armed and had their heads and faces covered. When the petitioner reached the living room, he pulled down his mask and fired toward the window. He then fired two shots at the first victim, striking him. The two men chased the second victim out of the apartment, firing and striking him. At the apartment, P called 911 and stated that the first victim had been shot. After being transported to a hospital, the first victim died, and the second victim survived. After the police arrived on the scene, several people who were present during the shooting identified the petitioner as one of the shooters. At the petitioner's criminal trial in 2016, several witnesses testified that the petitioner was the shooter, and at least two witnesses testified that they had heard an eyewitness scream the petitioner's name during the shooting. A recording of P's 911 call, in which she identified the petitioner as the individual who had shot the first victim, was admitted at the petitioner's criminal trial. The spontaneous excited utterances identifying the petitioner as the shooter made by both an eyewitness when she phoned her mother shortly after the shooting and by the second victim, when he spoke to a police officer as he was being treated for his gunshot wounds in the hospital, were also admitted at the petitioner's criminal trial. Two years after the petitioner was convicted, in an appeal in an unrelated habeas case brought by T, this court held that the state's failure to correct the false testimony of P in T's 2009 criminal trial violated T's due process rights. At the habeas trial in the present case, K testified that he had requested that the state disclose all exculpatory material but did not recall whether the state had disclosed any exculpatory material related to P, and the prosecutor in the petitioner's criminal trial, R, testified that he believed that he had turned over all exculpatory material that was in his possession to the defense. The

petitioner presented the testimony of B, a professor of psychology specializing in memory and psychology in the legal system. In his testimony, B detailed factors that can reduce identification accuracy or impact memory and testified that he would have been able to assist the petitioner's trial counsel in connection with cross-examination and arguments and in pursuit of a motion to suppress. On cross-examination, B testified that an eyewitness' familiarity with a suspect would make an identification more reliable. The habeas court rendered judgment denying the petition for a writ of habeas corpus. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised were adequate to deserve encouragement to proceed further.

2. The petitioner could not prevail on his claim that the habeas court improperly determined that he was not deprived of his rights to due process and to a fair trial in violation of *Brady* because the state failed to disclose that P had testified falsely in T's criminal trial: pursuant to *State* v. *Guerrera* (331 Conn. 628), R was not required to search the file in T's unrelated criminal case to exclude the possibility that the file contained exculpatory information; moreover, there was no evidence presented and no findings made by the habeas court that R had actual knowledge or cause to know of the existence of *Brady* material in T's file, R's lack of memory as to whether he had exculpatory information regarding P did not, without more, equate to affirmative proof of any fact, and there was no evidence at the habeas trial and the habeas court made no factual finding that K had made a specific request for that information, which was required in order to trigger the state's examination of that file under the circumstances of this case.

3. The petitioner could not prevail on his claim that the habeas court improperly concluded that he had failed to establish that K rendered ineffective assistance during his criminal trial:

   a. Contrary to the petitioner's argument, the habeas court properly concluded that K did not render ineffective assistance by failing to consult with or call an expert on eyewitness identification to testify at the petitioner's criminal trial: K offered a legitimate strategic reason for his decision not to consult an expert on eyewitness identification in which he recognized that the primary concern with eyewitness identifications was not present because the eyewitnesses knew the petitioner prior to the shooting; moreover, the petitioner failed to demonstrate that there was a reasonable probability that the result of his criminal trial would have been different if K had consulted such an expert, as the witnesses knew the petitioner and were therefore likely to identify him accurately,

B testified on cross-examination that familiarity makes an eyewitness identification more reliable, the petitioner admitted that K had attempted to impeach all of the eyewitnesses by testing their credibility and the consistency of their accounts, and the petitioner offered no evidence to undermine the fact that the witnesses who identified the petitioner at his criminal trial knew him for a long time before the shooting occurred. b. The petitioner could not prevail on his alternative claim that, if the state had disclosed P's prior false testimony, then K rendered ineffective assistance by failing to impeach her concerning that false testimony; the evidence adduced at the habeas trial did not establish that the state failed to disclose P's false testimony in T's criminal case to the defense, and the petitioner failed to call P to testify at the habeas trial to offer the additional information he claims should have been elicited by more thorough cross-examination or to show how alternative cross-examination questions would have impacted her credibility.

Argued February 8—officially released April 9, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition; thereafter, the court, *Newson, J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Donna Fusco*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

EVELEIGH, J. The petitioner, Miguel Vega, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal, (2)

improperly concluded that he failed to prove that the state had suppressed exculpatory information in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and (3) improperly concluded that he failed to establish that his trial counsel rendered ineffective assistance. Because the petitioner has failed to demonstrate that the court improperly denied his petition for certification to appeal, we dismiss the appeal.

The facts underlying the petitioner's conviction were recounted in the decision of this court on direct appeal in *State* v. *Vega*, 181 Conn. App. 456, 187 A.3d 424, cert. denied, 330 Conn. 928, 194 A.3d 777 (2018), and can be summarized for our purposes as follows. On the night of March 2, 2010, Michael Ellis, Jr. (Ellis), Altareika Parrish, Rahmel Perry, Shariymah James, Alice Phillips, Keyireh Kirkwood, and others gathered in a New London apartment. Id., 459. In the early morning of March 3, 2010, some individuals from the group went to a bar where the petitioner and a few of his associates were also present. Id. The petitioner motioned to Ellis to step away from Kirkwood, with whom the petitioner had a child. Id., 459–60. When Ellis did not do so, the petitioner approached Ellis and punched him in the face. Id., 460. A fight then broke out in the bar between the two groups, during which Perry began punching and kicking the petitioner, who was on the losing end of the fight. Id. Outside of the bar, another altercation ensued between the two groups, which was quickly broken up. Id.

After both groups left the bar, Ellis, Perry, Parrish, Kirkwood, Phillips, and James returned to the New London apartment at approximately 1:30 a.m. Id. Shauntay Ellis was also present in the apartment when the group returned. Id. At approximately 2 a.m., the petitioner and another man entered the apartment. Id. Both men were armed, were dressed in all black clothing, and

had their heads and faces covered. Id. The petitioner proceeded directly to the living room where Ellis and Perry were located. Id. He pulled down his mask and ordered everyone in the room to get on the floor. Id. The petitioner then fired toward the window, in Ellis' direction, but did not hit Ellis. Id. He then fired two shots at Perry, who was on the couch, striking him. Id. Meanwhile, Ellis ran out of the living room and toward the back door where the men had entered. Id. The intruders left the apartment and chased Ellis, firing approximately four shots and striking Ellis twice. Id., 461. At the apartment, Phillips called 911 and stated that Perry had been shot. Id. After being transported to the hospital, Perry succumbed to his injuries and Ellis survived. Id. After the police arrived on the scene, several people who were present during the shooting identified the petitioner as one of the shooters. Id.

In connection with these events, the petitioner was charged and convicted, following a jury trial in 2016,[1] of murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (2), burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (5), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). Id., 462–63. He was sentenced to a total effective term of seventy-five years of imprisonment. Id., 463. His conviction was affirmed on direct appeal. Id., 492.

In 2018, the petitioner filed a petition for a writ of habeas corpus, which he later amended. He alleged in

[1] A trial occurred in 2015 that ended in a hung jury and the trial court declared a mistrial. See *State* v. *Vega*, supra, 181 Conn. App. 462.

his amended petition, among other things, that his rights to due process and a fair trial were violated by the state's alleged failure to disclose material exculpatory evidence and that his trial counsel rendered ineffective assistance at his criminal trial. The court denied his petition. Thereafter, the petitioner filed a petition for certification to appeal. After the court denied the petition for certification to appeal, this appeal followed. Additional facts will be set forth as necessary in the context of the petitioner's claims.

I

The petitioner first claims that the court abused its discretion by denying his petition for certification to appeal. We disagree.

We first set forth certain legal principles that guide us in our review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous.

In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Howard* v. *Commissioner of Correction*, 217 Conn. App. 119, 124–25, 287 A.3d 602 (2022). As we discuss more fully in parts II and III of this opinion, because the resolution of the petitioner's underlying claims involve issues that are not debatable among jurists of reason, could not have been resolved by a court in a different manner, and are not adequate to deserve encouragement to proceed further, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal from the denial of the petition for a writ of habeas corpus.

II

The petitioner claims that the court improperly determined that he was not deprived of his rights to due process and to a fair trial in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. Specifically, he contends that the state failed to disclose that Phillips, who testified for the state in the petitioner's criminal trial, had testified falsely in the prior unrelated 2009 trial of Kurtis Turner. He does not claim that Phillips testified falsely in his criminal trial but argues that "it is clear that the state was on notice that exculpatory impeachment evidence existed in 2009. It is clear from the record that it was not disclosed to the defense. As a result, the habeas court erred in finding that the state did not suppress evidence by failing to tell the defense about Phillips' 2009 false testimony." We disagree.

"The fourteenth amendment to the United States constitution demands that [n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due

process of law . . . . Due process principles require the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. . . . In order to obtain a new trial for improper suppression of evidence, the petitioner must establish three essential components: (1) that the evidence was favorable to the accused; (2) that the evidence was suppressed by the state—either inadvertently or wilfully; and (3) that the evidence was material to the case, i.e., that the accused was prejudiced by the lack of disclosure." (Citations omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 591–92, 198 A.3d 562 (2019). "Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." *Walker* v. *Commissioner of Correction*, 103 Conn. App. 485, 491, 930 A.2d 65, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007).

In *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 187 A.3d 1163 (2018), this court held that the state's failure to correct the false testimony of Phillips that she did not expect any consideration for her testimony in the 2009 criminal trial of Kurtis Turner violated Turner's due process rights to a fair trial under *Brady*. See id., 747, 753–58. At the habeas trial in the present case, Attorney Michael Regan, who was the prosecutor in the petitioner's criminal trial, testified that he had an open file policy that meant that "whatever I had, [the] defense had" and that it was his belief that he had turned over all exculpatory material that was in his possession. Attorney Robert Kappes, who was assigned to represent the petitioner, testified that he had requested that the state disclose all exculpatory material but did not recall whether the state had disclosed any exculpatory material related to Phillips.

In rejecting the petitioner's *Brady* claim, the habeas court reasoned that the petitioner's argument that the

state was on notice of Phillips' false testimony in the Turner case was unavailing because that false testimony "was in a wholly unrelated proceeding." We agree that the knowledge that Phillips had previously testified falsely in the unrelated Turner case cannot be imputed onto the prosecutor in the petitioner's criminal trial.

In *State* v. *Guerrera*, 331 Conn. 628, 206 A.3d 160 (2019), our Supreme Court noted the well established law that "[t]he state has a duty under *Brady* to disclose to the accused evidence that is both favorable to the defense and material to the case. . . . As the state's representative, the prosecutor has a broad obligation to disclose *Brady* material because principles of fundamental fairness demand no less. . . . This obligation extends to evidence favorable to the defense that is not in the possession of the individual prosecutor responsible for trying the case; indeed, the obligation may encompass such evidence even if it is not known to the prosecutor. . . . More specifically, the prosecutor's duty of disclosure extends to *Brady* material that is known to the others acting on the government's behalf in [the] case, including, but not limited to, the police." (Citations omitted; internal quotation marks omitted.) Id., 646–47.

Our Supreme Court in *Guerrera* rejected the defendant's claim that the state's attorney had a duty to review for exculpatory *Brady* material 1552 telephone calls made by his codefendants that were recorded but not reviewed by the Department of Correction (department). Id., 646–56. The court concluded that "the 1552 calls that were not reviewed by the department, cannot reasonably be characterized as part of the state's investigatory file. Consequently, the defendant's claim that he was entitled to a review of those calls because they were part of the file must fail." Id., 655–56. Our Supreme Court adopted the reasoning set forth in *United States* v. *Joseph*, 996 F.2d 36, 41 (3d Cir.), cert. denied, 510

U.S. 937, 114 S. Ct. 357, 126 L. Ed. 2d 321 (1993), that *Brady* does not "require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information. . . . [When] a prosecutor has no actual knowledge or cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information—specific in the sense that it explicitly identifies the desired material and is objectively limited in scope." (Internal quotation marks omitted.) *State* v. *Guerrera*, supra, 331 Conn. 653.

In the present case, the petitioner's argument that "the state *knew* in 2009 that [Phillips] provided false testimony" in the Turner trial and therefore was obligated to turn that information over to the defense is premised on a misapprehension of the law. (Emphasis in original.) According to *Guerrera*, Regan was not required to search the unrelated file in the Turner case to exclude the possibility that that file contained exculpatory information. See *State* v. *Guerrera*, supra, 331 Conn. 653. No evidence was adduced at the habeas trial that Regan had actual knowledge of the existence of *Brady* material in the Turner file. Rather, Regan testified that, "if I had exculpatory information on [Phillips], I would have disclosed it, but I don't recall the specifics if I had any." The court found that Regan "had little specific memory of any specific discovery provided to the defense in this matter" and concluded that "[a] lack of memory does not, without more, equate to affirmative proof of any fact." Because there was no evidence presented and no findings made by the habeas court that Regan had actual knowledge or cause to know of the existence of *Brady* material in the unrelated Turner file, the defense was required to have made a specific request for that information in order to trigger the

state's examination of the unrelated Turner file. See *State* v. *Guerrera*, supra, 331 Conn. 653. There was no evidence at the habeas trial and the habeas court made no factual finding that Kappes had made such a request. Accordingly, because Regan was not required to review the Turner file for *Brady* information, the petitioner's *Brady* claim is without merit.[2] In light of the foregoing, we conclude that the petitioner has not demonstrated that the habeas court abused its discretion in denying certification to appeal with respect to this claim.

III

The petitioner next claims that the habeas court improperly concluded that he failed to establish that Kappes rendered ineffective assistance by failing to (a) consult with and/or call an expert on eyewitness identification at the petitioner's criminal trial and (b) impeach Phillips concerning her false testimony in the unrelated Turner case. We disagree.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

[2] Additionally, the court alternatively found that, even if it were assumed that the state was required to disclose Phillips' false testimony, the evidence presented at the habeas trial did not establish that the state had failed to disclose it. This finding further supports our conclusion that the court did not abuse its discretion in denying certification to appeal with respect to this claim.

(1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong." (Citation omitted; internal quotation marks omitted.) *Godfrey-Hill* v. *Commissioner of Correction*, 221 Conn. App. 526, 535, 302 A.3d 923, cert. denied, 348 Conn. 929, 304 A.3d 861 (2023).

A

The petitioner argues that the court improperly concluded that Kappes did not render ineffective assistance for failing to consult with and/or call an expert on eyewitness identification. We disagree.

As noted by the habeas court, the petitioner was identified as the shooter at the petitioner's criminal trial by Shauntay Ellis; Parrish, who had known the petitioner since middle school; James, whose best friend had a child with the petitioner; and Ellis.[3] Also admitted at the petitioner's criminal trial was a recording of Phillips' 911 telephone call in which she identified the petitioner as the one who had shot Perry. See *State* v. *Vega*, supra, 181 Conn. App. 491. Additionally, at least two witnesses testified at the petitioner's criminal trial that they had heard Kirkwood scream the petitioner's name during the shooting. Id. Also admitted

[3] Because Ellis refused to testify at the petitioner's second trial, his prior identification testimony from the petitioner's first trial was allowed to be read into the record.

at the petitioner's criminal trial were the spontaneous excited utterances identifying the petitioner as the shooter made by Kirkwood, when she telephoned her mother shortly after the shooting, and by Ellis, when he spoke to a police officer as he was being treated for his gunshot wounds in the hospital. Id., 464–78.

At the habeas trial, the petitioner presented the testimony of Garrett Berman, a professor of psychology at Roger Williams University specializing in applied psychology, memory, and psychology in the legal system. In his testimony, Berman detailed factors that can reduce identification accuracy or impact memory, including lighting, stress, disguise, weapons focus, the length of time a witness is exposed to a particular event, alcohol use, and contamination, including witnesses talking to each other after an event. He testified that he would have been able to assist the petitioner's trial counsel in numerous ways in connection with cross-examination and arguments and in pursuit of a motion to suppress. On cross-examination, he testified that an eyewitness' familiarity with a suspect would make an identification more reliable.

The court determined that the petitioner failed to prove ineffective assistance of counsel. The court reasoned that the petitioner failed to connect Berman's testimony or expertise "with any affirmative evidence as to how counsel's consultation with such an expert would actually have impacted the identification of the petitioner in this particular case. None of the identification witnesses from the criminal proceedings were called to testify at the habeas trial. The petitioner offered possibility and theory through his expert, but nothing in the way of actual evidence to undermine the fact that the witnesses who identified the petitioner at trial were personally familiar with him long before the shooting in question.

The petitioner also failed to present any evidence disputing the procedures used to identify him in connection with his arrest or during the trial. Given the above, the petitioner has failed to meet his burden to prove, under the circumstances of this particular case, that it was professionally unreasonable for [Kappes] not to have consulted with an expert in eyewitness identification or that use of such an expert would have had any reasonable likelihood of a different result."

The court properly determined that Kappes did not render constitutionally deficient performance. Kappes testified at the habeas trial that the eyewitnesses knew the petitioner prior to the incident and that, just before the shooting, the petitioner pulled his mask down, revealing his entire face. Kappes stated that he did not consult with or present the testimony of an eyewitness identification expert because "raising that type of claim would tarnish my credibility with the jury by trying to convince them that multiple people who knew [the petitioner] for such a long time couldn't recognize him when he pulled his mask down."

"[T]here is no per se rule that requires a trial attorney to call an expert in a criminal case. . . . [F]ailing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy. . . . Our appellate courts repeatedly have rejected a petitioner's claim that his trial counsel rendered deficient performance by failing to call an expert witness at trial on the ground that trial counsel's decision was supported by a legitimate strategic reason." (Citations omitted; internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, 222 Conn. App. 278, 294–95, 304 A.3d 862 (2023), cert. denied, 348 Conn. 940, 307 A.3d 275 (2024).

Kappes offered a legitimate strategic reason for his decision in which he recognized that the primary concern with eyewitness identifications was not present

because the eyewitnesses knew the petitioner prior to the shooting. "The primary concern expressed in cases discussing the problems with eyewitness identification relates to a witness observing and subsequently identifying a stranger. . . . Witnesses are very likely to recognize under any circumstance the people in their lives with whom they are most familiar, and any prior acquaintance with another person substantially increases the likelihood of an accurate identification." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 260 n.39, 49 A.3d 705 (2012).

The court also properly determined that the petitioner had not proven that there was a reasonable probability that, had Kappes called Berman to testify at the petitioner's criminal trial, the result of the trial likely would have been different. The witnesses knew the petitioner and therefore were likely to identify him accurately. See id. Berman testified on cross-examination that familiarity makes an eyewitness identification more reliable. Additionally, as stated by the petitioner in his appellate brief, Kappes "did try to impeach all of [the eyewitnesses], testing their credibility and the consistency of their accounts." Furthermore, as reasoned by the habeas court, the petitioner offered no evidence to undermine the fact that the witnesses who identified the petitioner at his criminal trial knew him for a long time before the shooting occurred. For the foregoing reasons, we conclude that the court properly determined that the petitioner failed to establish that Kappes rendered ineffective assistance at trial by declining to consult with and/or call an expert on eyewitness identification, and, therefore, the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

B

The petitioner argues, in the alternative, that if the state had disclosed Phillips' prior false testimony, then

Kappes rendered ineffective assistance for failing to impeach her concerning that false testimony. We disagree.

The habeas court found, in the alternative, that the evidence adduced at the habeas trial did not establish that the state failed to disclose Phillips' false testimony in the Turner case to the defense.[4] The court concluded that the petitioner's claim that Kappes rendered ineffective assistance due to his failure to cross-examine Phillips adequately regarding her false testimony in the Turner case failed for lack of evidence. The court reasoned that the petitioner failed to call Phillips to testify at the habeas trial "to offer the additional information he claims should have been elicited by more thorough cross-examination or to show how alternative cross-examination questions would have impacted [her] credibility."

We conclude that the habeas court properly concluded that the petitioner could not prevail on his claim due to a lack of evidence. "It is axiomatic that a habeas petitioner who claims prejudice based on counsel's alleged failure to present helpful evidence from a particular witness, must call that witness to testify before the habeas court or otherwise prove what the witness would or could have stated had he been questioned at trial, as the petitioner claims he should have been. See, e.g., *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 554, 124 A.3d 1 (petitioner failed to prove prejudice when he 'did not offer evidence regarding how [the witnesses] would have testified if they had been cross-examined [differently]'), cert. denied, 320 Conn. 910, 128 A.3d 954 (2015)." *Benitez* v. *Commissioner of Correction*, 197 Conn. App. 344, 351, 231 A.3d

[4] In so concluding, the court noted that Kappes testified at the habeas trial that he did not remember whether he had received any specific exculpatory information related to Phillips from the state and Regan had little memory of any specific discovery provided to the defense in this matter.

1285, cert. denied, 335 Conn. 924, 233 A.3d 1091 (2020). Accordingly, we conclude that the habeas court properly determined that the petitioner failed to establish ineffective assistance of counsel, and, therefore, the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

For the foregoing reasons, we determine with respect to the substantive claims raised by the petitioner in the present appeal that he failed to demonstrate that those issues are debatable among jurists of reason, could be resolved by a court in a different manner, or deserve encouragement to proceed further. Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal as to the substantive claims raised in the present appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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Summary process; motion to dismiss appeal; claim that this court lacked subject matter jurisdiction over defendant's appeal of trial court's dismissal of his special motion to dismiss filed pursuant to anti-SLAPP statute (§ 52-196a); whether defendant's appeal was from final judgment; whether defendant asserted colorable claim to protections afforded by § 52-196a.
Brewer *v.* Commissioner of Correction (Memorandum Decision) . . . 902
Bouchard *v.* Wheeler . . . 611
Underinsured motorist coverage; claim that trial court improperly denied motion for summary judgment in which defendant insurer sought to deny plaintiffs underinsured motorist benefits pursuant to statute (§ 38a-336) because defendant tortfeasors' underinsured motorist coverage was not less than liability limits of plaintiffs' insurance policy; whether trial court improperly concluded that tortfeasors' motor vehicle was underinsured motor vehicle pursuant to § 38a-336 (e); claim that legislative amendment (P.A. 14-20, § 1) modified definition of underinsured motor vehicle in § 38a-336 (e) and overruled Supreme Court precedent concerning that definition; correct legal standard governing determination of whether motor vehicle is underinsured pursuant to § 38a-336 (e), discussed; claim that § 38-336 is remedial statute that must be construed liberally to protect people injured by uninsured motorists.
Chase Home Finance, LLC *v.* Scroggin . . . 549
Foreclosure; motion for summary judgment; motion for protective order; claim that trial court erred in granting motion for summary judgment as to liability because

it improperly relied on affidavit of loan officer employed by plaintiff in determining that original plaintiff had been holder of note at time action was commenced; claim that trial court erred in granting motion for summary judgment as to liability because it failed to give defendant, as nonmoving party, benefit of all favorable inferences to be drawn from evidence by neglecting to draw adverse inference from plaintiff's refusal to produce witnesses and documents requested by defendant; whether defendant set forth any facts, other than plaintiff's filing of motion for protective order, in support of contention that plaintiff had engaged in extraordinary measures to prevent defendant from deposing its corporate designees; limitation by statute (§ 52-216c) of missing witness rule adopted in Secondino *v.* New Haven Gas Co. *(147 Conn. 672), discussed; claim that trial court abused its discretion when it implicitly granted plaintiff's motion for protective order.*

Clark *v.* Quantitative Strategies Group, LLC 224

Application for bank execution to satisfy domesticated judgment against defendant; motion for exemption from execution pursuant to statute ((Supp. 2022) § 52-367b); claim that plaintiff judgment creditors executed on bank accounts that did not belong to defendant; whether trial court properly found that bank accounts at issue were joint accounts and were not exempt from execution under § 52-367b; whether trial court correctly concluded that defendant's asserted exemption was not recognized or enumerated exemption that he was entitled to assert under § 52-367b; reviewability of defendant's claim for determination of interests pursuant to statute (§ 52-356c); whether defendant was authorized by § 52-356c to challenge bank's determination that he was co-owner of bank accounts by pursuing claim for determination of interests.

De Almeida-Kennedy *v.* Kennedy 19

Dissolution of marriage; motion for modification of unallocated alimony and child support; claim that trial court abused its discretion in determining that change in residence of parties' child did not constitute substantial change in circumstances; claim that trial court improperly denied defendant's motion for modification of unallocated alimony and child support without determining child support component of unallocated support order; procedure applicable on remand to financial aspects of modification of child support in context of unallocated support order, discussed; claim that trial court improperly interpreted alimony component of unallocated support order as set forth in parties' separation agreement to be nonmodifiable; whether trial court applied incorrect standard of law; claim that trial court improperly denied defendant's motion to modify alimony component of unallocated support order because it disallowed testimony of parties' child as to alleged cohabitation of plaintiff.

Delgado *v.* Commissioner of Correction 283

Habeas corpus; claim that habeas counsel in petitioner's second habeas action rendered ineffective assistance by failing to raise claims that petitioner's criminal trial counsel and counsel on direct appeal from conviction rendered ineffective assistance; whether criminal trial counsel's decision not to request self-defense instruction constituted deficient performance; claim that petitioner was prejudiced by trial counsel's failure to object to jury instruction on intent element of murder; claim that petitioner's counsel on direct appeal from conviction rendered ineffective assistance by improperly failing to raise issue of incorrect instruction on intent element of murder.

Donald G. *v.* Commissioner of Correction 93

Habeas corpus; claim that petitioner was deprived of due process right to fair trial because appellate counsel rendered ineffective assistance by failing to raise claims on direct appeal from petitioner's criminal conviction that petitioner's criminal trial counsel failed to raise claims of prosecutorial impropriety and claim that state violated Brady *v.* Maryland *(373 U.S. 83) by failing to provide petitioner with complete copy of police detective's notes; claim that petitioner was prejudiced by prosecutor's comment during closing argument to jury that petitioner had told detective "some BS" and prosecutor's use of term "victim" during trial; claim that petitioner was prejudiced by prosecutor's statement that witness who had not testified was in courtroom during prosecutor's closing argument to jury.*

Ferreira *v.* Ward 571

Foreclosure; action to foreclose judgment lien on certain real property of defendant; claim that current statutory homestead exemption (§ 52-352b (21)) applied retroactively to postjudment proceeding in which judgment lien had been issued and recorded and action to foreclose on judgment lien had been commenced when

repealed statutory exemption ((Rev. to 2017) § 52-352b (t)) was in effect, but judgment of foreclosure was rendered after § 52-352b (21) became effective; whether homestead exemption of § 52-352b (21) is procedural or substantive in nature; whether trial court improperly denied defendant's request for evidentiary hearing on his claim that homestead exemption of § 52-352b (21) applied to preclude plaintiff from foreclosing on his primary residence.

Glory Chapel International Cathedral *v.* Philadelphia Indemnity Ins. Co. 501

Insurance; motion to strike; offer of compromise; misjoinder; claim that trial court erred in striking certain counts from plaintiff's original complaint on basis of misjoinder; claim that, even if claims in original complaint were properly stricken, trial court erred by sustaining defendant's objection to substitute complaint filed pursuant to rule of practice (§ 10-44); whether trial court improperly sustained defendant's objection to offer of compromise filed after trial court rendered judgment for defendant and while appeal was pending with this court.

Greer *v.* State 1

Petition for new trial; claim that trial court abused its discretion in denying petitioner's petition for new trial based on newly discovered evidence; whether trial court properly determined that petitioner's purported new evidence, which consisted wholly of witness affidavit and testimony, would not, if introduced at new trial, likely result in different outcome.

Hine Builders, LLC *v.* Glasscock 185

Arbitration; motion to compel arbitration; motion to terminate automatic appellate stay; whether defendants' appeal was rendered moot by commencement of arbitration proceedings following trial court's order to commence arbitration proceedings.

In re Josyah L.-T. 345

Termination of parental rights; claim that this court should recognize right of respondent mother to be minor child's legal guardian on ground that she would be better caregiver to child than petitioner Commissioner of Children and Families.

James P. *v.* Commissioner of Correction 636

Habeas corpus; claim that criminal trial counsel rendered ineffective assistance; whether trial counsel performed deficiently by improperly advising petitioner with respect to whether sentencing court could deviate from plea agreement at sentencing in petitioner's favor; whether petitioner was prejudiced by trial counsel's allegedly deficient performance.

Jay R. *v.* Dept. of Children & Families (Memorandum Decision) 904

Krasko *v.* Konkos 589

Land use; motion to enforce settlement agreement; claim that trial court erred in granting plaintiffs' motion to enforce settlement agreement in absence of clear and unambiguous agreement.

Kuselias *v.* Zingaro & Cretella, LLC 192

Legal malpractice; motion for summary judgment; motion to reargue and reconsider; motion for judgment of nonsuit; accidental failure of suit statute (§ 52-592 (a)); claim that trial court improperly rendered summary judgment for defendants; claim that plaintiff's action was not time barred by applicable statute of limitations (§ 52-577) because action fell within purview of § 52-592; whether judgment of nonsuit rendered in prior action was result of matter of form for purposes of § 52-592; whether trial court abused its discretion in denying plaintiff's motion to reargue and reconsider its ruling on defendants' motion for summary judgment.

Marshall *v.* Marshall 45

Dissolution of marriage; claim that trial court abused its discretion by basing alimony and child support orders on plaintiff's reported income rather than on her more recent partnership distributions; claim that trial court abused its discretion by basing alimony and child support orders on plaintiff's reported income rather than on her earning capacity.

Mashantucket Pequot Tribal Nation *v.* Factory Mutual Ins. Co. 429

Insurance; declaratory judgment; breach of contract; motion to strike; action seeking judgment declaring that defendant insurer was required to provide coverage under commercial insurance policy issued to plaintiff for losses plaintiff sustained as result of COVID-19 pandemic; whether trial court improperly granted in part motion to strike; claim that trial court improperly concluded that contamination exclusion in policy applied to defeat plaintiff's claims for coverage under property damage and business loss interruption provisions; whether plaintiff's allegations in its operative complaint were sufficient to establish physical damage or loss; whether plaintiff alleged facts showing manner in which COVID-19 caused

physical, tangible alteration to or resulted in deprivation of property that rendered it physically unusable or inaccessible; claim that actual presence of communicable disease such as COVID-19 constituted physical loss or damage under policy's communicable disease response provision; claim that issue of whether COVID-19 physically altered property could not be determined at motion to strike phase of litigation.

McDonnell *v.* Roberts 388

Legal malpractice; motion to open and set aside judgment of nonsuit; claim that trial court abused its discretion in denying plaintiff's motion to open and set aside judgment of nonsuit; whether trial court erred in finding that plaintiff failed to show that good cause of action existed at time of judgment of nonsuit and that she was prevented from prosecuting action by mistake, accident or other reasonable cause.

Northeast Building Supply, LLC *v.* Morrill 137

Prejudgment remedy; vexatious litigation; subject matter jurisdiction; whether plaintiff had standing to pursue application for prejudgment remedy predicated on vexatious litigation claims that had been assigned to it from different entity.

111 Clearview Drive, LLC *v.* Patrick 419

Summary process action; motion in limine; claim that trial court improperly relied on doctrine of collateral estoppel in granting plaintiff's motion in limine to exclude from trial evidence related to prior foreclosure action; claim that defendant retained ownership interest in real property as omitted party from foreclosure action pursuant to statute (§ 49-30).

Patrick *v.* 111 Clearview Drive, LLC 401

Quiet title; motion to strike; subject matter jurisdiction; whether trial court properly dismissed quiet title action on ground that it lacked subject matter jurisdiction to adjudicate plaintiff's claims because plaintiff was collaterally attacking prior foreclosure judgment, rendering her claims moot and nonjusticiable; claim that, because plaintiff was unsuccessful in intervening in foreclosure action on behalf of her interest in property, she was denied constitutionally protected right to be heard prior to deprivation of property, which would entitle her to challenge validity of foreclosure judgment; claim that foreclosure judgment did not have preclusive effect against collateral attack as to party's interest in property because party in foreclosure action had not been properly served; claim that trial court improperly failed to adjudicate whether plaintiff was omitted party pursuant to statute (§ 49-30).

Priti, LLC *v.* Shakespeare (Memorandum Decision) 902

Rapp *v.* Commissioner of Correction 336

Habeas corpus; claim that habeas court failed to apply correct legal standard under statute (§ 52-470 (c) and (e)) in deciding that petitioner had not demonstrated good cause for late filing of habeas petition when prior habeas counsel allegedly failed to advise petitioner of time limits imposed by § 52-470 (c) and (e); import of decision in Rose *v.* Commissioner of Correction *(348 Conn. 333), holding that ineffective assistance of counsel is objective factor external to petitioner that may constitute good cause to excuse late filing of habeas petition under § 52-470 (c) and (e), discussed.*

Rios *v.* Commissioner of Correction 350

Habeas corpus; summary judgment; motion to dismiss; whether habeas court improperly granted petitioner's motion for summary judgment and rendered judgment granting petition for writ of habeas corpus, which alleged that application to petitioner of amendment to administrative directive on risk reduction earned credits issued by respondent Commissioner of Correction violated ex post facto clause of federal constitution; claim that habeas court improperly denied respondent's motion to dismiss that claimed that court lacked subject matter jurisdiction pursuant to applicable rule of practice (§ 23-29 (1)) and that habeas petition failed to state claim on which relief could be granted pursuant to Practice Book § 23-29 (2).

Rodriguez *v.* Hartford 314

Negligence; motion for summary judgment; governmental immunity; claim that trial court improperly denied plaintiff's requests to amend her complaint; whether trial court erred in addressing sua sponte whether proposed new claims were barred by applicable statutes of limitations (§§ 52-577 and 52-584); claim that trial court erred in concluding that plaintiff's complaint failed to set forth claim of public nuisance; claim that trial court improperly granted defendants' motion for summary judgment on basis of its conclusion that negligence claims against

defendant city and defendant city forester were barred by governmental immunity.
Sachem Capital Corp. *v.* Yoney (Memorandum Decision) 901
Stanley *v.* Grant (Memorandum Decision) 903
State *v.* Roberts 471
Carrying pistol without permit; motion to dismiss and/or set aside conviction; claim that defendant's conviction under applicable statute ((Rev. to 2017) § 29-35 (a)) should have been vacated in light of United States Supreme Court's decision in New York Rifle & Pistol Assn., Inc. *v.* Bruen *(597 U.S. 1); claim that § 29-35 (a) violated defendant's right to bear arms under second amendment to United States constitution and subjected defendant to disparate treatment as nonresident of state in violation of privileges and immunities clause of United States constitution; whether defendant was considered Connecticut resident or nonresident for pistol permitting purposes under applicable statute ((Rev. to 2017) § 29-28 (b) and (f)).*
Supronowicz *v.* Eaton 66
Adverse possession; claim that trial court erred in granting defendants' motion for summary judgment; claim that trial court improperly concluded that plaintiffs could not establish claim of adverse possession as matter of law; claim that trial court erred in determining that plaintiffs failed to demonstrate that privity existed between themselves and their predecessors in title for purposes of tacking periods of possession; claim that trial court improperly determined that no genuine issues of material fact remained regarding whether plaintiffs acknowledged defendants' superior title to disputed area and whether plaintiffs' use of disputed area was exclusive.
Torrington *v.* Council 4, AFSCME, AFL-CIO, Local 442 237
Arbitration; appeal from trial court's judgment vacating arbitration award and remanding matter for new arbitration hearing; motion to dismiss appeal; claim that this court lacked subject matter jurisdiction over defendants' appeal because appeal was not taken from final judgment; whether statutes (§§ 52-407cc and 52-423) governing arbitration proceedings in context of municipal employee contract grievances provided right of appeal from judgment vacating arbitration award.
U.S. Bank National Assn. *v.* Owen (Memorandum Decision) 903
Vega *v.* Commissioner of Correction 652
Habeas corpus; claim that habeas court abused its discretion by denying petitioner's petition for certification to appeal; claim that habeas court improperly determined that petitioner was not deprived of his rights to due process and to fair trial in violation of Brady *v.* Maryland *(373 U.S. 83) when state allegedly withheld exculpatory information from unrelated case; claim that habeas court improperly concluded that petitioner failed to establish that his trial counsel rendered ineffective assistance by failing to consult or call expert on eyewitness identification and by failing to impeach eyewitness who falsely testified in unrelated criminal case.*
Westchester Modular Homes of Fairfield County, Inc. *v.* Arbella Protection Ins. Co. . . . 526
Insurance; breach of contract; motion for summary judgment; claim that trial court improperly rendered summary judgment for defendant insurance company on basis of its conclusion that, pursuant to commercial general liability policy, defendant had no duty to defend plaintiff insured against counterclaim filed by third party in action arising out of contract for construction of home; whether notification to defendant of mere presence of water was sufficient to trigger duty to defend under terms of insurance policy.

NOTICE OF CONNECTICUT STATE AGENCIES

NOTICE OF PENDENCY OF REINSTATEMENT APPLICATION

In accordance with Section 2-53 of the Connecticut Practice Book, notice is hereby given that the following individual has filed an application for reinstatement to the bar:

CRAIG R. LARSEN

The Standing Committee on Recommendations for Admission to the Bar of Fairfield County will commence a hearing on the above application on Monday, April 29, 2024 at 9:30 am at Bridgeport Superior Court, 1061 Main Street, Bridgeport, CT 06604 and such future dates as are necessary to conclude the matter.

Please contact Kathleen M. Dunn, Chairperson (203-375-1433) for further information regarding the matter or if you have an objection to the application.